

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2018-001868
Case No. 18-ALJ-07-0003-CC

South Carolina Department of
Health and Environmental Control,

Appellant/Respondent,

RECEIVED
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SC Court of Appeals

v.

James W. Davenport,

Respondent/Appellant.

CORRECTED INITIAL BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Administrative Law Court (“ALC”) commit an error of law by concluding the contested case hearing is a civil action in which DHEC is pressing its claim?
- II. Did the ALC commit an error of law by concluding this matter was not a “disciplinary action[] by a state licensing board?”
- III. Is the ALC’s finding that DHEC acted without substantial justification unsupported by evidence or an error of law?
- IV. Is the ALC’s finding that no special circumstances exist to make an award of attorney’s fees unjust an error of law?

STATEMENT OF THE CASE

On October 21, 2016, the Appellant South Carolina Department of Health and Environmental Control (“DHEC” or “Department”) issued an administrative order revoking Respondent James Davenport’s paramedic certification based upon his failure to provide emergency medical treatment of a quality deemed acceptable by the Department and based upon misconduct. On November 7, 2016, Mr. Davenport filed with the Board of Health and Environmental Control (“the Board”) a request for final review (“RFR”) challenging the administrative order. The Board mailed its decision to decline to conduct a final review conference (“FRC”) on December 7, 2016, and on January 6, 2017, Mr. Davenport filed a request for a contested case hearing with the ALC.

The hearing on the merits was held on July 24-28, 2017, before the Honorable Shirley C. Robinson of the ALC. Both parties appeared and presented testimony and evidence. On March 20, 2018, the ALC issued its Final Decision and Order (“Merits Order”), which vacated DHEC’s

administrative order but ordered Mr. Davenport to complete an ethics and leadership class. DHEC did not appeal the Merits Order.

Mr. Davenport thereafter filed a Petition for Attorney's Fees and Court Costs. On August 1, 2018, the ALC issued its Order Granting the Petition for Attorney's Fees ("Order Awarding Attorney's Fees"), which awarded attorney's fees to Mr. Davenport pursuant to S.C. Code § 15-77-300 in the amount of \$91,120. The ALC rejected DHEC's argument that the contested case hearing was not a civil action in which DHEC was pressing its claim, and rejected DHEC's argument that it was entitled to an exception regardless because the underlying action was a disciplinary action by a state licensing board. (Order Awarding Attorney's Fees, pp. 3-4). The ALC then found that DHEC lacked substantial justification in pursuing its action and that no special circumstances existed which would make the award unjust. (*Id.*, pp. 4-8). DHEC filed a Motion to Alter or Amend (Reconsider) on August 13, 2018. DHEC opposed the petition, and the ALC held a motion hearing on the petition. On September 20, 2018, the ALC issued its Order on DHEC's Motion to Alter or Amend ("Reconsideration Order"), which reduced the awarded fees to \$87,670. DHEC filed this appeal of the attorney fee issue.

STATEMENT OF FACTS

DHEC certifies and regulates emergency medical technicians ("EMTs"), which includes EMT-basics, advanced EMTs, and paramedics, pursuant to the *Emergency Medical Services Act of South Carolina* ("the Act"), S.C. Code Ann. §§ 44-61-10 *et seq.*, and *Emergency Medical Services* ("the Regulation"), Regulation 61-7.¹ EMTs provide care under the supervision and direction of a licensed physician, who is referred to as the medical control physician ("MCP").

¹ Regulation 61-7 was amended, effective June 24, 2016, with the publication of Volume 40, Issue 6 of the *State Register*. The events concerning this matter occurred on March 19, 2016; thus, the provisions of Regulation 61-7 in effect at that time govern this action.

See 3 S.C. Code Ann. Regs. 61-7 § 402(B) (2011). DHEC may take action against the holder of an EMT certificate at any time it determines the holder failed to provide emergency medical treatment of a quality deemed acceptable by DHEC or was guilty of misconduct. *See* S.C. Code Ann. § 44-61-80(F) (Supp. 2016); *see also* S.C. Code Ann. Regs. 61-7 § 1100(B) (2011).

Mr. Davenport is the holder of a paramedic certification, who at all relevant times was working for Iva Rescue Squad, a licensed ambulance service. (DHEC Exh. 10; Davenport Trial Tr. 109:20-23, 111:25-112:4, and 112:23-113:13). EMTs operating for Iva Rescue Squad are subject to the Anderson County Standards of Care & Treatment Protocols (“the Standards & Protocols”). (DHEC Exh. 1; Aiken Trial Tr. 26:8-27:17). Dr. Thomas Kickham, the MCP for Iva Rescue Squad, developed, approved, and signed the Standards & Protocols, which direct the provision of care of Iva Rescue Squad EMTs. (DHEC Exh. 1; Aiken Trial Tr. 27:3-7; Kickham Trial Tr. 71:21-73:23).

On March 19, 2016, Mr. Davenport and Kimberly Aiken, his lower-certified EMT-basic partner, responded to a patient who stabbed himself in the stomach. (DHEC Exhs. 2 and 11b; Aiken Trial Tr. 22:11-14, 24:11-16, 31:5-16 and 40:10-16). Upon entering the residence, Mr. Davenport visually assessed the patient, who was sitting on a couch with a knife of unknown length embedded in his abdomen. (DHEC Exhs. 2, 16, and 17; Aiken Trial Tr. 41:10-42:15, 43:24-44:16, and 45:20-23; Davenport Trial Tr. 135:14-15 and 141:22-142:14). As shown in the body cam footage of a police officer on the scene and as confirmed in the ALC’s conclusions in the Merits Order, Mr. Davenport used profane and extremely inappropriate language with the patient. (Merits Order p. 11; DHEC Exh. 2; Davenport Trial Tr. 136:2-137:14). The patient visibly cowered and shied from communicating with Mr. Davenport. (DHEC Exh. 2). The ALC agreed with DHEC

in its conclusions that Mr. Davenport's conduct towards the patient violated Anderson County EMS's patient abuse policy. (Merits Order p. 11).

After the visual assessment of the patient, Mr. Davenport bandaged and stabilized the knife. (DHEC Exh. 2; Aiken Trial Tr. 44:17-25; Davenport Trial Tr. 142:15-22). With the assistance of the police officer, Mr. Davenport assisted the patient off of the couch. (DHEC Exh. 2; Davenport Trial Tr. 154:4-13). As the patient stood, he cried in pain. (DHEC Exh. 2; Davenport Trial Tr. 156:6-11). The officer and Mr. Davenport assisted the patient in walking from the couch to the residence's front door, down the four stairs leading to the patient's residence, and to the rear of the ambulance. (DHEC Exhs. 2, 19, and 20; Davenport Trial Tr. 154:4-13).

Following loading the patient into the ambulance, Mr. Davenport and Ms. Aiken discussed who was to ride in the ambulance's patient compartment. (DHEC Exhs. 2 and 4; Aiken Trial Tr. 48:6-21; Davenport Trial Tr. 158:4-159:5). Ms. Aiken expressed discomfort in caring for the patient, who suffered a penetrating traumatic injury and required advanced life support ("ALS") care, which is care that can only be provided by an advanced EMT or paramedic. (DHEC Exh. 4; Aiken Trial Tr. 48:6-23 and 107:1-22). Mr. Davenport explained he was not doing anything for the patient. (*Id.*). Mr. Davenport drove the ambulance and Ms. Aiken remained in the patient compartment. (*Id.*). While enroute to AnMed Medical Center's emergency department ("AnMed ED"), Ms. Aiken performed assessments and documented her findings in the patient care report ("PCR"). (DHEC Exh. 11b; Aiken Trial Tr. 49:1-10). No other care was provided to the patient. Notably, oxygen was not administered. (Davenport Trial Tr. 160:3-6). Additionally, Mr. Davenport failed to establish intravenous ("IV") access and administer normal saline to the patient and initiate a cardiac monitor-lead II, both of which are ALS skills that can only be performed by advanced EMTs and paramedics. (*Id.* 160:7-11 and 182:22-183:4).

