

20156

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE
LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 12-ALJ-21-0230-AP

Charles Holdorf, Appellant,

v.

South Carolina Department of Motor Vehicles and South Carolina Department of
Public Safety, Defendants,

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

RECORD ON APPEAL

RECEIVED

JAN 28 2013

SC Court of Appeals

T. Kirk Truslow
Post Office Box 238
North Myrtle Beach, S.C. 29597
(843) 280-9438
Attorney for Appellant

Linda A. Grice
Philip S. Porter
Frank L. Valenta, Jr.
10311 Wilson Boulevard
Post Office Box 1498
Blythewood, SC 29016-0020
(803) 896-9900
Attorneys for Respondent

INDEX

Order of May 1, 2012 2
Order of September 14, 2012 9
Transcript of Hearing, April 30, 2012 15

**STATE OF SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS**

South Carolina Department of Public Safety,)	Docket No. 11-OMVH-01-5927-CC
and)	
South Carolina Department of Motor)	
Vehicles,)	
Petitioners,)	FINAL ORDER AND DECISION
)	
vs.)	
)	
Charles Holdorf,)	
Respondent.)	
)	

Appearances:

For the Respondent: T. Kirk Truslow, Esquire

For the Petitioners: (Witness) C.D. Brigham, SCDPS - Horry

Other Information:

Respondent's Driver's License # 102259383

Type of Hearing: Implied Consent (S. C. Code Ann. § 56-5-2950)

Respondent alleged refusal to take chemical test(s)

INTRODUCTION

This matter is before the South Carolina Office of Motor Vehicle Hearings (OMVH) upon a request by Charles Holdorf for a contested case hearing. Respondent was arrested on October 28, 2011 for an offense arising out of an act alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. Upon refusal to submit to testing of his breath, blood or urine to determine his alcohol concentration, Respondent was charged with a violation of S. C. Code Ann. §56-5-2950 (Supp. 2010) and received a notice of suspension from the investigating officer. The matter was assigned to me to conduct a hearing.

FILED

MAY - 1 2012

SCOMVH

FILED

APR 09 2012

Written notice of the hearing was sent to the Petitioners, (South Carolina Department of Public Safety and South Carolina Department of Motor Vehicles), and to the Respondent. It was held on April 30, 2012 at the Horry County Historical Court House, Conway, South Carolina. After reviewing the entire record and considering all the evidence, I find that the suspension of Respondent's driver's license or driving privilege is sustained.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion by the parties, I make the following findings of fact by a preponderance of the evidence:

1. Notice of the date, time, place, and subject matter of the hearing was timely given to the parties.
2. On October 28, 2011 while on routine patrol in Horry County, Trooper Brigham witnessed the driver of a white in color Toyota operating the vehicle without wearing a seatbelt on Highway 57. Trooper Brigham initiated a traffic stop on the vehicle at the intersection of S.C. 9 and Highway 57.
3. The driver of the vehicle was Charles Holdorf, the Respondent.
4. When Trooper Brigham approached the Respondent's vehicle, he noticed a strong odor of alcohol coming from within the vehicle.
5. The Respondent was asked to exit his vehicle. Trooper Brigham noticed an odor of alcohol coming from the Respondent outside his vehicle.
6. Miranda Rights were given to the Respondent, and he was offered field sobriety tests. The first (1st) test was the "HGN" test. The Respondent would not follow instructions.
7. The second (2nd) test was the "walk and turn" test. The Respondent could not keep his balance while listening to instructions: stopped walking to steady himself; did not touch heel-to-toe; and lost his balance while walking.

8. The third (3rd) test was the "one (1)-leg stand" test. The Respondent could not perform the test.
9. Trooper Brigham arrested the Respondent for Driving under the Influence.
10. During an inventory of the Respondent's vehicle, Trooper Brigham found a plastic cup containing a liquor beverage.
11. The Respondent was transported to the North Myrtle Beach Department of Public Safety for the offering of the breath test.
12. When the Respondent entered the DataMaster Test room, the test was conducted according to SLED policy and procedure. The Respondent was advised that he was being video-recorded.
13. Trooper Brigham read and gave the Respondent a copy of the appropriate Implied Consent Advisement (Driving under the Influence advisement) in writing.
14. The Respondent's mouth was checked for foreign material.
15. The Respondent was observed for twenty (20)-minutes.
16. The Respondent submitted to a breath test for alcohol concentration, and the test result indicated an alcohol concentration of five one-hundredths of one percent (0.05%).
17. The DataMaster Test machine was operating properly as noted on the Breath Alcohol Analysis Test Report.
18. Trooper Brigham is a certified DataMaster Test Operator.
19. Based on his experience and training, Trooper Brigham determined that narcotics could possibly be involved.
20. Trooper Brigham advised the Respondent that his Implied Consent Rights still applied, and that the South Carolina Highway Patrol was requesting a urine sample be provided.
21. The Respondent verbally refused to submit to a urine test.
22. The Respondent was charged with a violation of S.C. Code Ann. § 56-5-2950 for refusing to submit to a urine test.
23. On October 28, 2011, the Respondent was issued a Notice of Suspension by Trooper Brigham which suspended his driver's license or driving privilege.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude as a matter of law the following:

General

1. In S. C. Code Ann. §1-23-600 (Supp.2010), the General Assembly provided for the creation of the South Carolina Division of Motor Vehicle Hearings. Effective January 1, 2006, the DMVH was authorized to employ Hearing Officers to preside over contested case hearings involving suspensions, cancellations, or revocations of drivers' licenses. The name of the DMVH was changed to the Office of Motor Vehicle Hearings (OMVH) effective October 1, 2008.
2. All hearings presided over by Hearing Officers of the OMVH must be conducted in accordance with the Administrative Procedures Act (APA) and the rules of procedure of the OMVH. A filing of a request for a hearing stays the suspension until a final decision is issued. S. C. Code Ann. §56-5-2951(G).
3. Appeals from final decisions of the Hearing Officers will be to the SCALC in accordance with S. C. Code Ann. § 1-23-600 (Supp. 2010).
4. Petitioner is an administrative agency of the State of South Carolina which is charged with administering its motor vehicle laws and delivering accurate and secure credentials and transaction documents to the citizens of this state. S. C. Code Ann. §56-1-5 (2006)
5. Basic administrative law principles establish that an agency bears the burden of proof in an enforcement action. *See Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991); Randy R. Lowell and Stephen P. Bates, South Carolina Administrative Practice and Procedure, 200-201 (2004). Since Petitioner asserts the affirmative of an issue, i.e. the enforcement of a driver's license suspension, and since it will be subject to an adverse ruling if no evidence is introduced, Petitioner bears the burden of proof in this enforcement action. *See Alex Sanders and John S. Nichols. Trial Handbook for South Carolina Lawyers*, Second Edition, 2001, § 9:3, p. 366.

Unlawful to drive while under the influence

6. Pursuant to S. C. Code Ann. § 56-5-2930 (Supp. 2010), it is unlawful for a person to drive a motor vehicle within this State while:

- a. under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired;
- b. under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired; or
- c. under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired.

Implied consent to submit to testing

7. S.C. Code Ann. § 56-5-2950(A)(Supp. 2010) provides:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of the law enforcement officer who arrested [the] person.... If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing.

Furthermore, the breath test must be administered by a person trained and certified by Petitioner pursuant to State Law Enforcement Division (SLED) policies. S.C. Code Ann. § 56-5-2950(A) (Supp. 2010).

8. S.C. Code Ann. § 56-5-2950(B) (Supp. 2010) further provides:

No tests may be administered or samples obtained unless upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

- (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;
- (2) his privilege to drive must be suspended for at least one month if he takes the tests or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;

000022

- (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
- (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
- (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

9. Upon motion by any party, the OMVH Hearing Officer may review the application of the policies, procedures, and regulations promulgated by SLED. If the Hearing Officer finds that the failure to follow any of the policies, procedures, regulations or other provisions of S.C. Code Ann. § 56-5-2950 materially affected the accuracy or reliability of the test results or the fairness of the testing procedure, the test results shall be excluded from evidence. The hearing officer must rule specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure, See S.C. Code Ann. § 56-5-2950(J)(Supp.2010).

10. If a person drives a motor vehicle and has an alcohol concentration of fifteen one-hundredths of one percent or more, Petitioner must suspend the person's driver's license, permit or nonresident operating privilege or deny the issuance of a license or permit to that individual. The arresting officer issues a notice of suspension which is effective beginning on the date of the alleged violation. See S.C. Code Ann. § 56-5-2951(A) (Supp. 2010)

11. A person may request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. S.C. Code Ann. § 56-5-2951(B) (Supp.2010). Section 56-5-2951(F) requires that the scope of the hearing be limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;
- (3) refused to submit to a test pursuant to Section 56-5-2950; or
- (4) consented to taking a test pursuant to Section 56-5-2950, and the:
 - (a) reported alcohol concentration at the time of testing was fifteen one-hundredths of one percent or more;
 - (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;
 - (c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950; and
 - (d) the machine was working properly.

000063

Nothing in this section prohibits the introduction of evidence at the administrative hearing on the issue of the accuracy of the breath test result.

