

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
South Carolina Department of Motor Vehicles

Deborah Brooks Durden, Administrative Law Judge

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ALC Case No. 18-ALJ-21-0011-AP  
SC Court of Appeals Case No. 2018-001788

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Toyota of Greer, Appellant

v.

South Carolina Department of Motor Vehicles, Respondent.

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**APPELLANT'S INITIAL BRIEF**

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**SC Court of Appeals**

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## STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT (ALC) MISINTERPRET *JOSEPH V. S.C. DEPT' OF LABOR*<sup>1</sup> IN FINDING THAT THE DMV WAS NOT REQUIRED TO FOLLOW DE-002, THUS CREATING THE POTENTIAL DANGER POSED BY THE LEVIATHAN OF THE AGENCY ACTING AS THE FOURTH BRANCH OF GOVERNMENT?
- II. DID THE ALC ERR IN AFFIRMING THE DECISION OF THE OMVH HEARING OFFICER WHEN THE SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLE'S (DMV) OWN MANDATORY PROCEDURES REQUIRED THAT THE LICENSE SUSPENSION BE RESCINDED THUS DENYING APPELLANT DUE PROCESS AND EQUAL PROTECTION?
- III. DID THE ALC ERR IN HOLDING THE ONLY LIMITATIONS ON THE DMV'S DISCRETION REGARDING SANCTIONS ARE CONTAINED IN S.C. CODE ANN. § 56-15-350 WHEN THE DMV ESTABLISHED THE MANDATORY PROCEDURE OF DE-002 AS A BINDING NORM AND REQUIRED THAT IT BE FOLLOWED AND PUBLISHED TO ALL SOUTH CAROLINA DEALERS IN THE DEALER AND WHOLESALER MANUAL?
- IV. DID THE ALC ERR IN FINDING THAT THE DMV WAS NOT REQUIRED TO FOLLOW DE-002 BECAUSE IT WAS NOT PROMULGATED AS A REGULATION?
- V. DID THE ALC ERR IN FAILING TO FIND THAT THE DMV ACTED ARBITRARILY WHEN IT DISREGARDED DE-002 WITHOUT ADEQUATE EXPLANATION OR NOTICE?
- VI. DID THE ALC ERR IN FINDING THAT APPELLANT HAD NOT CITED ANY LEGAL AUTHORITY THAT THE DMV COULD NOT ARBITRARILY DEVIATE FROM ITS ESTABLISHED PROCEDURE?
- VII. DID THE ALC ERR IN FINDING THE HEARING OFFICER DID NOT RULE THAT DE-002 WAS NOT MANDATORY?
- VIII. DID THE ALC ERR IN AFFIRMING THE DECISION OF THE HEARING OFFICER WHEN HE IMPROPERLY FOUND DE-002 "CONTAINS NO PROVISION THAT ASSERTS THE DEPARTMENT IS LIMITED TO ANY PARTICULAR CATEGORY" WHEN THE DMV'S SANCTION REPORTS FOUND THE ONLY VIOLATION TO BE IN THE 4 POINT CATEGORY FOR FAILING TO DELIVER TITLE?
- IX. DID THE ALC ERR IN FINDING IT WAS ONLY A CLERICAL ERROR WHEN THE HEARING OFFICER FOUND THAT THE VIOLATION OF "ENGAGING IN ANY ACTION WHICH CAUSES DAMAGE TO ANY PARTY OR TO THE PUBLIC" CARRIED A CHARGE OF "UP TO 6 POINTS" WHEN THE HEARING OFFICER'S DECISION CLEARLY SHOWED THAT HE IMPROPERLY CONSIDERED THE CHARGE OF FAILURE TO DELIVER TITLE WITHIN 45 DAYS AS A SUBSET OF THE SEPARATE CHARGE OF "ENGAGING IN ANY ACTION WHICH CAUSES DAMAGE TO ANY PARTY OR TO THE PUBLIC" EVEN THOUGH DMV FORM DE-002B LISTS THE

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<sup>1</sup> 417 S.C. 436, 455-56, 790 S.E.2d 763, 773 (2016).

**VIOLATIONS SEPARATELY AND ASSIGNS DIFFERENT POINTS FOR EACH VIOLATION?**

- X. DID THE ALC ERR IN AFFIRMING THE DECISION OF THE HEARING OFFICER WHEN HE FOUND THE DMV ADMITTED THAT THE ASSESSMENT OF 4-POINT VIOLATIONS REQUIRED A FINDING OF A "WILLFUL FAILURE TO DELIVER TITLE" AND THE DEFINITION OF "WILLFUL" AS CONTAINED IN DE-002 WAS NOT MET?**
- XI. DID THE ALC ERR IN HOLDING THERE IS NO AUTHORITY FOR A DEALER TO EXCEED 45 DAYS TO DELIVER TITLE WHEN DE-002 STATES THAT THERE IS NO VIOLATION UNLESS THE FAILURE WAS "WILLFUL"?**
- XII. DID THE ALC ERR IN HOLDING THERE IS NO AUTHORITY FOR A DEALER TO EXCEED 45 DAYS TO DELIVER TITLE WHEN A THIRD PARTY FAILS TO DELIVER TITLE?**
- XIII. DID THE ALC ERR IN FAILING TO FIND THE DMV EXCEEDED ITS STATUTORY AUTHORITY WHEN IT ISSUED A SUSPENSION WITHOUT A FINDING OF WILFULLNESS?**
- XIV. DID THE ALC ERR IN FINDING THE SCDMV ISSUED ITS SUSPENSION BASED ON DE-002, SECTION III.G.4 WHEN THE SCDMV ADMITTED IT DID NOT FOLLOW THE PROCEDURE?**
- XV. DID THE ALC ERR IN AFFIRMING THE DECISION OF THE HEARING OFFICER WHEN HE FOUND THERE WAS NO EVIDENCE OF A SANCTION REPORT RELATED TO MCCALLISTER'S COMPLAINT AS REQUIRED BY SECTION III.C.3. OF DE-002?**
- XVI. DID THE ALC ERR IN INCORRECTLY FINDING THAT LEAKS' MANAGER REVIEWED ALL SANCTIONS WHEN THERE IS NO EVIDENCE SHE CONSULTED HIM ON THE VIOLATIONS IN QUESTION?**
- XVII. DID THE ALC ERR IN OVERLOOKING APPELLANT'S REASONABLE BASIS FOR ITS ACTIONS AND FINDING THAT THE DMV MET ITS BURDEN TO SHOW APPELLANT VIOLATED S.C. CODE § 56-15-40(1) WHEN THERE WAS NO EVIDENCE THAT APPELLANT ENGAGED IN AN ACTION "WHICH IS ARBITRARY, IN BAD FAITH, OR UNCONSCIONABLE" AND CAUSED DAMAGE TO THE PUBLIC BUT RATHER THAT THE ACTS OF OTHERS CAUSED THE DELAY IN DELIVERING THE TITLE?**
- XVIII. DID THE ALC ERR IN APPLYING THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT TO DISREGARD THE REQUIREMENTS OF THE DEALERS ACT?**
- XIX. DID THE ALC ERR IN FINDING THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE HEARING OFFICER'S FINDINGS THAT THE COMPLAINANTS AND PUBLIC WERE HARMED BY APPELLANT'S ACTIONS?**
- XX. DID THE ALC ERR IN FINDING THE APPELLANT FAILED TO PERFORM "ITS MOST FUNDAMENTAL DUTY OWED TO ITS CUSTOMERS" WHEN THE FAILURES IN ALL INSTANCES WERE DUE TO "A PRIOR SELLER OR LIENHOLDER WHO HAS FAILED TO DELIVER TITLE AS REQUIRED**

- BY LAW”?
- XXI. DID THE ALC ERR BY IMPROPERLY FINDING THAT APPELLANT PROVIDED FALSE OR MISLEADING BILLS OF SALE OR AFFIDAVITS & NOTIFICATIONS OF SALE?
  - XXII. DID THE ALC ERR BY IMPROPERLY FINDING APPELLANT TOOK NO CORRECTIVE ACTION UNTIL CUSTOMERS FILED COMPLAINTS WITH THE DMV?
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  - XXIV. DID THE ALC ERR IN HOLDING THAT APPELLANT SOLD THE GILLIAM CAR “WITH KNOWLEDGE OF A LIEN” WHEN IN FACT THE SELLER AND FORD MOTOR CREDIT SAID THERE WAS NO LIEN?
  - XXV. DID THE ALC ERR IN FAILING TO FIND THE HEARING OFFICER IMPROPERLY ADMITTED HEARSAY EVIDENCE IN THE FORM OF NOTES MADE BY AGENT BENJAMIN IN THE DEALER COMMENTS SECTION OF THE DOCUMENT ENTITLED “INVESTIGATION OF COMPLAINT REGARDING DEALER/WHOLESALER?”
  - XXVI. DID THE ALC ERR IN AFFIRMING THE DECISION OF THE HEARING OFFICER WHEN THERE IS NO EVIDENCE OF A SEPARATE REVIEW AND APPROVAL AS REQUIRED BY SECTION III D. OR A REVIEW OF THE SUSPENSION BY THE AUDIT UNIT MANAGER AS REQUIRED BY SECTION III G.7?
  - XXVII. DID THE ALC ERR IN FAILING TO CONSIDER THE CIRCUMSTANCES SURROUNDING THE SALE TO QUALITY AUTO?
  - XXVIII. DID THE ALC ERR IN FINDING THERE WAS NO EVIDENCE IN THE RECORD THAT APPELLANT OFFERED CUSTOMERS AN OPPORTUNITY TO RETURN THE CARS?
  - XXIX. DID THE ALC ERR IN FINDING IT WAS WITHIN THE HEARING OFFICER’S DISCRETION TO CONSIDER THE LENGTH OF TIME IT TOOK APPELLANT TO PROVIDE THE TITLES WHEN THAT WAS NOT INCLUDED IN THE DEFINITION OF “WILLFUL”?
  - XXX. DID THE ALC ERR IN AFFIRMING THE HEARING OFFICER’S MISSTATEMENTS REGARDING APPELLANT’S TESTIMONY AS TO QUALITY AUTO?