Upon arrival to the AnMed ED, Mr. Davenport and Ms. Aiken unloaded and transferred the patient, who was in a stretcher, to a critical care bed. (Aiken Trial Tr. 53:8-18). After returning to the ambulance, Mr. Davenport, noticing Ms. Aiken's discomfort, asked if she was alright. (DHEC Exh. 4; Aiken Trial Tr. 53:19-54:9). Mr. Davenport explained the only thing he would have done for the patient was to administer an IV, but he wasn't giving any drugs. (*Id.*). Mr. Davenport determined the patient only required basic life support ("BLS"), not ALS. (*Id.*). Ms. Aiken completed the PCR. (Exhibit 11b; Aiken Trial Tr. 105:3-24). Mr. Davenport signed the PCR; however, the PCR did not contain the purported assessments taken by Mr. Davenport. (Davenport Trial Tr. 146:5-7, 150:25-151:3, and 160:16-20).

At AnMed ED, the patient reported a pain level of nine out of ten. (DHEC Exh. 6; DeAngelo Trial Tr. 57:14-15). The ED physician made a trauma alert prior to the patient's arrival and requested a trauma surgeon consult. (DHEC Exh. 6; DeAngelo Trial Tr. 59:8-19). While in the ED, nursing staff established IV access in the left and right antecubital. (DHEC Exh. 6; DeAngelo Trial Tr. 57:19-59:7). Nursing staff administered a normal saline bolus in one antecubital and ertapenem, an antibiotic, in the other. (*Id.*). The ED physician noted, "[t]he patient has the potential for rapid decompensation because of stab wound to abdomen and was taken emergently to OR by surgeon." (DHEC Exh. 6). The trauma surgeon performed an exploratory laparoscopy. (DHEC Exh. 7; DeAngelo Trial Tr. 48:16-50:16). After removing the knife, the surgeon determined the knife penetrated the patient's peritoneum, but did not injure other organs. (*Id.*).

DHEC obtained a copy of the police officer's body-cam footage and initiated an investigation into Mr. Davenport's conduct and treatment during the call. (Wronski Trial Tr. 20:22-21:4). The investigation included review of Anderson County's internal investigation into

the call, the PCR, the body-cam footage, medical records, and an interview of Mr. Davenport. (*Id.* 22:15-25:12 and 33:3-34:11). DHEC determined Mr. Davenport committed regulatory and statutory violations and, accordingly, proposed a consent order suspending his certification for two years. (*Id.* 125:8-19). In light of Mr. Davenport's rejection of the consent order, (*Id.* 129:6-10), DHEC convened the Investigative Review Committee ("IRC"), as required by the Act. (*Id.* 38:14-39:8). The IRC is:

[A] professional peer review committee that is convened by the department when the findings of an official investigation against an entity or an individual regulated by the department may warrant suspension or revocation of a license or certification. This committee consists of the State Medical Control Physician, three regional EMS office representatives, at least one paramedic, and at least one emergency room physician who is also a medical control physician. Appointment is made to this committee by the Director of the Division of EMS and Trauma.

S.C. Code Ann. § 44-61-20(16)². At the IRC meeting, both DHEC and Mr. Davenport presented their respective cases. (Wronski Trial Tr. 42:2-12). After the presentations, the IRC recommended DHEC propose a consent order suspending Mr. Davenport's certificate for one year, requiring Mr. Davenport undergo a psychiatric evaluation and complete any ordered treatment, and requiring completion of two courses. (*Id.* 42:13-43:11). If Mr. Davenport rejected that proposal, the IRC recommended revocation. (*Id.* 43:12-44:10). DHEC adopted the recommendations. (*Id.* 44:11-21).

Mr. Davenport rejected the IRC-recommended consent order. (*Id.* 44:11-21). Accordingly, DHEC issued the administrative order revoking Mr. Davenport's certification based upon his failure to provide acceptable emergency medical treatment and misconduct. (Administrative Order). Regarding the misconduct, DHEC determined Mr. Davenport disregarded appropriate treatment orders by Dr. Kickham, *i.e.*, the various orders in the Standards & Protocols,

² Section 44-61-20(16) was amended effective May 18, 2018, with passage of 2018 Act No. 248.

discontinued care of a patient without providing for further administration of care by an equal or higher medical authority, and created a substantial possibility death or serious physical harm could result from his actions. (*Id.*). Following the Board's decision not to conduct a final review conference, the matter moved to the ALC.

ARGUMENT

Standard of Review

This appeal from a final order of the ALC does not involve the Merits Order, since DHEC chose not to press its claim. Rather, it is an appeal of the ALC's final order on attorney's fees. A trial court's decision regarding an award of attorney's fees under S.C. Code Ann. § 15-77-300 will not be disturbed absent an abuse of discretion. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *Zabriski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001).

I. THE CONTESTED CASE WAS AN ADMINISTRATIVE PROCEEDING, NOT A CIVIL ACTION IN WHICH DHEC WAS PRESSING ITS CLAIM.

S.C. Code Ann. Section 15-77-300(A) states:

In any *civil action* brought by the State . . . the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if: (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust. The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

(Emphasis added).

The ALC erroneously concluded that "[Mr. Davenport's] contested case hearing equates to a civil action for purposes of qualifying for attorney's fees under § 15-77-300." (Order Awarding Attorney's Fees, p. 3). While the ALC is a "court of record," it is an agency within the executive

branch of government, not the judicial branch. *See* S.C. Code Ann. § 1-23-500; *see also* *Great Games v. S.C. Dep't of Revenue*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000) (explaining the ALC is an agency of the executive branch of government and does not have authority to pass upon the constitutionality of a statute or regulation.). The ALC presided over the underlying administrative proceedings pursuant to its statutory authority to hear and decide contested cases involving departments of the executive branch of government, including DHEC decisions, pursuant to S.C. Code Ann. Section 1-23-600(A).

The ALC cites to *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 405 S.E.2d 830 (1991), as being instructive. Importantly, in *McDowell*, the Supreme Court held that the hearing conducted by the Fair Hearing Committee of the South Carolina Department of Social Services (“DSS”), which was requested by an applicant following a DSS staff decision denying her Food Stamp application, was not subject to attorney’s fees because, at that point, DSS “was not ‘pressing its claim’ in litigation,” but, instead, “was merely functioning as an administrative-decision-maker.” 304 S.C. at 543. The Supreme Court held that DSS was not “pressing its claim” for purposes of applicability of the state action attorney fee statute until it sought judicial review in circuit court of the final decision following the administrative hearing. The DSS hearing in *McDowell* and the contested case before ALC are the equivalent. Accordingly, DHEC has similarly not pressed its civil action or claim.

Additionally, there has been at least one bill incorporating administrative proceedings into Section 15-77-300 that was not passed into law. *See* H.3383, 112th Leg., 1st Sess. (1997). This is evidence that Section 15-77-300 was not intended to include contested cases before the ALC. *See* *Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1961) (“It will be presumed that the Legislature in adopting an amendment to a statute intended to make some

change in the existing law.”). Accordingly, this matter does not qualify for attorney’s fees pursuant to § 15-77-300.