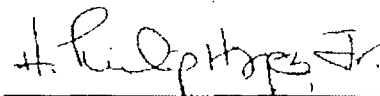
12. I conclude as a matter of law that the Petitioners have met the burden of proof pursuant to Section 56-5-2950 (Supp.2010). The Respondent was lawfully arrested for Driving under the Influence; the Respondent was read and given a copy of the appropriate Implied Consent Advisement (Driving under the Influence Advisement) in writing; and the Respondent verbally refused to submit to the urine test offered to him by Trooper Brigham. Accordingly, the relief requested by the Respondent is denied.

ORDER

Based upon the above findings of fact and conclusions of law, it is hereby:

ORDERED that the suspension of Respondent's driver's license or driving privilege is sustained.

AND IT IS SO ORDERED.



H. Philip Hayes, Jr.
OMVII Hearing Officer

May 1, 2012
Florence, South Carolina

000024

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Charles Holdorf,)
)
 Appellant,)
)
 v.)
)
 South Carolina Department of Motor)
 Vehicles and South Carolina Department of)
 Public Safety,)
)
 Respondent.)
 _____)

FINAL ORDER

DOCKET NO: 12-ALJ-21-0230-AP

This matter is before the Administrative Law Court (“ALC” or “Court”) on a Notice of Appeal filed by Charles Holdorf (“Appellant”). The Appellant states two grounds for his appeal. First, he argues that the suspension of his license for refusal to submit to a urine test should be overturned because the arresting officer lacked the necessary reasonable suspicion that the Appellant was under the influence of drugs other than alcohol to administer a urine test. The Appellant implies in his argument that the Hearing Officer’s decision was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Second, the Appellant argues that the suspension of his license should be overturned because the arresting officer failed to properly administer and offer the urine test. The Appellant’s second argument rests on the grounds that the Hearing Officer’s decision was affected by an error of law. The Hearing Officer issued his order after conducting a hearing pursuant to S.C. Code Ann. § 56-9-363 (Supp. 2009). The Administrative Law Court (ALC) has jurisdiction to hear this matter pursuant to S.C. Code Ann. §§ 56-9-363 & 1-23-660 (Supp. 2009). Because this court finds that the Record on Appeal establishes that the Hearing Officer did not abuse his discretion, that his decision was not clearly erroneous, or affected by an error of law, the decision appealed from is affirmed.

FACTS

On October 28, 2011, Officer Brigham witnessed the driver of a white Toyota vehicle traveling on S.C. Highway 57 in Horry County without wearing a seatbelt. Officer Brigham conducted a traffic stop on the vehicle, which was driven by the Appellant. Upon approaching the vehicle, Officer Brigham smelled a strong odor of alcohol. Officer Brigham conducted two field sobriety tests. During the first test, the Appellant did not follow the instructions and therefore, the test could not be

FILED
SEP 14 2012

completed. The Appellant failed the second field sobriety test. Upon the completion of the field sobriety tests, the Appellant was arrested and transported to the nearest police facility with a Datamaster breath testing device.

Upon arrival at the facility, the Appellant was advised that the South Carolina Highway Patrol was requesting that he provide a breath sample. He was advised that he was being video recorded and he was provided with a copy of his implied consent rights which were also read to him while he was being video-taped. After waiting the statutory twenty minutes for observation, the Appellant supplied a breath sample. The results of the test showed that the Appellant had a blood alcohol level of .05, indicating that the Appellant's blood alcohol level was within statutory limit.

Officer Brigham suspected, based on his experience and training, that the Appellant was under the influence of other drugs. The Appellant was informed that his implied consent rights still applied and that the South Carolina Highway Patrol was requesting that a urine sample be provided. The Appellant verbally refused to give a urine sample. At that time, a notice of suspension of driving privileges was provided to the Appellant.

The Appellant requested an administrative hearing. Pursuant to notice to the parties, a hearing was held before OMVH Hearing Officer, Phil Hayes on April 30, 2012. The Appellant did not appear at the hearing but was represented by T. Kirk Truslow, Esq. After hearing testimony from Officer Brigham, the Hearing Officer sustained the suspension of the Appellant's license in a Final Order & Decision dated May 1, 2012. The Appellant then filed the present appeal.

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660 (Supp. 2009). Therefore, the OMVH is an "agency" under the Administrative Procedures Act ("APA"). See S.C. Code Ann. § 1-23-310(2) (Supp. 2009). As such, the APA's standard of review governs appeals from decisions of the OMVH. See S.C. Code Ann. § 1-23-380 (Supp. 2009); see also Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). S.C. Code Ann. §1-23-380(5) (Supp. 2009) provides the standard for appellate bodies, including the ALC, to use when reviewing agency decisions:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the

administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2009).