## STATEMENT OF THE CASE

The South Carolina Department of Motor Vehicles (DMV) issued an Official Notice of Dealer License Suspension against Appellant on June 27, 2017. The Notice prohibited Appellant from selling cars for a full week. The reason given was that Appellant accumulated 12 points under DMV policy DE-002<sup>2</sup>, on three occasions over three years having “Engaged in any action which causes damage to any party or to the public (failure to deliver title within 45 days of date of sale).” DE-002 defined a willful failure to deliver title as:

...refers to the failure of a dealer to execute an assignment of title to the buyer and deliver the title to the buyer or the department within 45 days of the date of sale **when the prior seller or lienholder has delivered the title as required by law.** (emphasis added). (R. , Pet. Ex. 5)

DE-002 further provides:

The “failure to deliver title violation” is not considered willful if the dealer can provide a written statement, which is substantiated by a Dealer Licensing Audit Unit agent identifying a prior seller or lien holder who has failed to deliver the title as required by law. (R. ,Pet. Ex. 5)

Appellant denied that it committed a willful failure to deliver title or willfully engaged in any action which caused damage to any party or to the public. Appellant alleged it provided written statements for all three sales that were substantiated by a DMV agent that the prior owner or lien holder did not deliver the title to Appellant, as required by law.

Appellant filed a Request for Contested Case Hearing on July 6, 2017. (R. ) On October 2, 2017 a hearing was held before a Hearing Officer of the Office of Motor Vehicle Hearings. An Order was issued on December 12, 2017, which sustained the License Suspension of June 27, 2017. (R. ) Appellant timely filed its Notice of Appeal with the Administrative Law Court (ALC)

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<sup>2</sup> The DMV puts all South Carolina Dealers on notice of their point sanctions in their Dealer and Wholesaler Manual.

on January 11, 2018. (R. ) The ALC affirmed, and issued her Order without oral argument on July 31, 2018. (R. ) Appellant timely filed a Motion for Reconsideration/Rehearing on August 10, 2018. (R. ) Appellant's Motion was denied on September 4, 2018. (R. ) Appellant received a copy of this decision on September 4, 2018. Appellant timely filed its Notice of Appeal to this Court on October 1, 2018.

### STANDARD OF REVIEW

An Appellate Court may reverse the decision of the ALC if it is affected by an error of law or is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *South Carolina Dep't of Motor Vehicles v. Blackwell*, 389 S.C. 293, 295, 698 S.E.2d 770, 771 (2010). This Court is empowered to reverse the decision of the ALC if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are (1) violative of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(5).

Basic administrative law principles establish that an agency bears the burden of proof in an enforcement action. Since the DMV asserts the affirmative of an issue, i.e. the enforcement of a dealer's license suspension, and since the dealer will be subject to an adverse ruling if no evidence is introduced, the DMV bears the burden of proof in this matter. See *Carter v. Columbia and Greenville R.R. Co.*, 1883 WL 4856, at \* 6 (S.C. 1883); Alex Sanders and John S. Nichols, *Trial Handbook for South Carolina Lawyers*, Fourth Edition (2008), § 9:3, p. 398.

## FACTS

Appellant has been in business since 2004 employing over 86 South Carolinians. (R. , Tr. p. 177) Their title department processed over 25,000 vehicle titles in the relevant time period. (R. Tr., p. 172) Appellant hired staff and implemented a process to efficiently handle the paperwork necessary to obtain titles for vehicles traded in or purchased by the dealership and forwarded to the next buyer. (R. , Tr. 181-184) However, the actions of previous owners and lenders can interfere with Appellant's ability to timely obtain a title. This suspension will cost Appellant an estimated \$2.1 million in sales. (R. , Tr. p. 177)

The DMV has implemented a uniform and fair system in which points are charged for violations and has developed a required procedure for the application and administration of any sanctions against dealers. (R. , Pet. Ex. 5) This uniform and fair system, derived from statutory law, was designed to insure that any of the several hundred dealerships in South Carolina were treated fairly and equally. This Appeal is asking that the uniform and fair system be applied to Appellant, to insure equal protection and due process.

The DMV has developed a Dealer and Wholesaler Manual "to provide new and existing dealers with up-to-date information."<sup>3</sup> It "... lists requirements mandated by state and federal law, and DMV's policy." (R. )

The Manual contains a sub-section entitled "Dealer Sanctions" which sets forth the point system that could lead to suspension. (R. ) It lists a sanction of "6 points to Revocation" for "Engaging in any action which causes damage to any party." (R. ) It lists a sanction of only 4

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<sup>3</sup> Since August 1, 2009, the Manual showed the 4-point category as "willful failure to deliver title" and "6 points to revocation for engaging in any action which causes damage to any party." (R. ) (posted online at <http://www.scdmvonline.com/Forms/Dealer-Manual.ashx>, page 5-4) Respondent failed to introduce the updated Manual, but instead submitted the 2007 Manual (R. ), which pre-dates DE-002 (R. ) and does not include the "willful" language.

points for “Willful failure to deliver title to buyer or department within 45 days of sale.” (R. ) Thus, all South Carolina dealers are on notice of how the sanction points apply to them.

These points are based on DMV Procedure DE-002, which is the official procedure regarding the issuance of dealer sanctions. (R. , Pet. Ex. 5) The first page of DE-002 states that DMV employees are required to read and follow these procedures. (R. , Pet. Ex. 5)

Section III D.2. states that points are assessed utilizing DMV Form DE-002B. (R. , Pet. Ex. 5) Section III D.4 requires the Dealer License and Audit Unit (DLAU) to adhere to the written process to insure uniform and fair assessment of sanctions. (R. , Pet. Ex. 5) Table DE-002B lists violations for “Engaging in any action which causes damage to any party or to the public” as requiring a sanction of 6 points to revocation, and “Willful failure to deliver title to buyer or department within 45 days of date of sale” as requiring a sanction of 4 points. (R. , Pet. Ex. 5) The Table does not provide for a lesser point sanction. This Table mirrors the Table published to all South Carolina Dealers in the Dealer Manual.

Section III C.3 requires that a Sanction Report be completed if the administrative investigation reveals violations. (R. , Pet. Ex. 5) The DMV presented only two Sanction Reports<sup>4</sup> which list the violation as “Failure to deliver title within 45 days of date of sale.” (R. , Pet. Exs. 6 and 8). Four points were assessed as the sanction on both reports.

Zenda Leaks, Assistant Manager of the DLAU, agreed in her testimony that DMV policy states:

The “failure to deliver title violation” is not considered willful if the dealer can provide a written statement, which is substantiated by a Dealer Licensing and Audit Unit agent identifying a prior seller or lien holder who has failed to deliver the title as required by law. (R. , Tr. pp. 63-64, Pet. Ex. 5)

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<sup>4</sup> There were three claimed violations, but only two Sanction Reports.

The rationale behind this exception is that a dealer cannot be penalized if a previous owner or lienholder violates the law.<sup>5</sup> S.C. Code §56-19-360 requires that the previous owner:

“[s]hall, at the time of the delivery of the vehicle, execute an assignment and warranty of title to transferee [the dealership]”

In all three instances, the previous owner failed to deliver the title “as required by law.”

Despite the Assistant Manager’s agreement that willfulness did not exist, the DMV employees ignored the policy and sanctioned Appellant on the three following transactions. This Appeal requests that this uniform and fair system be applied to Appellant, ensuring due process and equal protection, so the sanction that will deprive prospective customers the right to purchase cars and employees to be paid may be reversed.

#### **Sheila Gilliam Purchase**

The Derricks traded in a 2007 Ford Explorer on January 25, 2016 and certified there was no lien on the vehicle. (R. , Res. Ex. 3) They failed to deliver the title as required by law.

Therefore, Appellant took it upon itself to solve the problem. Appellant’s Title Clerk ran an inquiry through the DMV’s electronic registration system on February 4, 2016, which showed a lien from Ford Motor Credit (FMC) had not been satisfied.<sup>6</sup> (R. , Res. Ex. 4, Tr. pp. 131-132) The Clerk contacted FMC who confirmed that the loan had been paid several years earlier, but it neglected to file the lien release. (R. , Tr. p. 133) Because the account was closed years earlier, FMC had difficulty locating the file and providing the lien release and the Clerk had to call multiple times until she was finally able to speak with an employee who was able to provide the release. (R. , Tr. pp. 135-136) Thus, the delay fell at the feet of the lienholder, FMC.

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<sup>5</sup> A license is a valuable property right. *See e.g., Davis v. SCDMV*, 420 S.C. 98, 800 S.E.2d 493, 496 (Ct. App. 2017). The DMV Procedure recognizes the unfairness of denying dealers their valuable property rights due to actions of others, which is why points are not assessed if the fault lies with a previous owner or lender.

<sup>6</sup> South Carolina law provides that the lienholder holds the title when a car is financed, S.C. Code §56-19-265(A), and requires the DMV to mail the Certificate of Title to the first lienholder named in it. S.C. Code §56-19-340.