II. THIS MATTER IS A DISCIPLINARY ACTION BY A STATE LICENSING BOARD.

Even if the contested case hearing before the ALC were considered to be a civil action in which DHEC was pressing its claim, the state action attorney fee statute “do[es] not apply to . . . disciplinary actions by state licensing boards . . .” S.C. Code Ann. § 15-77-300(C). The ALC erred in rejecting DHEC’s argument that its revocation action against Mr. Davenport’s EMT certificate was not a disciplinary action by a state licensing board and thus excepted from the statute’s provisions. The ALC stated it was “unable to identify any statutory authority qualifying DHEC as a ‘state licensing board’ having the power to institute ‘disciplinary actions.’” (Order Awarding Attorneys Fees, p. 3). It then explained, “[t]he exception outlined in § 15-77-300 is referring to [disciplinary actions taken by the Department of Labor, Licensing and Regulation Professional and Occupational Licensing Boards (POL Boards)]” and, accordingly, DHEC does not qualify. (*Id.*, p. 4). The ALC’s narrow interpretation of § 15-77-300(C) is contrary to its plain and ordinary meaning and the legislative intent in using the terms “licensing board” and “disciplinary action.” Further, the ALC erroneously added new material terms to the § 15-77-300(C) exception.

A. DHEC is a “state licensing board.”

Section 15-77-300 does not define “state licensing board.” A common and ordinary definition of “board” is “a group of people elected or appointed to take the care and management of a public trust or institution, or conduct the business of a municipal or private corporation, e.g., *a board of health, a board of trade . . .*” *Ballentine’s Law Dictionary*, Board (3rd ed. 2010) (emphasis added). A “license” is “a privilege conferred by a public body on a person for the

doing of something which otherwise he would not have the right to do.” *Id.*, License. Using these definitions, and in the context of applicable law, DHEC is a “state licensing board” because it is a group of designated individuals mandated by law to administer a program regarding privileges to practice emergency medical services that is aimed at protecting the public health.

The General Assembly established the South Carolina Board of Health and Environmental Control (“Board”) as the governing body of DHEC, charged with administering and supervising the Department. *See* S.C. Code Ann. § 44-1-20. The Board is authorized to “conduct such administrative reviews as may be required by law, as considered necessary by the board to render a final agency determination in matters involving the issuance, denial, renewal or revocation of permits, *licenses*, or other actions of the department which may give rise to a contested case pursuant to Chapter 23 of Title 1.” S.C. Code Ann. § 44-1-50. (Emphasis added). The procedure by which the Board reviews decisions involving licenses, and other decisions that may give rise to a contested case, is set forth in S.C. Code Ann. Section 44-1-60. The *South Carolina Administrative Procedures Act* defines “license” to “include[] the whole or part of any agency permit, franchise, *certificate*, approval, registration, charter, *or similar permission required by law*” *Id.* § 1-23-310(4) (emphasis added). The statutory provisions governing the ALC contain an identical definition of “license.” *See* S.C. Code Ann. 1-23-505(4).

Boards, departments, and agencies are used interchangeably by the S.C. Code of Laws and court rules. *See, e.g., id.* § 1-23-310(2) (defining “agency” as “each state board, commission, department, or officer, other than the legislature, the courts, or the Administrative Law Court, authorized by law to determine contested cases.”) and Rule 2(C), SCALC (“Agency means a state agency, department, board or commission whose action is the subject of a contested hearing, an appeal heard by an administrative law judge, or a public hearing on a proposed regulation presided

over by an administrative law judge.”). The Board’s statutory authority evidences that decisions made by DHEC regarding licenses are decisions of a “licensing Board.”

Applicable law also demonstrates DHEC’s regulatory program involves the “licensing” of EMTs. The Act and Regulation explain DHEC is responsible for certifying EMTs. *See* S.C. Code Ann. § 44-61-30(A) and –(B)(3). The Act defines “certificate” as an:

official acknowledgment by the department that an individual has completed successfully one of the appropriate emergency medical technician training courses referred to in this article in addition to completing successfully the requisite examinations, which entitles that individual to perform the functions and duties as delineated by the classification for which the certificate was issued.

S.C. Code Ann. § 44-61-20(6) (emphasis added). To distinguish between the various types of privileges issued by DHEC in the EMS industry (*e.g.*, to operate as an ambulance service or first responder agency, to utilize vehicles as ambulances, and to practice as an EMT), the Act and Regulation utilize the terms “license” and “permit,” in addition to “certificate.”³ In EMS, where there are multiple different regulated entities, individuals, and items, the use of different terms provides clarity for DHEC, the regulated community, and the public. The Act even defines “licensee” to encompass not only those individuals or entities holding licenses to operate ambulance services, but also those individuals holding certificates to practice as an EMT. *See id.* § 44-61-20(2) (defining “licensee” to mean “any person, firm, corporation, or governmental division or agency possessing authorization, permit, license or certification to provide emergency medical service in this State.”). Further, the confidentiality section of the Act refers to official investigations conducted by the IRC and states that “[t]he fact of suspension or restriction of a

³ *See* S.C. Code Ann. § 44-61-20(19) (defining “license” as “an authorization to a person, firm, corporation, or governmental division or agency to provide emergency medical services in the State.”) and 44-61-20(27) (defining “permit” as “an authorization issued for an ambulance vehicle which meets the standards adopted pursuant to this article.”); *see also id.* §§ 44-61-40 (describing the required licenses and permits for the provision of emergency medical response or ambulance services) and 44-61-80 (describing the required certificate for practicing as an EMT).

license, and the fact of any subsequent related action taken by the department is public information under the Freedom of Information Act after issuance of an administrative order.” S.C. Code Ann. § 44-61-160(C). (Emphasis added). “Licensing” and “certification” have the same meaning within the context of the Act.

The National Registry of EMTs (the National Registry), which is the statutorily established credentialing body for South Carolina EMTs⁴, aptly explains that regardless of labels, state authorizations to practice as an EMT have the legal effect of a license:

Regardless of what descriptive title is used by a state agency, if an occupation has a statutorily or regulatorily defined scope of practice and only individuals authorized by the state can perform those functions and activities, the authorized individuals are licensed. It does not matter if the authorization is called something other than a license; the authorization has the legal effect of a license.

https://www.nremt.org/rwd/public/document/certification_licensure. November 23, 2018. DHEC is a “state licensing board,” as used in § 15-77-300(C).

B. This matter is a “disciplinary action.”

“[D]isciplinary action” is also not defined by § 15-77-300. “Discipline” is a “rule or system of rules governing conduct or activity.” <https://www.merriam-webster.com/dictionary/discipline>. November 23, 2018. This matter concerns DHEC’s findings that Mr. Davenport failed to comply with the rules governing EMT conduct, *i.e.*, the Act and Regulation. The Act uses “disciplinary action” and “enforcement action” interchangeably. *See* S.C. Code Ann. §§ 44-61-20(30)(c) (prescribing the State Medical Control Physician (“SMCP”) duties to include “provid[ing] recommendations for *disciplinary actions* in cases involving inappropriate patient care;”) and 44-61-80(F) (providing “The department may take *enforcement action* against the holder of a certificate”) (emphasis added). Disciplinary and enforcement action both refer to the

⁴ To be certified as an EMT, the Act requires passing the National examination and maintaining a National Registry credential or registration. *See id.* § 44-61-80(C) and –(E); *see also id.* § 44-61-20(22) (defining the National Registry).

imposition of an administrative sanction based upon statutory or regulatory violations whereby perpetrators have the right to appeal through applicable law. This matter is a “disciplinary action.”

C. The ALC’s interpretation erroneously inserts new terms and leads to absurd results.

In drafting § 15-77-300(C), the General Assembly used general, broad, open-ended language. If the exception was intended to only cover actions taken by the POL Boards, as the ALC concluded, the General Assembly would have used more directed and narrow language, such as, “. . . disciplinary actions by state licensing boards *established in title 40 of the S.C. Code of Laws . . .*” The General Assembly declined to do so. Contrary to the legislative intent, the ALC’s interpretation erroneously adds such limiting language to the § 15-77-300(C). *See Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (“When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature’s language . . .”).

Additionally, because of the similarities between the functions and responsibilities of DHEC in this context and the POL Boards, the ALC’s exclusion of DHEC from being a “state licensing board” leads to an absurd result. Both the POL Boards and DHEC in the EMT context regulate professionals⁵ through licensure schemes that are aimed at protecting the public health, safety, and welfare. These agencies exercise the same general functions. The POL Boards and DHEC even follow the same general steps with regards to discipline – (1) Receipt of a complaint; (2) Investigation by staff; (3) Review of evidence by an IRC; (4) IRC recommendation; (5) Presentation of facts to the Board (POL Board or DHEC Board); and (6) final decision. *See Mann*,

⁵ DHEC regulates and licenses other professionals in addition to EMTs, including athletic trainers, midwives, and hearing aid specialists. *See Practice of Specializing in Hearing Aids Act*, S.C. Code Ann. §§ 40-25-10, et seq.; *The Athletic Trainers’ Act of South Carolina*, S.C. Code Ann. §§ 44-75-10, et seq.; *The Practice of Selling and Fitting Hearing Aids*, 3 S.C. Code Ann. Regs. 61-3; *Licensed Midwives*, 4 S.C. Code Ann. Regs. 61-24; and *Athletic Trainers*, 8 S.C. Code Ann. Regs. 61-96.

Pisarik, and Mustian, *Professional and Occupational Licenses*, in South Carolina Administrative Practice and Procedure 6, 276-277 (Randolph R. Lowell 3rd ed. 2013). The policy behind the § 15-77-300(C) exception of not hindering action against professionals by regulatory bodies exercising their lawful police powers is equally present with both the POL Board actions and DHEC actions. Accordingly, to hold the POL Boards are subject to the § 15-77-300(C) exception, but DHEC, which exercises the same responsibilities, wields the same disciplinary authority, and follows similar processes, is not, leads to absurd results. *See Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) (“[A] court must reject a statute’s interpretation leading to absurd results not intended by the Legislature.”). This matter is a disciplinary action by a state licensing board and an award of attorney’s fees pursuant to § 15-77-300 is barred.

III. DHEC’S ACTION HAD REASONABLE BASES IN LAW AND FACT.

A prerequisite to award attorney’s fees pursuant to § 15-77-300 is “the court find[ing] that the agency acted without substantial justification in pressing its claim against the party.” S.C. Code Ann. § 15-77-300(A)(1). Substantial justification does not mean “justified to a higher degree,” but rather “justified to a degree that could satisfy a reasonable person.” *Heath*, 302 S.C. at 183. Should the Court of Appeals determine this matter is subject to recovery of attorney’s fees, the ALC’s conclusion that DHEC lacked a substantial justification in pressing its claim is affected by an error of law and is not supported by evidence. The record demonstrates DHEC’s findings had reasonable bases in law and fact. In fact, at the conclusion of DHEC’s case-in-chief, Mr. Davenport moved for a directed verdict, which the ALC denied without argument from DHEC. (July 27th Trial Tr. 218:8-219:16).⁶ The denial of Mr. Davenport’s directed verdict motion

⁶ The Court of Appeals in *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 497-498 (Ct. App. 2006), explained the standard for trial court’s reviewing a motion for a directed verdict:

In ruling on a motion for directed verdict, the trial court must view the evidence and all its reasonable inferences in the light most favorable to the nonmoving party. When the evidence yields only one

demonstrates DHEC's case was legally and factually reasonable. Moreover, in granting the Petition, the ALC failed to consider the administrative process undertaken by DHEC, which is convincing evidence of the action's reasonableness. The ALC also erred by applying a more exacting standard than the established standard of inquiring whether there was a reasonable basis in law and in fact. *See McDowell*, 304 S.C. at 542. In doing so, the ALC failed to consider the substance of the matter litigated, including an inquiry into the clarity of the governing law – *i.e.*, whether the applicable law was clear and settled by precedent or ambiguous with no precedent. *See, e.g., McDowell*, 304 S.C. 539 (finding DSS acted without substantial justification when there was settled precedent contrary to its position), *Layman v. State*, 376 S.C. 434, 630 S.E.2d 265 (2008) (finding the State acted without substantial justification when the State breached an unambiguous contract with certain TERI participants), and *Heath*, 302 S.C. 178 (1990) (finding a county acted without substantial justification in violating an unambiguous statute). Finally, the ALC also erred by failing to recognize and apply § 15-77-300(A)'s presumption that agencies are substantially justified when they are following a statutory mandate.

A. The ALC erroneously failed to consider the administrative process DHEC undertook in taking this action.

Prior to reaching the ALC, this matter went through several administrative filters. First, DHEC consulted Dr. Edgar DesChamps, the SMCP who has decades of experience in the EMS

inference, a directed verdict in favor of the moving party is proper. On the other hand, the trial court must deny a motion for a directed verdict when the evidence yields more than one inference or its inference is in doubt. . . . However, this rule does not authorize the submission of speculative, theoretical, and hypothetical views to the jury. The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror.

(Citations omitted). Notably, in the context of the *Equal Access to Justice Act* ("EAJA"), 24 U.S.C. § 2412(d)(1), which as further discussed has been referenced by the South Carolina Supreme Court as instructive when analyzing § 15-77-300 petitions, there is a presumption that a government case strong enough to survive a motion to dismiss and a motion for summary judgment is substantially justified, as will support a denial of an award of attorney's fees to the prevailing party. *See U.S. v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378 (7th Cir. 2010); *see also* 32 Am Jur 2d Federal Courts 258.

industry and is responsible for “provid[ing] recommendations for disciplinary actions in cases involving inappropriate patient care.” *See* S.C. Code Ann. § 44-61-20(30)(c). DHEC then convened the IRC, a professional peer review committee, which reviewed information gathered during its investigation, heard from Mr. Davenport, and issued recommendations. *See id.* § 44-61-20(16)⁷. The IRC included the SMCP, three regional EMS office representatives, a paramedic, and an emergency room physician who is also a MCP. (DesChamps Trial Tr. 233:17-234:8; Wronski Trial Tr. 39:11-40:5). DHEC adopted the IRC’s recommendations. (Wronski Trial Tr. 44:11-19). Finally, the DHEC Board reviewed Mr. Davenport’s RFR and ultimately declined to conduct a FRC. (Board Notice Declining FRC). The fact that DHEC’s decision was formulated utilizing this process supports its reasonableness.

The Court, citing *McDowell*, stated “in determining the existence of substantial justification, the Court will evaluate DHEC’s litigation position *rather than the administrative events giving rise to the litigation.*” (Order Awarding Attorney’s Fees, p. 5) (emphasis added). While *McDowell* requires evaluation of litigation position, it does not preclude from consideration the events giving rise to litigation. In fact, the events leading to the litigation are undoubtedly relevant to the reasonableness of the action and one’s litigation position. If the IRC and/or SMCP recommended no action and despite the recommendation(s), DHEC proceeded with action, the reasonableness of such action would be called into question. To turn a blind eye to the IRC, which was required by statute to be convened when an investigation may warrant suspension or revocation, is erroneous. Further, Regulation 61-7 § 301 directs DHEC to utilize consultations, which would include the IRC, in enforcing the Regulation. By mandating the IRC and the above process, the General Assembly created a system to ensure a peer review was in place and to assist

⁷ *See supra* FN2.