Appellant sold the Ford Explorer to Sheila Gilliam on March 29, 2016, (R. , Pet. Ex. 9) expecting FMC (contacted on February 4<sup>th</sup>) to release the paid off lien within the 45 days. Appellant knew there was no lien on the car, since both the previous owner and lienholder confirmed it was paid off years before the resale. Appellant was able to receive a lien release letter from FMC dated June 28, 2016. (R. , Res. Ex. 5) The Clerk then expedited the process to complete the title work on the Explorer as shown by the selection of the expedited process at the top of the Form 400. (R. , Res. Ex. 6) Appellant received the duplicate title and completed the tag work on July 6, 2016. (R. , Pet. Ex. 10)

The DMV received a complaint from Gilliam on the same date FMC finally issued its lien release letter. DMV Field Agent Benjamin investigated and received a written statement from Appellant explaining that the lienholder FMC was the cause that the title was not issued within 45 days.<sup>7</sup> (R. , Pet. Ex. 8) He also admitted that he accepted Appellant's written statement as "substantiated" as required by DE-002. (R. , Tr. pp. 119-120)

DMV Agent Benjamin further testified that he considered any failure to deliver the title within 45 days as "willful," but later admitted that this was not consistent with DE-002 as to the definition of "willful". (R. , Tr. pp. 109-111) Therefore, the 4 points were wrongfully charged against Appellant. If this one transaction fell off, Appellant never would have received 12 points, and would not be facing suspension.

#### **Quality Auto of Anderson Purchase**

Hughes traded in a 2000 Chrysler 300 on February 13, 2016 (R. ) and reported a lien with Carolina Title Loans. (R. , Pet. Ex. 7) Thus, the title was held by the lender. She agreed it should be paid off as part of her deal. Appellant's Clerk called the Spartanburg branch listed on the payoff

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<sup>7</sup> Appellant inquired of the DMV as to whether there was a rule in South Carolina that a title had to be in hand before resale, and was told there was not. (R. , Tr. pp. 188-189)

sheet and was told that the title was being held at the Greer branch. (R. , Tr. pp. 139-140) She contacted the Greer branch and received the payoff amount. (R. ,Tr. p. 140, Res. Ex. 7) The Clerk sent the check to the lender at the Greer branch on February 25, 2016, which was cashed on March 8<sup>th</sup>, well within the 45-day window. (R. , Tr. p. 140, Res. Rx. 8) Thus, there was nothing prohibiting the lender from forwarding the title to Appellant within the 45 days.

Appellant sent the car to America's Auto Auction (AAA) where, on February 26<sup>th</sup>, Quality Auto paid \$300 for it. (R. , Res. Ex. 1)<sup>8</sup> Again, Appellant knew there was no lien on the car since the payoff check was written before the resale date. (R. , Res. Ex 8) All the paperwork was provided by and signed by employees of the Auction. Quality Auto, a used car dealer, was aware that it purchased the vehicle with "Title Attached." (R. , Res. Ex. 1, Tr. p. 27) This meant that the car did not have the title at the time it was presented at auction. (R. , Tr. p. 27) Quality Auto also was aware that it could notify the auction if it did not have the title within 30 days and either return the vehicle or wait to receive the title. (R. , Tr. p. 29, Res. Ex. 2) Instead, Quality Auto decided not to return the vehicle but to sell the car without the title. (R. , Tr. pp. 31-33)

When the title was not received within the expected time (as required by law), Appellant's Clerk began to call Carolina Title Loans' Greer branch (that had cashed the payoff check). (R. , Tr. pp. 141-142) After leaving several messages with no response, the Clerk contacted the Spartanburg branch and was informed that the manager was on vacation. (R. , Tr. p. 143) When the manager returned, she released the lien and sent the title to Appellant. (R. , Tr. p. 143) The Clerk was able to process the title paperwork and deliver the title to Quality Auto on July 18<sup>th</sup>. Once again, the problem was with a previous lienholder.

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<sup>8</sup> The Bill of Sale contained in Petitioner's Exhibit 7 at p. 7 is not a form used by Appellant and was not signed by any employee of Appellant. (R. , Tr. 144) It obviously came from the Auction.

Quality Auto sold the vehicle before it received the title (R. , Tr. pp. 31-33) and then filed a complaint on July 14<sup>th</sup> with the DMV. Agent Benjamin again investigated (R. , Tr. p. 92), again received a written statement that the lienholder had not provided the title within 45 days (R. , Pet. Ex. 6), and again accepted it as substantiated. (R. , Tr. pp. 119-120) Benjamin again ignored DMV policy and wrongfully issued the 4-point sanction against Appellant. If the policy was followed, Appellant's points would drop from 8 to 4.

### **Tonya McCallister Purchase**

Gorman traded in a 2006 Mazda to Appellant on January 3, 2017. (R. , Pet. Ex. 12, pp. 6-7) Gorman informed the dealership that there was no lien on the car and that he lost the title but would provide a duplicate. (R. , Tr. p. 157) When he failed to bring the title, Appellant's Title Clerk ran an inquiry through the DMV electronic registration system to apply for a duplicate. (R. , Tr. p. 157) Gorman had a South Carolina address and failed to inform the dealership that his car was registered in North Carolina. The South Carolina DMV system therefore showed the previous owner to Appellant's Clerk and she attempted to contact Gorman to get the paperwork necessary to request a duplicate. (R. , Tr. pp. 157-158) Meanwhile, Tonya McCallister purchased the Mazda on February 10, 2017. (R. , Pet. Ex. 12) At the time of this purchase, the previous owner certified that no lien existed on the car.

When Gorman did not return the Clerk's phone calls, she enlisted the help of one of the salesmen. (R. , Tr. p. 158) When the Clerk finally spoke with Gorman, she learned that this car had been titled in North Carolina and that Gorman had originally financed the purchase which placed the title in the lender's hands. While Gorman had satisfied the lien, the lienholder had failed to file a lien release and he was having difficulty getting the title. (R. , Tr. pp. 158-159) The Clerk immediately had a sister store in North Carolina run a North Carolina vehicle inquiry report.

(R. , Tr. 159-160, Res. Ex. 9) She then contacted the previous lienholder on April 12<sup>th</sup> (R. , Tr. 161-162, Res. Ex. 9) and obtained a lien release the same day. (R. , Tr. 161-162, Res. Ex. 10) Once again, the delay was caused by a previous lender not filing the lien release.

A duplicate title was issued in North Carolina on May 6, 2017. (R. , Pet. Ex 12) The Clerk attempted to process the paperwork with the DMV but was unable to do so because taxes were owed on the car by Ms. McAllister. (R. , Tr. p. 75, Pet. Ex. 11) The Clerk tried unsuccessfully to contact Ms. McCallister regarding the tax issue. (R. , tr, p. 75, Pet. Ex. 11) She then contacted DMV Agent Benjamin, who advised her to process the paperwork as “title only.” (R. , Tr. p. 75)

Ms. McCallister submitted a complaint to the DMV on April 26, 2017, which was again investigated by Agent Benjamin. (R. , Tr. pp. 105-106). Benjamin again received a written statement from Appellant that the prior seller failed to deliver the title. (R. , Pet. Ex. 11), which he accepted as substantiated (R. , Tr. pp. 119-120). No Sanction Report was presented related to Ms. Gilliam’s complaint. Nevertheless, he wrongfully issued a 4-point penalty against Appellant, once again ignoring DMV policy.

## ARGUMENTS

### I. THE ALC ERRED IN FINDING THE DMV IS NOT REQUIRED TO FOLLOW PROCEDURE DE-002

#### A. The ALC’s Order Misapprehended the South Carolina Supreme Court’s Opinion in *Joseph* that Checks the Actions of the “Administrative State.”

The ALC appears to hold that DE-002 should have no bearing at all in the case and that the DMV is free to abandon its established point system whenever it wants.<sup>9</sup> This holding is not supported by South Carolina or federal law. The South Carolina Supreme Court is keenly aware

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<sup>9</sup> A similar point system is used for driver’s licenses, but that system was approved by the South Carolina Legislature, S.C. Code § 56-1-710, *et seq.*

of the potential dangers of the “leviathan” of administrative agency rule-making, calling it “the so-called Fourth Branch of government” and warning against “the danger it poses to the once sacrosanct constitutional principle of separation of powers.” *Joseph v. S.C. Dep’t of Labor*, 417 S.C. 436, 455-56, 790 S.E.2d 763, 773 (2016) (Kittredge, J. concurring, and adopted by the Majority). In *Joseph*, the Court found that the South Carolina Board of Physical Therapy created a binding norm that it was required to follow (the 2011 Position Statement) and, therefore, the Position Statement had the effect of a regulation under the APA.<sup>10</sup> The ALC misapprehended *Joseph* in holding that because DE-002 was not promulgated as a regulation, it does not have to be followed<sup>11</sup> when even a general policy statement cannot be arbitrarily ignored by an agency.<sup>12</sup>

The South Carolina Supreme Court’s test to determine if an agency has created the equivalent of a regulation is:

Whether a particular agency creates a regulation or simply announces a general policy statement depends on whether the agency action establishes a “binding norm.” *Home Health Serv., Inc. v. S.C. Tax Com’n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994). The “key inquiry” is

the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm. [*Sloan v. S.C. Bd. Of Phys. Therapy Ex’mnrs.*, 370 S.C. 452, 491, 636 S.E. 2d 598 (2006) (Toal, C.J., dissenting)] (*quoting Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983))...

*Joseph*, 417 S.C. at 454, 790 S.E. 2d at 772.

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<sup>10</sup> It further found that the Board violated the APA by adopting the 2011 Position Statement without promulgating it as a regulation.