DHEC in making sound decisions regarding disciplinary actions. The ALC abused its discretion by disregarding the events leading to the contested case when assessing the reasonableness of DHEC's action.

B. The ALC erroneously failed to recognize and apply the presumption of reasonableness.

Section 15-77-300(A) was amended in 2010 to add, among other things, the following: "The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction." 2010 S.C. Act No. 125, § 1. DHEC is charged with administering the EMS Program, which includes the certification of EMS personnel. *See* S.C. Code Ann. § 44-61-30(A) and -(B)(4). As described above, DHEC followed the statutorily-prescribed process for investigating and pursuing this disciplinary matter. The ALC failed to recognize the statutory presumption. Likewise, the ALC failed place the burden of proving DHEC acted "without substantial justification" on Mr. Davenport. *See R.P. v. S.C. Dep't of Health and Human Servs.*, 06-ALJ-08-0605-AP (May 15, 2014) (holding that "unlike under federal law, the party seeking attorneys' fees pursuant to § 15-77-300 has the burden of proving that the government agency acted without substantial justification."). The ALC committed a legal error by failing to recognize and apply the statutory presumption.

C. DHEC was reasonable in finding Mr. Davenport disregarded appropriate orders by a physician concerning treatment.

DHEC found Mr. Davenport committed misconduct, as defined by S.C. Code Ann. § 44-61-80(F)(6) and Regulation 61-7 § 1100(B)(6), by disregarding appropriate⁸ orders concerning

⁸ Regarding appropriateness, Dr. Edgar DesChamps, the SMCP, testified Dr. Kickham's orders in the Standards & Protocols were in acceptance with general practice and principles of emergency medicine and in accordance with the scopes of practice of different certification levels of EMTs. (DesChamps Trial Tr. 237:23-238:1). There was no contest regarding the orders' appropriateness. Notably, the ALC confused the distinction between appropriate orders regarding treatment and the generally accepted standards of emergency medical treatment. The generally accepted

emergency treatment. “Order” is not defined by the Act or Regulation. DHEC utilized the plain ordinary meaning of “order,” which is “an authoritative indication to be obeyed; a command or direction.” *The American Heritage College Dictionary* 979 (4th ed. 2002). This definition is logical and reasonable in the context of the relationship between EMTs and their MCPs. All licensed ambulance services must have a MCP. *See* S.C. Code Ann. § 44-61-40(C). MCPs are the authorities allowing EMTs to practice. *See* 3 S.C. Code Ann. Regs. 61-7 § 402. MCPs supervise and maintain control of EMT care. *Id.*; *see also* Rick L Hindman & W. Ann Maggiore, *Medical Control of Emergency Medical Services*, 4 J. Health & Life Sci. L. 65 (2011). As such, EMTs must comply with their MCPs’ directives, whether written or oral, regarding treatment.⁹

The Standards & Protocols indicate they are “considered minimum standards by Anderson County EMS.”¹⁰ In conjunction, the plain ordinary English meaning of “order,” the Standards & Protocols’ explanation of EMTs’ responsibilities, and the statutorily-prescribed relationship between MCPs and EMTs are all consistent with DHEC’s position that “orders” are policies that prescribe a definitive action to be taken for a particular condition or situation. (DesChamps Trial Tr. 239:14-240:4 and 284:2-18; Wronski Trial Tr. 48:6-18).

standards of treatment are the minimum levels of care to be provided by EMTs. MCPs’ orders must be appropriate – meaning the orders must at least meet the generally accepted standards of treatment, but cannot exceed the EMTs’ scopes of practice. Appropriate orders of MCPs certainly can (as they did in this case) exceed the generally accepted standards of emergency medical treatment – *e.g.*, while Dr. Kickham’s orders directed Mr. Davenport to administer oxygen and apply a heart monitor to this patient, the generally accepted standards did not require administration of oxygen or application of a heart monitor. The ALC’s emphasis on the inconsistencies between the appropriate orders and generally accepted standards is misplaced. (*See* Order Awarding Attorney’s Fees, p. 7).

⁹ An “off-line medical control physician” is a provider’s MCP who takes responsibility for treatment of patients in the prehospital setting, by standing orders or protocols. 3 S.C. Code Ann. Regs. 61-7 § 201(R). An “on-line medical control physician” is a provider’s MCP who directly communicates with EMTs regarding appropriate patient care procedures en-route. *Id.* § 201(S).

¹⁰ While the Standards & Protocols do “discourage[] blindly following a protocol” and allow for deviations “if . . . documented and explained,” the Standards & Protocols do not allow for blatant disregard of the MCP’s orders. (DHEC Exh. 1). As noted, the Standards & Protocols are the “minimum standards” for practicing under Dr. Kickham. (*Id.*). Further, the Standards & Protocols require contacting the MCP when an EMT is unsure of the correct action. (*Id.*). Additionally, any deviation from compliance must be documented and explained. (*Id.*). Mr. Davenport never contacted Dr. Kickham. (Davenport Trial Tr. 160:12-15). Mr. Davenport never documented or explained his deviations. (*Id.* 187:13-23).

DHEC presented substantial factual support, including testimony from Dr. Kickham (Anderson County's MCP), Dr. DesChamps (the SMCP), Robert Wronski (Chief of DHEC's Bureau of EMS), Keith Eudy (who performed a review of the call in question), Scott Stoller (Anderson County's EMS Director), and Sheila Kaiser (Mr. Davenport's friend and Anderson County's Training Officer), that Mr. Davenport disregarded orders by Dr. Kickham that prescribed a definitive treatment for a particular condition or situation. The Standards & Protocols direct EMTs to "[d]emonstrate professionalism and courtesy" and "[i]ntroduce [themselves] and be supportive" to patients suffering from psychiatric emergencies. (DHEC Exh. 1). Instead of introducing himself, Mr. Davenport told the patient, "Ever been told you're an idiot – you're being told it right now." (DHEC Exh. 2; Davenport Trial Tr. 136:2-16). Through the course of the response, Mr. Davenport continued the verbal abuse stating: "Yea, well that's what the f**k happens when you stab yourself in the belly with a knife."; "You stabbed yourself in the wrong spot. That's not where your heart is."; "I don't want to hear [the patient's] complaints]. I stepped on a G*d-d**n IED and blew my nuts off."; "Let's just don't be stupid."; "F**king stupid people." (DHEC Exh. 2; Davenport Trial Tr. 136:17-137:14). This shocking behavior was in direct contravention of Dr. Kickham's orders and the Standards & Protocols' Patient Abuse Policy. (DHEC Exh. 1; Kickham Trial Tr. 90:5-16, 114:13-115:14, and 123:8-124:10; DesChamps Trial Tr. 242:19-243:16, and 244:2-21; Wronski Trial Tr. 50:18-51:16; Stoller Dep. Tr. 132:17-133:15 and 134:12-22). The Standards & Protocols provide that "[p]atients should not ambulate to the ambulance" and EMTs are to "[t]ransport all patients via an appropriate carrying device." (DHEC Exh. 1). In contravention of these orders, Mr. Davenport ambulated the patient and failed to utilize a carrying device. (DHEC Exh. 2; Kickham Trial Tr. 86:9-88:21 and 192:13-193:6; DesChamps Trial Tr. 245:4-247:4, 249:24-250:4, 291:24-293:11; Eudy Trial Tr. 17:15-19:12 and 33:5-24;

Stoller Dep. Tr. 118:24-119:14). For critical traumas, the Standards & Protocols require EMTs to “[c]orrect life threatening problems immediately and administer oxygen / airway maintenance as soon as possible.” (DHEC Exh. 1). Moreover, for patients suffering a mechanism of injury and/or severe trauma, the Standards & Protocol direct EMTs to apply a non-rebreather mask at 10-15 liters per minute. (*Id.*). Mr. Davenport failed to administer oxygen to this patient, as directed by Dr. Kickham. (Eudy Trial Tr. 38:7-21; Kickham Trial Tr. 96:17-100:18, 103:1-104:7, 106:20-107:13, 202:12-203:4, and 219:21-22; DesChamps Trial Tr. 251:24-255:7; Wronski Trial Tr. 51:17-52:13 and 55:25-57:3). The Standards & Protocols direct paramedics to initiate the IV access protocol and clarifies that “[IV] access is initiated enroute to the medical facility, unless extrication is required.” (DHEC Exh. 1). For trauma patients, paramedics are to establish IV access and administer normal saline. (*Id.*). Mr. Davenport failed to establish IV access and administer normal saline, as required by Dr. Kickham’s orders. (Eudy Trial Tr. 17:15-19:12 and 39:10-23; Kickham Trial Tr. 100:19-102:16, 103:1-105:11, 105:17-107:13, 202:12-203:4, and 219:18-20; DesChamps Trial Tr. 251:1-253:17, 256:9-257:7, and 287:9-291:23; Wronski Trial Tr. 51:23-52:9 and 52:14-55:24; Kaiser Trial Tr. 163:12-167:12; Stoller Dep. Tr. 118:24-119:14). The Standards & Protocols require paramedics to initiate a cardiac monitor-lead II for trauma patients. (DHEC Exh. 1). In disregard to Dr. Kickham’s orders, Mr. Davenport failed to establish a cardiac monitor. (Eudy Trial Tr. 17:15-19:12 and 40:2-41:5; Kickham Trial Tr. 106:20-107:13, 110:17-111:19, and 202:12-203:4; DesChamps Trial Tr. 251:24-253:2 and 255:25-256:8; Wronski Trial Tr. 54:16-55:24; Stoller Dep. Tr. 118:24-119:14). Finally, the Standards & Protocols direct EMTs to “document at a minimum vital signs and location of injury or complaint . . .” and to “[d]ocument all findings and information associated with the assessment, performed procedures, and any medication administrations in the [PCR].” (DHEC Exh. 1). Mr. Davenport failed to document

the results of the assessments he purportedly performed, as required by Dr. Kickham's directives. (Kickham Trial Tr. 92:21-96:5, 121:19-122:8; DesChamps Trial Tr. 247:5-249:7).

The ALC misunderstood DHEC's position stating "DHEC pressed its claim believing any deviation from [the Standards & Protocols] constituted 'disregard[ing] appropriate order by a physician concerning emergency treatment or transportation.'" (Order Awarding Attorney's Fees, p. 5). The ALC cited bits and pieces of testimony and concluded, "DHEC's untenable position that any breach of guideline or protocol, however slight or nonsensical, constitutes grounds for certification revocation." (*Id.*, p. 6). Such was not DHEC's position. Not everything within the Standards & Protocols concerns treatment. Not everything within the Standards & Protocols is a directive. The Standards & Protocols include recommendations and discretionary guidance. An EMT commits misconduct only when there is a definitive treatment commanded for a particular condition or situation.

In holding DHEC acted without substantial justification, the ALC erroneously equated DHEC's position to that of the Department of Social Services ("DSS") in *McDowell*, 304 S.C. 539 (1991), which is abundantly distinguishable. In *McDowell*, a case involving the denial of benefits, DSS ruled a car titled jointly in the applicant's and her son's names was the applicant's asset, thereby placing her over the resource limit for eligibility. DSS erroneously held for a trust to arise, the property could not be titled jointly. *See id.* at 542. In awarding the applicant attorneys' fees, the Supreme Court explained how DSS lacked a reasonable basis in law and fact:

DSS ruled . . . that for a resulting trust to arise, the property could not be jointly titled. This conclusion is incorrect under established South Carolina precedent. When property is titled jointly, a resulting trust does not arise unless there is evidence to the contrary, as in this case. DSS therefore relied on an erroneous legal conclusion in defending its decision in proceedings before the circuit court and Court of Appeals. DSS's litigation position was not substantially justified because it had no reasonable basis in law and fact.

Id. at 542-543 (citation omitted). By contrast, in this matter, DHEC's action was not against established precedent. This matter is a case of first impression. *See Cody v. Caterisano*, 631 F.3d 136, 142 (4th Cir. 2011) ("litigating cases of first impression is generally justifiable").

While the ALC disagreed with DHEC's interpretation of "order," DHEC's interpretation was reasonable and consistent with rules of statutory interpretation. Notably, the ALC's various Orders are devoid of any conclusion as to the meaning of "order." In fact, the ALC's Orders are devoid of any analysis of the meaning of "order." While DHEC resorted to the plain ordinary meaning of "order," if the ALC had determined "order" was ambiguous, the ALC failed to accord DHEC deference as is required by *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014).¹¹ For the above reasons, DHEC had reasonable factual and legal grounds for its finding that Mr. Davenport disregarded physician orders concerning treatment.

D. DHEC was reasonable in finding Mr. Davenport discontinued care without the patient's consent and without providing further administration of care by an equal or higher authority.

DHEC found Mr. Davenport committed misconduct, as defined by S.C. Code Ann. § 44-61-80(F)(8) and Regulation 61-7 § 1100(B)(8), by discontinuing care of the patient without the patient's consent and without providing for further administration of care by a paramedic or higher level authority. "Discontinue" is not defined by the Act or Regulation. The plain ordinary meaning of "discontinue" is "to stop doing or providing (something)" *The American Heritage College*

¹¹ In *Kiawah Dev. Partners II*, the Supreme Court delineated the following two-step process for interpreting and applying statutes and regulates administered by an agency:

First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.

Kiawah Dev. Partners, II, 411 S.C. at 32-33 (citations omitted).

Dictionary 404 (4th ed. 2002). Mr. Davenport discontinued care when he ceased providing care to the patient, transferred care responsibilities to his EMT-basic partner (a lower level authority), and took over the driving responsibilities. (DHEC Exh. 2; Wronski Trial Tr. 57:9-58:25). Mr. Davenport did not obtain the patient's consent for the discontinuation. (*Id.*). This is a reasonable interpretation that is factually supported by the record.

Despite utilizing the plain ordinary meaning, the ALC noted, "DHEC's witnesses could not provide a definition or standard by which to assess the discontinuation of care." (Order Awarding Attorney's Fees, p. 6). The ALC also stated "[Mr. Davenport] was *readily available to resume care* of the patient if anything changed en-route to the hospital." (*Id.*) (emphasis added). If one "resumes care," there necessarily was a "discontinuation" of care. The ALC remarked "DHEC's position was further negated by Anderson County's protocol which specifically permitted [Mr. Davenport] to delegate patient management and transportation to his partner." (*Id.*). The ALC stated, "DHEC's witnesses, Dr. Kickham and Dr. DesChamps, attested to the permissibility of [allowing Ms. Aiken to ride in the patient compartment] to the subject call."¹² (*Id.*). The ALC's statements are misleading because Mr. Davenport's discontinuation was in contravention of the Regulation and the Standards & Protocols. As testified by the DHEC's and Mr. Davenport's witnesses, the patient required ALS care, which Ms. Aiken, the EMT-basic