<sup>11</sup> The ALC erred in holding the only limitations on the DMV’s discretion regarding sanctions are contained in S.C. Code Ann. § 56-15-350 when DE-002 was a binding norm established by the DMV.

<sup>12</sup> *INS v. Yang*, 519 U.S. 26 (1996).

The Supreme Court found the Position Statement was a binding norm because it gave the Board no discretion in applying the policy. As set forth below, the DMV was required to follow DE-002, and had no discretion to rewrite it and apply sanctions as it saw fit.<sup>13</sup> By disregarding DE-002, the DMV deprived Appellant of due process and equal protection.

Further, the *Joseph* Court did not justify reversal by finding an equal protection violation alone. In fact, the majority opinion was a plurality opinion, and the deciding vote was Justice Kittredge. He clearly stated in his concurrence that he would not support reversing based on constitutional grounds. Instead, he wanted to check the power of the fourth branch of government that “presents a threat to our civil society” by applying statutory grounds alone.

#### **1. DE-002 creates a binding norm as the official procedure.**

The DMV has an official procedure that has been adopted since August 2009. DE-002 is “Approved By” and signed by the DMV Director. (R. , Pet. Ex. 5) The purpose of Procedure DE-002 is to “establish uniform guidelines for the allocation and administration of sanctions. . .” (R. , Pet. Ex. 5) and to ensure “uniformed [sic], fair, impartial, and thorough . . . assessment of sanctions. . . .” (R. , Pet. Ex. 5) Uniform fairness is essential as the DMV’s Assistant Manager testified, “[w]e try as much as possible to treat all dealers the same.” (R. , Tr. p. 61) Respondent’s counsel confirmed this in his opening statement:

According to our procedure, if we’re going to follow our own rules, that is the least we can do under the circumstances we find ourselves.

(R. , Tr. p. 9)

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<sup>13</sup> In fact, the DMV promises in the Dealer Manual that any “[c]hanges in law or policy may require periodic updates” and those updates “ . . . will be placed on the DMV’s website.” (R. ) DMV presented no policy change evidence for the removal of the willfulness requirement, nor allowing for the reduction in points for damage to any party on its website.

## **2. DE-002 is written in mandatory terms.**

In the present case, DE-002 does not give the DMV discretion as to whether it must be followed. The Procedure requires Managers to have employees: 1) read it; 2) acknowledge that they have read it; and 3) follow it. (R. , Pet. Ex. 5) DE-002 uses the term “will” and not “may.” See *State v. Hill*, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994) (“The word ‘may’ ordinarily signifies permission and generally means the action spoken of is optional or discretionary.” (quoting *Robertson v. State* , 276 S.C. 356, 358, 278 S.E.2d 770, 771 (1981)) (internal quotation marks omitted)). DE-002 is clearly meant to apply to dealers and not just agency personnel. Leaks, Assistant Manager of the DMV, agreed that DE-002 is the mandatory official procedure regarding the issuance of dealer sanctions (R. , Tr. pp. 85-86, Pet. Ex. 5)

## **3. The South Carolina DMV Dealer and Wholesaler Manual Makes it binding on the dealers.**

It is quite clear that the DMV meant for Appellant to be aware of and to follow DE-002. The DMV requires dealers to answer affirmatively that they have the Dealer Manual when applying for a dealer license. (R. , Pet. Ex 1) The stated purpose and scope of the Manual is “...to provide new and existing dealers with up-to-date information” regarding “... requirements mandated by state and federal law, and DMV’s policy.” (R. ) Any changes in policy were promised to be placed on the website. Page 5 – 3 of the Dealer Manual clearly states:

The Department of Motor Vehicles (DMV) has established uniform guidelines for the application and administration of sanctions for dealers... that violate rules, regulations, policy, or law. . . . DMV will suspend, for a period of 7 days, the license of any dealer... that accumulates 12 points. (R. )

Page 5 – 4 of the Dealer Manual then lists the Dealer Performance Violations; the ones relevant for this case are:

Engaging in any action which causes damage to any party: 6 points to Revocation

Willful failure to deliver title to buyer or department within 45 days of sale: 4 points. (R. )

This Table is a summary of the DE-002 Sanction Table.

Administrative Procedure Act S.C. Code §1-23-10(4) clearly defines a regulation that fits the facts of this case:

“Regulation” means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency... but does not include descriptions of agency procedures applicable only to agency personnel...

It is clear that the sanction point system contained in DE-002 is a “statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency.”

The Policy is external, for it is for all South Carolina dealers, and not just an internal policy for the DMV.<sup>14</sup> Therefore, it is mandatory.

#### **4. DE-002 interprets and applies its power to sanction.**

It is clear that DE-002 is the DMV’s effort to interpret and apply the statutes that impact Dealer Sanctions. It has a Definitions Section defining willful failure to deliver title. (R. , Pet. Ex. 5) It clearly lists the performance violations and allocates various points for each violation. (R. , Pet. Ex. 5) It covers in detail how suspensions will be determined. Nothing could be clearer that DMV’s intention was to interpret the statute and impact the dealers through the sanction procedure. This is why they put the dealers on notice through the Dealer Manual.

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<sup>14</sup> The DMV’s examples presented to the ALC of two of their internal procedures that should not be binding only emphasize how DE-002 is quite different. The first, an internal policy regarding how personal calls are handled by DMV employees, is nothing like DE-002 with its Sanctions Table published and distributed to the dealers with the danger of taking their licenses away. This is also true with the Department’s use of its “Phoenix System.” Nothing in DE-002 has to do with the internal procedures of how employees are supposed to act in the performance of their general duties. Rather, it is a specific, direct procedure as to how it should sanction dealers in order to take away their property rights, as published in the Dealer Manual.

**5. The Department notified Appellant that the suspension was based on DE-002.**

S.C. Code § 1-23-320(3) requires that a party be provided with notice which includes reference to the sections of statutes and rules involved. The DMV's Official Notice did just that, alleging:

The Department of Motor Vehicles (DMV) has determined that you have violated registration, dealer licensing and titling provisions of Title 56 and have accumulated 12 or more points listed below under DMV Policy DE-002 pertaining to Dealer Sanctions. (R. , Official Notice)

DMV Counsel acknowledged in his Opening Statement to the Hearing Officer that the Procedure should be followed. (R. , Tr. p. 9)

Therefore, DE-002 constitutes a binding norm and the DMV cannot arbitrarily depart from the Procedure.

**B. It was error to find the DMV was not required to follow DE-002.**

The ALC erred when it found the DMV was not required to follow DE-002.<sup>15</sup> The ALC completely disregarded DE-002, finding that a suspension can be based on a failure to timely deliver title even when there was no willfulness. (R. , ALC Order p. 9) The DMV is not authorized under § 56-15-350 to suspend a dealer's license merely for failure to deliver title within 45 days. Under §56-15-350, a suspension may only be issued for a violation of Chapter 15 of Title 56. (§56-15-350(b)). The only section of Chapter 15 possibly applicable is §56-15-40, which requires actions that are arbitrary, in bad faith, or unconscionable. This is why the 4-point violation requires

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<sup>15</sup> The ALC incorrectly stated that Appellant cited 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." (R. , ALC Order p. 9) Appellant cited *Shepherd v. Merit Systems Protection Board*, 652 F.2d 1040 (D.C.Cir.1981), *Moret v. Karn*, 746 F. 2d 989 (3<sup>rd</sup> Cir. 1984); and *WMI Liquidating Trust v. F.D.I.C.*, 110 F. Supp. 3d 44, 53 (D.D.C. 2015), which cites *INS v. Yang*, 519 U.S. 26 (1996) in support of this argument. (R. , Reply Brief, p.1)

a finding of willfulness and the DMV exceeded its authority in issuing a suspension without the finding of willfulness.

The ALC improperly found that the Hearing Officer had not ruled that DE-002 was not mandatory. The Order clearly addressed the requirements of DE-002 and then determined that the DMV did not have to follow the Procedure. Appellant raised the issue of the mandatory nature of the Procedure and the DMV's duty to follow it at the hearing as well as the fact that without a finding of willfulness, the 4-point violations could not be charged. (R. , Tr. pp. 190-193) The Hearing Officer found:

I find that the assessment of 4 point violations were made pursuant to a finding by Petitioner of a "willful failure to deliver title to buyer or department within 45 days of date of sale." Having made these findings, Petitioner is required to show that the failures to deliver title were "willful" as defined in its Procedure DE-002. (R. , Order p. 6)

The Hearing Officer then ruled in direct contradiction to his Findings of Fact and omitted the "willful" requirement:

I conclude that the evidence showed that the Respondent committed the violation of failing to deliver title within the statutory period. (R. , Order p. 226)

In so ruling, the Hearing Officer removed the requirement that the failure to deliver title be "willful" even though he had previously ruled that willfulness was a requirement to find a violation. The ALC affirmed this ruling.

The Hearing Officer does not make a finding of willfulness, instead he allowed the DMV to disregard DE-002 and alter the assigned category of the violation:

The Official Notice of License Suspension listed each complaint as "[e]ngaging in any action which causes damage to any party or to the public" with a parenthetical "(failure to deliver within 45 days of date of purchase)." . . . **DE-002 contains no provision that asserts the Department is limited to any particular category.** An action which causes damage to any party or to the public is a separate violation on

the grid. It provides for sanction points up to 6 for each repetition. . . (emphasis added) (R. , Order p. 13)<sup>16</sup>

DE-002 Section III.D.2. states:

In cases of a performance violation(s), the Dealer Licensing and Audit Unit Manager or designee will review and, if approved, assess points to the dealer license utilizing DMV Form DE-002B, “Performance Sanctions/Violations.”

(R. , Pet. Ex. 5) The Hearing Officer could only make this finding by determining that DE-002 was not mandatory. Table DE-002B lists separate violations for “Engaging in any action which causes damage to any party or to the public” as requiring a sanction of 6 points to revocation, and “Willful failure to deliver title to buyer or department within 45 days of date of sale” as requiring a sanction of 4 points. (R. , Pet. Ex. 5) The Table does not provide for a lesser point sanction as a subset of the sanction. The ALC erroneously affirmed this finding, concluding that the DMV could issue a 4-point sanction despite a finding of no “willfulness.” (R. , ALC Order, p. 10)

## **II. THE DMV’S FAILURE TO FOLLOW DE-002 REQUIRES THAT THE LICENSE SUSPENSION BE RESCINDED.**

### **A. It was Error to Uphold the Suspension When Appellant was not “Willful.”**

#### **1. A 4-Point violation for failure to deliver title requires a finding of willfulness.**

In accordance with Section III C.3. of DE-002, the DMV submitted two Sanction Reports which list the violation as “Failure to deliver title within 45 days of date of sale.”<sup>17</sup> (R. , Pet. Exs. 6 and 8) The ALC noted that Leaks testified multiple violations could arise from a single complaint and that “a particular act could potentially be regarded as more than one violation listed

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<sup>16</sup> The use of the phrase “sanction points up to 6” is not inconsequential and the ALC erred in finding this was only a clerical error. The violation for “damage to any party or to the public” would have to carry a penalty of “up to 6 points” rather than “6 points to revocation” to argue that the Department could assess 4 points under this category.

<sup>17</sup> Benjamin and Leaks signed the Sanction Reports, agreeing that these were the offenses being charged. (R. )

on the sanction table.” (R. , ALC Order p. 9) This overlooks the fact that only one four point violation was assessed as the sanction on both reports.<sup>18</sup> As the Third Circuit recognized in *Moret v. Karn*, 746 F.2d 989 (3rd Cir. 1984):

Even if the evidence in the record, combined with the reviewing court's understanding of the law, is enough to support the order, the court may not uphold the order unless it is sustainable on the agency's findings and for the reasons stated by the agency.

*Id.* at 992, citing K. Davis, Administrative Law Treatise Sec. 14:29 (1980). The DMV cannot now argue it was a 6 point violation that was graciously reduced.

The procedure clearly and unequivocally requires:

2. Willful Failure to Deliver Title Complaints<sup>19</sup>

Dealers are required to execute an assignment of title to the buyer... The “failure to deliver title violation” is not considered willful if the dealer can provide a written statement which, is substantiated by a Dealer Licensing and Audit Unit agent identifying a prior seller or lienholder who has failed to deliver the title as required by law.”<sup>20</sup> (R. , Pet. Ex. 5)

This is reiterated in the definition of “willful failure to deliver title.” (R. , Pet. Ex. 5) This policy is consistent with South Carolina law. (S.C. Code § 56-19-360 requiring the prior seller (or lienholder) to deliver the Certificate of Title.)

Leaks and Benjamin both agreed that willfulness is required to assess 4 points for failure to deliver title<sup>21</sup> and that the DMV cannot find willfulness if a third party failed to deliver title to

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<sup>18</sup> The DMV did not present evidence of a Sanction Report related to Tonya McCallister’s complaint.

<sup>19</sup> DMV’s argument that willfulness only applies to a criminal violation is belied by the Definitions Section (R. , Pet. Ex. 5) and Section III. C.2 (R. , Pet. Ex. 5) dealing with all failures to deliver titles within 45 days.

<sup>20</sup> The only exception to this section is when a Dealer sells a car “out of trust,” which is not alleged in any of the complaints against Appellant.

<sup>21</sup> Even if the improperly applied the category of “Engaging in an action which causes damage to any party or to the public” is considered, it also requires a finding of willfulness, which has not been proven. Table DE-002B references S. C. Code §56-15-40(1) in this category which requires a finding that the dealer engaged in an action which was “arbitrary, in bad faith, and unconscionable.” (R. , Pet. Ex. 5) The evidence was clear that it was the acts of others, not Appellant, that caused the delay in delivering the titles. (The application of § 56-15-40(1) is further addressed in Section IV)

the dealer. (R. , Tr. 63-64, 111-112) Benjamin also admitted he received a written statement from the Appellant as to all three Complaints identifying a third party who failed to deliver title and that he substantiated the statements. (R. , Tr. p. 120)

## **2. There was no evidence of willfulness**

The DMV has determined in its own Procedure that there is no “willful” violation if a prior seller or lien holder has failed to deliver the title. (R. , Pet. Ex. 5) This is consistent with South Carolina law requiring previous owners and lienholders to deliver title to Appellant. The written statements of Appellant’s employees that the actions of third parties prevented the timely transfer of the three titles, substantiated by DMV Agent Benjamin, prevents the finding of a sanctionable offense under the DMV’s Procedure.<sup>22</sup> Therefore, none of the 12 points in the Official Notice should have been assessed against Appellant. The DMV’s decision to sanction Appellant, and the Orders of the Hearing Officer and ALC were clearly erroneous in view of the evidence in the whole record and should be reversed.<sup>23</sup>

## **B. The Department Admittedly Failed to Follow its Mandatory Procedure**

### **1. The DMV arbitrarily removed the willfulness requirement**

The ALC erred in finding the DMV issued its suspension based on DE-002, Section III.G.4 when the DMV admitted it did not follow the Procedure.

The DMV employees defiantly testified that they did not require “willfulness” when investigating the complaints against Appellant, despite admitting that DE-002 required it.<sup>24</sup> (R. ,

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<sup>22</sup> Procedure DE-002 does not give the DMV the option to consider the violation “willful” if it decides the Dealer should have done more to get the title from the prior seller or lienholder and the ALC erred in affirming the Hearing Officer’s conclusion of law.

<sup>23</sup>The ALC erred in holding there is no authority for a dealer to exceed 45 days to deliver title when DE-002 states there is no violation unless the failure was “willful,” and South Carolina law requires delivery of titles by previous owners to Appellant.

<sup>24</sup> Willfulness is required in DE-002 in Section I, Definitions (R. , Pet. Ex. 5) and Section III.C.2. (R. , Pet. Ex. 5)

Tr. pp. 78, 83-84, 109-112) DMV Agent Benjamin testified that he considered any failure to deliver the title within 45 days as “willful,” but later admitted that this was not consistent with DE-002. (R. , Tr. 110-111) Leaks admitted that the Procedure required “willfulness” and that she couldn’t change the Procedure (R. , Tr. p. 86) Contradicting herself, she testified the DMV could arbitrarily remove the willfulness requirement by omitting it from the letters and Official Notice sent to Appellant. (R. , Tr. p. 78) To allow these certain employees to arbitrarily change the requirement would defeat the policy purpose of establishing uniform and fair guidelines for the administration of sanctions. It denies Appellant due process and equal protection. It also highlights the danger of the Fourth Branch of Government making up law as it sees fit. The DMV’s decision to sanction Appellant was arbitrary and in excess of its authority. The Hearing Officer’s Order upholding the suspension and the ALC’s affirmance were clearly erroneous in view of the evidence in the whole record and should be reversed.

**2. The DMV arbitrarily failed to have the suspension approved by the Audit Unit Manager.**

The DMV has also failed to follow its own procedure in Section III. G.7 that requires the Audit Unit Manager to review and approve any suspension before it is issued. (R. , Pet. Ex. 5)<sup>25</sup> The DMV had the burden of proof, and has failed to present any evidence that the Audit Unit Manager reviewed the matter and approved the suspension. The Assistant Manager testified that she both reviewed and signed off on all sanctions. (R. , Tr. pp. 35-36) The ALC erred in finding that her testimony that she consulted her manager on a single complaint meant that he reviewed all sanctions. The testimony, in fact, was that her supervisor previously had overruled her the only time she testified she sought review when she wanted to sanction where a customer contributed to

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<sup>25</sup> This is after ignoring the requirements of Section III.D to have a separate review and approval of any sanction. (R. ) Leaks testified she signed off on the sanctions and reviewed them. (R. )

the problem. (R. , Tr. p. 57) This suggests that the Audit Unit Manager likewise would have overruled her decisions on the three complaints had he had an opportunity to review it.

On this ground alone, the suspension requires reversal.

**3. The DMV failed to present the required Sanction Report as to the McCallister Complaint.**

Section III C.3 of DE-002 requires a Sanctions Report be completed if the investigation reveals a violation. Only two Sanction Reports were presented, implying no violation was found for the third.

The Hearing Officer found:

- a. Section III C.3 of DMV Procedure DE-002 requires that a Sanctions Report be completed if the administrative investigation reveals violation. Petitioner presented two Sanction Reports which list the violations as “Failure to deliver title within 45 days of date of sale” (Pet. Exs. 6 and 8) Four points are assessed as the sanction on both reports. Petitioner did not present evidence of a Sanction Report related to Tony McAllister’s complaint. (R. , Order p. 6)

The Hearing Officer then erroneously ruled that the DMV’s suspension should be upheld. (R. , Order p. 13) This would reduce the points from 12 to 8 and would not support suspension.