¹² This is incorrect. Dr. Kickham simply recited the Standards & Protocols, which allow EMT-basics to ride calls for patients only requiring BLS. (Kickham Trial Tr. 203:23-206:25). Regarding the subject call, Dr. Kickham testified Ms. Aiken was not qualified to meet the patient's immediate needs during the transport because the patient required ALS level care, which only Mr. Davenport, a paramedic, could perform. (*Id.* 119:4-120:16). Further, as testified by Dr. Kickham, the policy prohibits transfer of certain patients to lower level certifications, including patients suffering from multiple trauma and patients requiring ALS care. (*Id.* 122:9-123:3). Dr. DesChamps testified that for the subject call, "the highest qualified person should have been in the back. . . . It's a failure to oversee the entire picture of the call. The higher level person should have been in the back." (DesChamps Trial Tr. 258:15-24). On cross-examination, Dr. DesChamps indicated that an EMT-basic can ride the patient compartment despite having a paramedic partner "[i]n certain circumstances." (*Id.* 277:6-11). However, Dr. DesChamps did not testify that it was permissible for Ms. Aiken to ride the subject call. In fact, Dr. DesChamps clarified "patients who have severe or significant injuries or where there's likely decompensation" require the highest appropriately trained EMT to ride in the patient care compartment. (*Id.* 275:21-276:21).

partner, was unable to provide. (Aiken Trial Tr. 48:6-16; Eudy Trial Tr. 17:15-19:14 and 61:4-62:14; Kickham Trial Tr. 102:17-25; Douglas Trial Tr. 117:19-118:6; Wronski Trial Tr. 158:10-15). Accordingly, the delegation allowed by the Standards & Protocols Policy-07 “to others who are qualified to meet the patient’s immediate needs or reasonably perceived needs” was inappropriate. (DHEC Exh. 1). Policy-26 also explains that patients suffering from multiple trauma and patients needing ALS intervention, which include the patient in question, cannot be transferred to a lower level certification. (*Id.*). Policy-26 also requires paramedics accompany a patient if an EMT expresses discomfort with assuming care, as Ms. Aiken did when asked by Mr. Davenport about riding the call. (DHEC Exhs. 1, 2, & 4; Aiken Trial Tr. 48:6-23 and 107:1-22). Similarly, Regulation 61-7 § 1000(A) provides that when ALS procedures are required, an advanced EMT or paramedic must attend the patient. The record is replete with evidence supporting this misconduct. (DesChamps Trial Tr. 258:15-24; Wronski Trial Tr. 57:9-58:25 and 179:4-182:7; Kaiser Trial Tr. 167:13-18). DHEC had reasonable legal and factual bases for finding Mr. Davenport discontinued care without the patient’s consent and without providing for an equal or higher medical authority.

E. DHEC was reasonable in finding Mr. Davenport created a substantial possibility of death or serious physical harm.

DHEC found Mr. Davenport committed misconduct, as defined by S.C. Code Ann. § 44-61-80(F)(14) and Regulation 61-7 § 1100(B)(15), by creating a substantial possibility of death or serious physical harm could result from his: ambulation of the patient to the ambulance, failure to establish IV access, and failure to ride in the patient care compartment. While the ALC ultimately disagreed, DHEC had a reasonable basis in law and fact for this misconduct.

The patient had a knife of unknown length impaled in his abdomen, a significant physical injury that ultimately required surgical intervention. While the patient’s vital signs were normal,

the injury combined with the uncertainties placed the patient at risk to rapidly decompensate. There was lay and expert testimony regarding the vicinity of the knife wound, the movement of the impaled knife associated with walking the patient, and potential lethal consequences of puncturing vital organs. (Eudy Trial Tr. 17:15-19:12 and 62:18-65:3; Kickham Trial Tr. 87:14-88:21; DeAngelo Trial Tr. 60:15-61:24 and 72:15-74:18; Douglas Trial Tr. 114:16-117:14 and 150:10-153:17; Wronski Trial Tr. 59:1-60:10; Deason Trial Tr. 270:3-22). The ALC concluded, “[t]he problem with DHEC’s position, however, was that it was unable to provide that [Mr. Davenport’s] methods were any more prone to substantial harm than its experts’ offered approaches” and, further, “DHEC’s suggested alternatives were as dangerous, if not more dangerous, than [Mr. Davenport’s] methods.” (Order Awarding Attorney’s Fees, p. 7). There is expert testimony reasonably disputing the ALC’s conclusion. (Kickham Trial Tr. 222:12-22; Douglas Trial Tr. 125:7-129:3 and 171:8-181:18). Moreover, following the ALC’s logic raises the question of when, if ever, should an EMT utilize a carrying device (e.g., stairchair, stretcher, or spine board), which by design is used for patient safety and minimization of patient movement.

There was also expert testimony regarding the importance of establishing IV access and, thereby, maintaining the blood pressure of the patient. (Kickham Trial Tr. 101:1-102:13; DesChamps Trial Tr. 258:25-260:5; Wronski Trial Tr. 59:1-11 and 60:16-61:12). The window of opportunity to establish IV access may be limited, particularly if the patient has undiagnosed internal bleeding or slow or late developing internal bleeding. If IV access cannot be established, a patient may be deprived of potential life-saving medications and fluids. While the ALC disagreed, there is evidence reasonably supporting DHEC’s position that there was a substantial possibility of death or serious physical harm by failing to establish IV access.

Finally, because the education and experience of a paramedic exceeds that of an EMT-basic, paramedics are better suited to assess patients and identify life-threatening complications. (DesChamps Trial Tr. 258:15-260:5; Wronski Trial Tr. Trial Tr. 59:1-11 and 61:13-18). As noted, Mr. Davenport did not ride this call, provide the various ordered ALS treatments, or monitor the patient for any other required treatments. While the patient did not decompensate and successfully underwent surgery, there was a reasonable basis in DHEC's position that Mr. Davenport's failure to ride in the patient care compartment created a substantial possibility of death or serious physical harm. Moreover, in conjunction, the ambulation, the failure to establish the IV, and the failure to ride the call strengthen the reasonableness of DHEC's basis for this misconduct.

F. DHEC was reasonable in finding Mr. Davenport failed to provide acceptable treatment.

DHEC found that, based upon generally accepted emergency medical standards¹³, Mr. Davenport failed to provide acceptable emergency medical treatment in violation of S.C. Code Ann. § 44-61-80(F), as a result of: (1) his failure to treat the patient with dignity and respect; (2) his ambulation of the patient to the ambulance instead of using a carrying device; (3) his failure to establish IV access on the patient; and (4) his failure to accompany the patient in the ambulance's patient compartment during transport. Holding EMTs to generally accepted standards of prehospital care is reasonably consistent with § 44-61-80(F)'s requirement that EMTs provide acceptable treatment. Dean Douglas, an experienced paramedic and prehospital care instructor, provided expert testimony regarding the education of EMTs, the generally accepted standards of prehospital care, and how Mr. Davenport ran afoul of such standards. Again, while the ALC disagreed with DHEC's conclusions, the record is replete with testimony and evidence that support

¹³ See *supra* FN8 regarding the relation between "appropriate order[s] by a physician concerning emergency treatment" and generally accepted standards of emergency medical treatment.

the reasonableness of DHEC's position. (Douglas Trial Tr. 118:17-119:20, 125:7-129:3, 131:3-132:14, 135:18-136:19, 158:12-160:15, 169:1-181:18, 193:7-194:1, 208:2-210:18, and 215:19-216:15; Wronski Trial Tr. 61:19-63:19; Deason Trial Tr. 276:21-281:6).