Because the DMV failed to follow its required procedures, this Court should rescind the 7-day suspension. That will cost Appellant \$2.1 million in sales, deprive 86 employees of a week’s wages, and prohibit the public from buying a car. (R. , Tr. p. 177)

**III. THE DMV’S SUSPENSION WAS ARBITRARY AND CAPRICIOUS AND SHOULD BE RESCINDED**

The DMV improperly argued it can arbitrarily choose parts of the Procedure it wants to follow: this denies fundamental fairness to the Appellant. *See Hipp v. S.C. Dep't of Motor Vehicles* , 381 S.C. 323, 325, 673 S.E.2d 416, 417 (2009). The ALC erred in finding the DMV was not required to follow its general policy. The United States Supreme Court has found that

even a general policy statement cannot be arbitrarily ignored by an agency. In *INS v. Yang*, 519 U.S. 26 (1996), Justice Scalia, J, writing for the majority, held:

Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as ‘arbitrary, capricious, [or] an abuse of discretion’ within the meaning of the [APA].

The DMV chose to administer the statutes entrusted to it by promulgating DE-002. DE-002 was the DMV’s announced general policy, as shown by the DMV’s Dealer Manual, Sanction Letters (R. , Pet. Ex. 4), and Official Notice<sup>26</sup> (R. ). The DMV introduced DE-002 into evidence as the relevant procedure (R. , Tr. p. 90) and admitted it was required to follow the procedure. (R. , Tr. pp. 83-86) An agency acts arbitrarily or capriciously when it disregards its established policy without adequate explanation. See *WMI Liquidating Trust v. F.D.I.C.*, 110 F. Supp. 3d 44, 53 (D.D.C. 2015) citing *Yang, supra*. See also *Shepherd v. Merit Systems Protection Board*, 652 F.2d 1040 (D.C.Cir.1981) (finding an agency abuses its discretion if it fails to follow its own regulations and procedures).

The unanimous United States Supreme Court in *Yang*<sup>27</sup> recognized that an agency can define terms within its own policies. The DMV did so in limiting the 4-point violation to “willful” failure to deliver title and defining “willful” to exclude circumstances in which a third party has failed to deliver title to the dealership. (R. ,Pet. Ex. 5)

The DMV had the discretion to pick the category, but once picked, it had to follow the requirements for the category. The DMV chose 4 points for the 45-day violation, as shown by the

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<sup>26</sup> S.C. Code § 1-23-320(3) requires that a party be provided with notice which includes reference to the sections of statutes and rules involved.

<sup>27</sup> 519 U.S. at 32 (1996).

Sanction Reports. The choice of a 4-point sanction was a choice that the violation was not “damage to any party or to the public.”<sup>28</sup> The DMV could have revised DE-002 to remove the “willfulness” requirement for the 4-point violation for failure to deliver title within 45 days, or to allow the charging of a 4-point sanction under the violation of “damage to any party”. It did not. No such change was placed on the website or in the Dealer Manual.

Two cases involving procedures of the INS are instructive. In *Moret v. Karn*, 746 F.2d 989 (3d Cir.1984), the Third Circuit found that the agency abused its discretion when it failed to follow its Status Review Plan. Moret was a “Mariel Cuban” immigrant who came to the U.S. without a visa. He was eligible for parole and was released. His parole had been revoked and restored on several occasions. His last placement was terminated when Moret left the program without permission. The INS notified Moret that his parole been revoked "as a result of [his] failure to maintain the conditions of [his] resettlement."

The Third Circuit found the INS’s procedures allowed for the revocation of a Mariel Cuban's parole when either the alien had been convicted of a felony or serious misdemeanor, or when the INS determined that the alien presented a clear and imminent danger to the community or himself. The Third Circuit held that the INS abused its discretion in terminating Moret’s parole without following its procedure that required a finding of clear and imminent danger. Likewise, the DMV abused its discretion by not following the requirements of DE-002 that required a finding of willfulness.

The Eastern District of New York similarly found the INS abused its discretion in denying an alien's application for stay of deportation because the agency failed to follow its guidelines.

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<sup>28</sup> See *Moret v. Karn*, 746 F.2d 989, 992 (3rd Cir. 1984).

*Piper v. Crossland*, 519 F.Supp. 962 (E.D.N.Y.1981).<sup>29</sup> The Third Circuit found that although the INS has discretion in deportation matters, it must follow the rules it adopted.<sup>30</sup> The INS was found to have abused its discretion in denying the petition because it did not articulate a determination, as required in its Operations Instruction, that the petition was "frivolous" or that there were "substantial adverse factors" which "would probably lead" to the denial of extended voluntary departure. As in *Moret* and *Piper*, the DMV is not free to create a new reason for sanctioning Appellant, based on a hybrid violation created by its assistant manager.

The DMV undisputedly failed to follow DE-002 and presented no adequate explanation for disregarding the Procedure. The arbitrary and capricious actions of the DMV require a reversal of the suspension of the Appellant's license.

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<sup>29</sup> Piper entered the United States on a one-year student visa. After overstaying his visa, he was involved in numerous efforts to extend his ability to stay, the last of which was an I-130 petition by his stepmother to have him classified as an Alien Relative. Petitioner applied to the District Director to extend the stay of his order of deportation pending adjudication of an appeal and the I-130 petition. The application was denied.

<sup>30</sup> INS's Operations Instruction 242.1(a)(25) provided in pertinent part:

Pending final adjudication of a petition which has been filed, the district director will not deport ...the beneficiary of the petition if approval of the petition would make the beneficiary immediately eligible for adjustment of status under section 245 of the Act or for voluntary departure under the Service policy set forth in Operations Instruction 242.10(a)(6)(i). The district director may, however, seek to deport ... the beneficiary when it is determined that the petition is frivolous or there are substantial adverse factors which, based on the district director's opinion, would probably lead to the denial of adjustment of status or extended voluntary departure in the exercise of discretion.

#### IV. THE COURT ERRED IN FINDING THAT THE DMV MET ITS BURDEN OF PROVING A VIOLATION OF THE DEALERS ACT

Even if the DMV could arbitrarily change the offense to “engaging in any action which causes damage to any party or to the public,” it must prove a violation of the Dealer’s Act, which it has not done<sup>31</sup> and it was error for the Hearing Officer and the ALC to find that it did.<sup>32</sup>

S.C. Code Ann. § 56-15-40 states, in part:

(1) It shall be deemed a violation of paragraph (a) of § 56-15-30 for any ... motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public. . . .<sup>33</sup>

“Arbitrary” for purposes of the Dealers Act is defined as “acts which are unreasonable, capricious or nonrational; not done according to reason or judgment; depending on will alone.” *Taylor v. Nix*, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992).<sup>34</sup> A Dealer’s conduct under the Dealer’s Act need only have some reasonable basis. *Id.* Although a decision is mistaken or wrong, it is not necessarily arbitrary. *See Webb v. Dameron*, 219 S.W.2d 581, 585 (Tex. App., 1949) (“Action is not arbitrary or capricious when exercised honestly and upon due consideration, where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached.” Internal citations omitted)

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<sup>31</sup> The DMV bears the burden of proof. *See Carter v. Columbia and Greenville R.R. Co.*, 1883 WL 4856, at \* 6 (S.C. 1883); Alex Sanders and John S. Nichols, *Trial Handbook for South Carolina Lawyers*, Fourth Edition (2008), § 9:3, p. 398. OMVH Rule 15(b) makes clear that the burden of proof is on the Department:

In matters involving... the imposition of sanctions, including the suspension . . . of a license, . . . the Department of Motor Vehicles shall have the burden of proof.

<sup>32</sup> Appellant argued at the hearing that there was no evidence of acts by Appellant that were arbitrary, unconscionable or in bad faith. (R., Tr. p. 196) The Hearing Officer found Appellant acted arbitrarily. (R. , Order p. 13). The ALC affirmed the Hearing Officer’s finding. (R. , ALC Order p. 10)

<sup>33</sup> Neither the Hearing Officer nor the ALC found Appellant’s actions were unconscionable or in bad faith.

<sup>34</sup> *Freeman v. Hendrick Honda*, 414 S.C. 362, 778 S.E.2d 902 (2015) provides an example of when a dealership’s actions were found to be arbitrary under the Dealers Act. Hendrick notified its customers that the closing fee it charged was a “means of reimbursing it for certain overhead costs . . .” but never calculated those costs. Therefore, the amount of its closing fee was arbitrary. Appellant, in contrast, was following its established procedures that had resulted in titles being obtained within the 45-day period over 25,000 times in the applicable time period.

Appellant's conduct was based on many thousands of transactions in which titles for which the loans had been paid were timely received. The DMV made it clear to Appellant that they could resell a car in South Carolina before the title was received. (R. , Tr. pp. 188-189) It was the actions of third parties that prevented their timely receipt and forwarding of the titles. This is the exact reason the DMV policy does not penalize a dealer for the inactions of others out of their control. As soon as Appellant received the required documents, it provided the titles.

**A. The ALC Erred in Substituting the Requirements of the Unfair Trade Practice Act for the Dealers Act.**

The ALC improperly found, “[s]ubstantial 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.” (R. ALC Order, p 9) A violation of the Dealers Act is not shown by the mere potential for actions to deceive customers or the potential for repetition. S.C. Code § 56-15-350(b) does not give the DMV the right to suspend Appellant’s license for a violation of the South Carolina Unfair Trade Practices Act. The Official Notice does not allege that Appellant’s license is being suspended pursuant to the SCUTPA. The fact that both the Dealers Act and the Unfair Trade Practices Act allow the courts to be guided by the definitions in the Federal Trade Commission Act does not mean the two statutes are interchangeable.