In finding Mr. Davenport's language did not "qualify as unacceptable medical treatment," the ALC erroneously injected additional standards for this violation. *See Hodges*, 341 S.C. at 87 ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language . . ."). The ALC stated, "DHEC made no showing that [Mr. Davenport's] language was *of such a degree of offensiveness*, and *so detrimental to the patient*" and a "reasonable person would not conclude that [Mr. Davenport's language and manner] was of such an *intolerable* and *pugnacious nature* as to necessitate revocation" (Order Awarding Attorney's Fees, pp. 7 and 8) (emphasis added). Section 44-61-80(F) makes no reference to standards regarding a degree of offensiveness, detriment to a patient, intolerability, or pugnacity. The ALC also erroneously characterized the unacceptable emergency treatment violation as a "catch-all provision of § 44-61-80(F)." (*Id.* p. 5). While the unacceptable emergency medical treatment provision is not a "misconduct" defined by § 44-61-80(F), it serves as an independent basis for action against EMTs. The ALC also noted "DHEC has never utilized a finding of unacceptable quality medical treatment to revoke an EMT's certification." (*Id.* p. 8). This is an irrelevant and erroneous consideration. An agency's disparity of sanctions imposed on licensees is not a basis for reversal of an agency's sanction. *See Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 185, 332 S.E.2d 539, 541 (Ct. App. 1985) ("An agency need not exercise its discretion identically in every case. 'A penalty that is within the authority of the agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases' and 'mere unevenness in the application of the sanction does not render

its application in a particular case unwarranted in law.”). For the above reasons, DHEC was reasonable in finding Mr. Davenport failed to provide acceptable treatment.

IV. SPECIAL CIRCUMSTANCES MAKE AWARD OF FEES UNJUST.

To award attorney’s fees pursuant to § 15-77-300, a court must also find “there are no special circumstances that would make the award of attorney’s fees unjust.” S.C. Code Ann. § 15-77-300(A)(2). The ALC erroneously confused the “special circumstances” prong with the “substantial justification” prong. In dismissing DHEC’s assertion that special circumstances exist that make an award unjust, the ALC stated, “DHEC acted without substantial justification in seeking the highest form of punishment for a matter that was handled adequately at the local level.”¹⁴ (Order Awarding Attorney’s Fees, p. 8).

There is no South Carolina case law regarding the “special circumstances” prong. However, the South Carolina Supreme Court has noted the similarity between § 15-77-300 and the EAJA.¹⁵ See, e.g., *Heath*, 302 S.C. 178 (1990) and *McDowell*, 304 S.C. 539 (1991). There are instructive federal cases addressing the EAJA special circumstance exception, which indicate that it acts as a safety valve and serves at least two purposes. *The Taylor Group, Inc. v. Johnson*, 919 F.Supp. 1545 (M.D. Ala 1996); see also 32 Am Jur 2d Federal Courts 263. The exception insures the government is not deterred from advancing in good faith the novel, but credible

¹⁴ In addition to mistaking DHEC’s authority in enforcing the Act and Regulation with Anderson County’s authority in its employment matters, the ALC confuses the facts regarding Anderson County’s internal sanctions against Mr. Davenport. At the time Anderson County issued its sanctions (*i.e.*, the ethics and leadership class), it did not have the benefit of reviewing the body-cam footage. Therefore, Anderson County was unaware of, among other things, the patient abuse and ambulation of the patient to the ambulance and, accordingly, would have had a different decision regarding the remediation/sanctions than the originally ordered class. (Kickham Trial Tr. 124:15-125:5, 129:13-21, 153:7-8, and 178:6-19; Stoller Dep. Tr. 112:23-113:6 and 170:3-15).

¹⁵ 28 U.S.C. § 2412(d)(1) states, “Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”

extensions and interpretations of the law that often underlie vigorous enforcement efforts, and gives the court discretion to deny awards where equitable considerations dictate an award should not be made. *Id.*

The special circumstances exception is precisely applicable to this matter. DHEC was advancing a good faith and credible application of the Act and Regulation in pursuing this action. Awarding attorney's fees would have a significant chilling effect on DHEC exercising its lawful police powers. The ALC's erroneous application will have DHEC and other agencies second-guessing pursuing good faith and logical interpretations of its laws aimed at protecting the public. Additionally, taxpayers should not be responsible for nearly \$90,000 in attorney's fees to an individual who verbally abused a patient. Equitable considerations dictate that an award should not be granted.

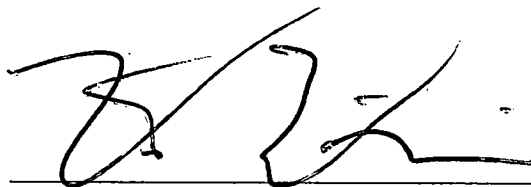
While the applicability of the "special circumstances" prong is admittedly intended to be limited, the present case involving the State's police powers is distinguishable from any case in which a South Carolina court has awarded attorney's fees pursuant to § 15-77-300. *Cf. with McNaughton v. Charleston Charter Sch. for Math & Sci., Inc.*, 411 S.C. 249, 768 S.E.2d 389 (2015) (awarding attorney's fees to a teacher in a breach of contract claim), *Heath*, 302 S.C. 178 (1990) (awarding attorney's fees when a county violated an unambiguous state statute), *Layman v. State*, 376 S.C. 434 (2008) (awarding attorney's fees when the State and retirement system breached an unambiguous contract), *McDowell*, 304 S.C. 539 (1991) (awarding attorney's fees when DSS relied on an erroneous legal conclusion in denying food stamp benefits), *Simpkins v. City of Gaffney*, 315 S.C. 26 (Ct. App. 1993) (awarding attorney's fees when the City clearly had no authority to suspend operation of a zoning ordinance and to put a moratorium in place), *Brown v. City of N. Charleston*, 314 S.C. 298 (Ct. App. 1994) (awarding attorney's fees when City's

position that displaced tenants were not entitled to statutory displacement and relocation costs because the project causing the displacement did not receive federal funds was contrary to the unambiguous statute in question), and *Cornelius v. Oconee County*, 369 S.C. 531 (2006) (awarding attorney's fees where the County could cite to no viable authority to support its position that it was not bound by a referendum's terms that authorized the County to own and operate a utility). In the context of a state agency exercising its lawful police powers, special circumstances exist to make an award of attorney's fees unjust. The ALC abused its discretion in finding no special circumstances exist that make an award of fees unjust.

CONCLUSION

For the foregoing reasons, the ALC erred in law and abused its discretion. Accordingly, the ALC's Order Awarding Attorney's Fees and Reconsideration Order should be reversed and DHEC should not be ordered to pay any attorney's fees.

Respectfully submitted,



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23
November 26, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2018-001868
Case No. 18-ALJ-07-0003-CC

South Carolina Department of
Health and Environmental Control,

Appellant/Respondent,

v.

James W. Davenport,

Respondent/Appellant.

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SC Court of Appeals

PROOF OF SERVICE

I, Rita D. DeCarlis, Paralegal for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **28th day of November 2018**, served a copy of the corrected **Initial Brief of Appellant/Respondent and Designation of Matter to be Included in the Record on Appeal** upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid and addressed as follows:

David E. Rothstein, Esquire
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605

Rita D. DeCarlis
Rita D. DeCarlis

November 28, 2018
Columbia, South Carolina



November 28, 2018

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
NOV 28 2018
SC Court of Appeals

RE: SCDHEC v. Davenport Case No. 17-ALJ-07-0003-CC
Appellate Case No.: 2018-001868
DHEC OGC# 22888

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the corrected **Initial Brief of Appellant/Respondent, Designation of Matter to be Included in the Record on Appeal and Proof of Service.**

Per my telephone communications with Mary Kaitlyn, the final two pages, which included the signature page, were inadvertently left out of our filing of the Intimal Brief of Appellant/Respondent that was filed with your office on November 26. We have notified counsel for the Respondent/Appellant, Davenport and he consents to our corrected filing of same.

Thank you for your kind attention to this matter. It would be appreciated if your office would please return a clocked copy to me for our files.

Sincerely,

Rita D. DeCarlis
Rita D. DeCarlis

/rdd

Enclosures

cc (w/corrected enclosures): David E. Rothstein, Esquire