Even if Unfair Trade Practice Act cases can inform the definition of “unfair,” the terms “unfair or deceptive acts or practices” under § 56-15-30 must be viewed in conjunction with §56-15-40. The ALC cannot read § 30 in isolation. Respondent has cited to the ALC only one case, *DeBondt v. Carlton Motorcars, Inc.*, which addresses both statutes. 342 S.C. 254, 536 S.E.2d 399 (Ct. App. 2000). In that case, the Court of Appeals applied different standards to each cause of action and required a finding that the dealership’s actions were arbitrary, in bad faith, or unconscionable to constitute a violation of the Dealers Act. *Id.* There is no evidence that the actions

were arbitrary, in bad faith, or unconscionable. Therefore, this Court should reverse and rescind Appellant's suspension.

**B. The DMV's Investigating Agent did not find a Violation of the Dealers Act**

Agent Benjamin testified that he investigated the three complaints and found the titles were delivered late. Benjamin did not testify that he found Appellant acted arbitrarily, unreasonably, capriciously, or nonrationally. In fact, he accepted Appellant's explanation that in all three cases title had not been timely delivered by a prior owner or lender. (R. , Tr. p. 120) There is no evidence in the record that the DMV's decision to assess points against Appellant was based on anything other than a failure to deliver title within 45 days.

Even if the Hearing Officer properly considered the comments contained in Benjamin's Investigation Report, which Appellant argues he did not,<sup>35</sup> the comments demonstrate that Appellant had already taken corrective action to address any problems. The comment references four separate dealerships with no reference with any particular problems Appellant experienced.

Because the DMV found only a failure to deliver title within 45 days in its Sanctions Reports, it clearly exceeded its statutory authority in issuing a 7-day suspension. S.C. Code Ann. § 1-23-380(5).

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<sup>35</sup> The Hearing Officer wrongfully considered notes made by Agent Benjamin in the Dealer Comments section of the document entitled "Investigation of Complaint Regarding Dealer/Wholesaler." (R. ) These notes were hearsay and should not have been considered. Agent Benjamin did not testify that it was a regular practice of his investigation activity to make the report; therefore, the document did not meet the hearsay exception of SCRE 803(6). It also contained subjective opinions, which are not admissible under 803(6). The document also contained a second level of hearsay in that it referred to statements allegedly made to Agent Benjamin by an unknown person at the dealership. Because the declarant is not named, the DMV has not shown that the statement was made by an agent of Appellant concerning a matter within the scope of that person's employment and during the time the person was employed. Therefore, the hearsay exception under SCRE 801(d)(2)(D) was not met and the statement is inadmissible hearsay. Appellant made a continuing objection to statements contained within the documents submitted by the DMV. (R. )

**C. The Record as a Whole Shows Appellant took Reasonable Steps to Obtain the Titles in a Timely Manner.**

The Record shows that Appellant took reasonable steps to obtain titles in a timely manner. Appellant processed over 25,000 titles during the relevant time period and implemented an effective system to do so. (R. , Tr. pp. 173, 177-179) Appellant employed 10 clerks to handle title work for its 4 stores. (R. , Resp. Ex. 12). The sales volume compared to three complaints<sup>36</sup> demonstrates that Appellant was not acting in a manner that was arbitrary, unreasonable, capricious, or non-raional.

Appellant had a reasonable basis for its actions. It had evidence that all loans had been satisfied before the cars were resold. (R. , Tr. p. 133, 157, Resp. Ex. 8)<sup>37</sup> The lienholders were statutorily required to release the liens once the loans were paid. S.C. Code. Ann. § 56-19-680. Appellant's vast experience with these situations indicated that the titles would be provided within 45 days.<sup>38</sup>

**D. It is not a Violation of the Dealers Act to Sell a Car without the Title in Hand**

The Hearing Officer recognized that S.C. Code Ann. § 56-19-370 allows a dealer to sell a car without the title in hand. (R. , Order pp. 10-11) The statute provides the dealership has 45 days to deliver the title. Appellant testified he was told by the DMV on more than one occasion that they could sell a car before they had physical possession of the title. (R. , Tr. pp. 188-189)

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<sup>36</sup> The Hearing Officer excluded references to any violations other than the three contained in the Official Notice (R. , Tr. pp. 47, 56), finding Appellant was not on notice that any events for which points had been previously assessed were at issue.

<sup>37</sup> Mr. and Mrs. Derrick stated there was no lien on the vehicle at the time that they traded it in. (R. \_\_\_ Resp. Ex. 3) In the Gilliam matter, Appellant had confirmation from Ford Motor Credit that the loan on the Ford Explorer had been paid in full four years earlier. (R. \_\_\_, Tr. p. 133) In the Quality Auto matter, Appellant's Clerk was able to immediately receive the payoff amount and send a check to satisfy the existing lien. (R. \_\_\_, Tr. p. 140, Resp. Ex. 8) In the McCallister matter, Mr. Gorman stated he had no liens and that he would provide the duplicate title. (R. , Tr. p. 157)

<sup>38</sup> Appellant testified that title releases were normally received within 45 days after loans were paid. (R. Tr. pp. 153, 163-165) Appellant's experience was that it could obtain duplicate titles within 45 days as well. (R. , Tr. p. 171)

This is how business is done throughout the state. This allows the public early access to increased inventory. Therefore, it cannot be arbitrary, unconscionable, capricious, or nonrational to sell a car without the title in hand.

**E. The Length of Time that it Took for Third Parties to Act does not Constitute a Violation by Appellant.**

The ALC improperly found that it was within the Hearing Officer's discretion to consider the length of time it took Appellant to provide titles to its customers. This only would be so if the delay was caused by the Appellant. The DMV recognizes in DE-002 that dealers are not acting "willfully" (i.e., arbitrarily, unreasonably, capriciously, or nonrationally) if previous owners or lenders do not follow the law and the Hearing Officer made this finding (R. ). The definition of "willful" is not based on the length of time it takes third parties to deliver title to Appellant.

Appellant took consistent action to follow up with the third-parties involved regarding the status of the titles. The ALC erred in finding that the Dealership took no action until customers filed Complaints with the DMV. Appellant's Clerk testified that if a lien had been paid off but not released with the DMV, she called at least three times a week to check on the status. (R. , Tr. p. 135) She testified that she made numerous calls to Ford Motor Credit regarding the vehicle purchased by Gilliam. (R. , Tr. pp. 135-136) Gilliam's complaint was not received by the DMV until June 28<sup>th</sup> (R. , Pet. Ex. 8), the same day that Ford Credit issued its release letter (R. , Resp. Ex. 5). This indisputably demonstrates that Appellant had been working to receive the Release prior to any complaint being filed.

Appellant's Clerk also testified that she made numerous calls to Carolina Title Loans, at the branch that processed the payoff, regarding the vehicle purchased by Quality Auto. She started making the calls a few weeks after the loan was paid off and continued to pursue the release

through a different branch when she did not receive a response. (R. , Tr. 142-143)<sup>39</sup> Therefore, it is clear error to conclude that Appellant did nothing until the complaint was filed.

Appellant's other Clerk testified that she similarly made calls every two to three days to Mr. Gorman regarding the title for the vehicle purchased by McCallister. (R. , Tr. 157-158) Appellant received the lien release letter from the previous lienholder on April 12<sup>th</sup> (R. , Resp. Ex. 10) and immediately began processing the paperwork in North Carolina. McCallister's complaint was dated April 26<sup>th</sup>, two weeks later. (R. , Pet. Ex. 11) As soon as the Dealership received the lien release it processed the paperwork to transfer the titles. (R. , Tr. pp. 137, 143, 161, 163) None of these actions were arbitrary, unreasonable, capricious, or nonrational.

#### **F. There is no Evidence of Deceptive Acts by Appellant**

Appellant did not act in a manner that was designed to deceive its customers and it was error for the Hearing Officer and ALC to find to the contrary.<sup>40</sup> Because the loans were paid for

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<sup>39</sup> The Hearing Officer misstated the testimony of Appellant's Clerk regarding the sale to Quality Auto. The Clerk did know the branch where the title was held. She testified that she contacted the Greer branch and received the payoff information. (R. , Tr. p. 140) She further testified that she sent the payoff check to the same branch and the check was cashed by Carolina Title Loan. (R. . Tr. p. 140, Resp. Ex. 8) It was not until after the Chrysler 300 was sold to Quality Auto that it became known that the branch which had originally held the title had closed. (R. , Tr. pp. 141-142)

<sup>40</sup> To the extent this finding can be read as a finding of bad faith or unconscionability, it was made in error.

"Bad faith" has been defined as:

The opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.

*State v. Griffin*, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915).

There is no evidence that Appellant was prompted by an "interested or sinister motive" to deceive its customers. *Id.* The evidence shows Appellant trusted Ford Motor Credit, Carolina Title Loans, and Mr. Gorman to provide the title or releases within the required period. If that trust was misplaced, it was an honest mistake and not the result of a sinister motive.

South Carolina Courts have defined unconscionability as the absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them. *Hardee v. Hardee*, 355 S.C. 382, 585 S.E.2d 501 (2003).

all three cars,<sup>41</sup> it was not misleading to inform the customers that there were no liens, other than those entered into by the customer to purchase the vehicles. Lienholders are required to execute a release of their security interest within 10 days of a demand and within a maximum of 30 days. S.C. Code. Ann. § 56-19-680. The only remaining actions were for the lien holders to provide documentation of the satisfactions.

Further, the Bill of Sale presented by the auction and signed by Quality Auto stated that the vehicle was “free of all liens and encumbrances in the **buyer’s** name [Quality Auto] . . .” and it was error for the Hearing Officer or ALC to find otherwise.<sup>42</sup> (R. , Pet. Ex. 7, p. 7) It is undisputed that there were no liens in Quality Auto’s name when it bought the car.

**G. The Fact that the DMV Met with Appellant does not Prove a Violation of the Dealers Act.**

The ALC references the fact that the DMV met with Appellant after two of the complaints had been received. However, there is no evidence that points were assessed in the third complaint

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Unconscionability clearly requires more than mere negligence. The Third Circuit has recognized the “extremely limited scope of the concept of unconscionability.” *Matthews v. Pineo*, 19 F.3d 121, 124 (3rd Cir., 1994). In addressing an option presented to a debtor in bankruptcy, the Third Circuit found “[a]n option is not ‘unconscionable’ simply because it may be disruptive, unpleasant, undesirable, or painful. Instead, to be ‘unconscionable’ an option must be ‘shockingly unfair, harsh, or unjust’ or ‘outrageous’” *Id.* The evidence presented by the DMV simply does not rise to the level of unconscionability. Compare, *Halbersberg v. Berry*, 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990) (finding sufficient evidence of unconscionability where after Halbersberg and Berry agreed to the terms of a partnership and Halbersberg paid \$10,000 toward the construction cost of a building, Berry executed a lease in his name alone without consulting Halbersberg, completed the building, exercised exclusive control of the building, and collected rents which were not shared with Halbersberg.)

<sup>41</sup> Appellant paid off the loan with Carolina Title Loan.(R. , Resp. Ex. 8) Prior to the sale to Sheila Gilliam the lender confirmed the 9-year-old loan was satisfied 4 years earlier. (R. , Tr. p. 133) The Administrative Law Court erred in holding that Appellant sold the Gilliam car “with knowledge of a lien” when the seller said there was no lien and Ford Motor Credit said there was no lien. The previous owner of the Mazda also confirmed there was no outstanding lien prior to the sale to McCallister. (R. , Tr. p. 157) The Administrative Law Court erred in holding the Appellant had no idea whether there was a lien on the McCallister car when the seller reported there was no lien, which was later confirmed by the prior lender.

<sup>42</sup> The Hearing Officer mischaracterized the Bill of Sale as being prepared and executed by the Appellant (R. , Order p. 2, Tr. p. 144) when it was not. Appellant’s Clerk testified that Appellant does not use a form like the one on page 7 of Respondent’s Exhibit 7. (R. Tr. p. 144) The Clerk further testified that the signature on the Bill of Sale did not belong to any employee of Appellant. (R. , Tr. p. 144) It obviously was signed by the Auction.

because Appellant acted contrary to an instruction received from the DMV at that meeting. In fact, there is no Sanction Report at all for the third complaint.

**H. The ALC Erred in Failing to Consider the Circumstances Surrounding the Sale to Quality Auto.**

Quality Auto is a merchant in the business of buying and selling cars.<sup>43</sup> It purchased the Chrysler 300 at auction with “Title Attached,” meaning it was aware that the title was not available and that the car could be returned if it wasn’t received within 30 days.<sup>44</sup> (R. , Tr. pp. 27, 29, Respondent’s Exs. 1 and 2) The ALC erred in finding “the record is devoid of evidence that Appellant offered any of these customers the opportunities to return their vehicles in exchange for the purchase price” (R. , ALC Order p. 10) when the Record clearly shows Quality Auto had an opportunity to return the Chrysler 300 to the auction and chose not to return the car but to wait for the title instead. (R. , Tr. pp. 31-33)

Under the auction policy, the sale was not final until title was delivered and that Quality Auto had received title within 45 days of the final sale. Therefore, there was no violation. (R. Tr. pp. 70-71)<sup>45</sup> This one adjustment would drop the points below the sanction level.

**I. The DMV Failed to Meet its Burden of Proof as to Damages.**

The ALC erred in finding there was substantial evidence to support the Hearing Officer’s findings that the complainants and public were harmed by Appellant’s actions. The DMV has the burden of proof and did not present evidence that the three customers suffered damages as a result

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<sup>43</sup> The ALC improperly found that Scott Bocook alleged that he purchased a vehicle, when it was Quality Auto of Anderson. (R. , Respondent’s Ex. 1)

<sup>44</sup> Mr. Bocook testified that he had an absolute right to return the car to the auction and receive a refund if he didn’t have a title within 30 days. (R. , Tr. pp. 27, 29)

<sup>45</sup> The Hearing Officer found, “In the Bocook Complaint, [Appellant] asserted that it knew of the title loan lien before it put the vehicle on the market, it either had to know or not know where to contact the lender and receive the title.” (R. , Order, p. 13) This is a misstatement. Appellant’s Clerk testified that she contacted the Greer branch and received the payoff information and paid it off. (R. Tr. p. 140, Respondent’s Exs. 7 and 8) It was not until after the car was sold that it became known that the branch which had originally held the title had closed. (R. Tr. pp. 141-142)

of the Appellant's actions. OMVH Rule 15(b). The DMV did not present testimony by Gilliam or McCallister that they suffered any damages or that they even ceased driving the cars in question.<sup>46</sup>

Although Mr. Bocook testified generally that Quality Auto sold the car at a loss, there is no evidence in the record showing that Quality Auto suffered a loss. The evidence placed in the record by the DMV shows only that a James Rice subsequently paid \$870 for the car, which is more than twice what Quality Auto paid. (R. , Pet. Ex. 7)

### CONCLUSION

The ALC's Order would allow the DMV to arbitrarily disregard the binding norms in DE-002 and act as an unchecked administrative state, taking away the substantial rights of Appellant and requires reversal. *See Trowell v. S.C. Dept. of Public Safety*, 384 S.C. 232, 681 S.E.2d 893 (Ct. App. 2009) These binding norms were published to all South Carolina Dealers in the Dealer Manual. Agent Benjamin admitted that he substituted his own definition of "willfulness" for that of DE-002 and Assistant Manager Zenda Leaks admitted that she created her own sanction categories not contained in the Procedure.

The evidence in the Record shows that the DMV's investigation revealed only a failure to deliver title within 45 days. The DMV chose the 4-point violation and not the violation for "damage to any party or the public" that must start at 6 points. The DMV admitted that it was required to make a finding of willfulness in order to assess the 4 points and that its own definition of willfulness was not met. There is no evidence that the DMV Manager performed a review prior to the issuance of an Official Order of Suspension.

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<sup>46</sup> Appellant's counsel objected to the complaint forms as hearsay in an ongoing objection which was renewed for each Exhibit. The Hearing Officer agreed that hearsay statements contained within those exhibits would not be admitted or considered. (R. , Tr. pp. 93-95, 102, 107)

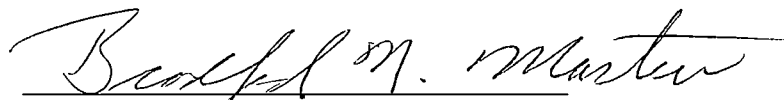
No evidence was presented at the hearing that the DMV's investigation found the dealership's actions were arbitrary, unreasonable, capricious, or nonrational. The testimony of Benjamin and Leaks showed that the DMV acted arbitrarily and abused its discretion in disregarding the published binding norms of DE-002 by ignoring the findings in its own Sanction Reports, ignoring the "willfulness" requirement for a 4-point violation, creating a new hybrid sanction category not contained on the grid, and eschewing managerial review.

Appellant raised the issues at trial of the DMV's failure to follow its established procedure and failure to prove a violation of the Dealer's Act. The Hearing Officer ruled on these issues, first correctly finding that the 4-point violation required proof of willfulness and then erroneously ruling that the DMV was not required to follow its established procedure. The Hearing Officer also erroneously found that Appellant acted arbitrarily. This finding was based in part on the erroneous factual findings that the dealership presented false documents to customers.

The dangers posed by the "leviathan" of an administrative agency rulemaking are clearly on display in this case. For these reasons this Court should rescind the 7-day suspension of Appellant's license in order to avoid the consequences of an unchecked administrative state.

Respectfully Submitted,

November 30, 2018



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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
South Carolina Department of Motor Vehicles

Deborah Brooks Durden, Administrative Law Judge

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ALC Case No. 18-ALJ-21-0011-AP  
SC Court of Appeals Case No. 2018-001788

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Toyota of Greer, Appellant

v.

South Carolina Department of Motor Vehicles, Respondent.

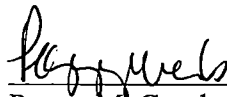
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PROOF OF SERVICE

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I certify that I have served Appellant's Initial Brief and Designation of Matter by depositing a copy in the United States Mail, postage prepaid, on November 30, 2018, addressed to Respondent's Counsel of Record, Philip S. Porter, Esq., Frank L. Valenta, Esq., and Brandy Duncan, Esq., South Carolina Department of Motor Vehicles, P.O. Box 1498, Blythewood, SC 29016.

November 30, 2018



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November 30, 2018

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

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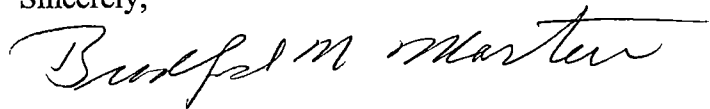
Re: *Toyota of Greer v. South Carolina Department of Motor Vehicles*  
ALC Case No. 18-ALJ-21-0011-AP  
SC Court of Appeals Case No. 2018-001788

Dear Ms. Kitchings:

Enclosed for filing is an original and one copy of Appellant's Initial Brief, Appellant's Designation of Matter to Be Included in the Record on Appeal, and a Proof of Service in the above captioned matter. Please file the original with your Court and return a clocked copy to me in the enclosed envelope.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Bradford N. Martin

/pm  
Enclosures

cc: Philip S. Porter, Esq.  
Frank L. Valenta, Esq.  
Brandy Duncan, Esq.

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