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

[Section 1-23-380(g)(5)] specifically states that: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.

We, therefore, caution the Bench and Bar as to the limitation upon application of the "substantial evidence" rules in reviewing the decision of the administrative agencies. As stated in Dickinson-Tidewater, Inc. v. Supervisor of Assess., 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside.

The Court further noted that:

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

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

An appeal from an action of an administrative agency must be sustained if supported by substantial evidence. Hamm v. American Telephone & Telegraph Co., 302 S.C. 212, 394 S.E.2d 842 (1990); Lark v. Bi Lo, Inc., *supra*. In Lark, our Supreme Court quoted Consolo v. Federal Maritime Commission, 383 U.S. 612, 16 L.Ed.2d 131, 86 S.Ct. 1218 (1966), to define substantial evidence:

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

Lark, 276 S.C. T 136, 276 S.E.2d at 312. See, also, Dorman v. DHEC, 350 S.C. 159 (Ct. App. 2002), 565 S.E.2d 129; Hamm v. South Carolina Public Services Commission and Wild Dunes Utilities, Inc., 312 S.C. 295, 422 S.E.2d 128 (1992).

A court cannot weight the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion. Dorman v. DHEC, *supra*; Hamm v. American Telephone and Telegraph Co., *supra*; Chemical Leaman Tank Lines v. South Carolina Public Services Commission, 258 S.C. 518 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. See Fowler v. Lewis, 260 S.C. 54, 194 S.E.2d 191 (1973).

On review of the facts or orders of administrative agencies, the court will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. Public Administrative Law and Procedure § 220(a) (1983). Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary support or is arbitrary or capricious as a matter of law. Hamm v. South Carolina Public Services Commission, 294 S.C. 320, 364 S.E.2d 455 (1988).

DISCUSSION

When an individual is arrested for suspicion of driving under the influence, standard police procedure is to transport the individual to a breath testing facility. If the breath test does not indicate that the individual has a blood/alcohol limit above the legal limit, the arresting officer may require a urine sample for further testing if the arresting officer has reasonable grounds to believe that the individual is under the influence of drugs other than alcohol. S.C. Code Ann. § 56-5-2950. However, §56-5-2950 provides that "if a person is arrested for an offense arising from acts alleged to have been committed while driving a motor vehicle while under the influence of alcohol, drugs or a combination of alcohol and drugs...no tests may be administered or sample obtained unless...prior to the

commencement of the testing procedure, the person has been given a written copy of and verbally informed...” of the Implied Consent Rights. S.C. Code Ann. § 56-5-2950.

An individual does not have to be informed of his implied consent rights more than once per arrest. *See City of Florence v. Jordan*, 362 S.C. 227, 607 S.E.2d 86 (2004). Section 56-5-2950 does not provide the accused a right to be explicitly advised in writing what specific type of test if being requested. *Jordan*, 362 S.C. at 231-232, 607 S.E.2d at 89. More over, “the implied consent rights provided under section 56-5-2950(a) inform the accused that he may refuse *any* test and refuse to give *any* samples.” *Id.* One notice of an individual’s implied consent rights informs the individual of his right to refuse any of the tests or samples requested and informs the individual of the consequences of refusing any tests or samples requested. *See Id.*

In this case, the Appellant was arrested and taken to a breath testing facility so a breath test could be administered. The breath test indicated that his blood alcohol level was .05 which is below the statutory limit. His blood alcohol level, accompanied by the fact that the Appellant failed the field sobriety test administered to him when he was initially stopped, led Officer Brigham to reasonably suspect that the Appellant was under the influence of drugs other than alcohol. Officer Brigham then requested that the Appellant provide a urine sample. The Hearing Officer determined in his Final Order and Decision that Officer Brigham’s determination that drugs other than alcohol could be involved was based on the officer’s training and experience. The Appellant argues that the Hearing Officer’s determination in this matter was clearly erroneous in the view of reliable, probative, and substantial evidence of the whole record.

S.C. Code Ann. § 1-23-380(g)(5) provides that “[t]he Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact.” § 1-23-380(g)(5) also provides that the decision under appeal must be clearly erroneous in view of the substantial evidence on the whole record in order to be overturned. In other words, “[t]he substantial evidence rule...means that we will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304.

In this case, the Hearing Officer’s determination that Officer Brigham reasonably concluded that the Appellant could possibly be under the influence of drugs other than alcohol was not clearly erroneous. In reviewing the substantial evidence of the whole record, the record supports Officer

Brigham properly acted within the guidelines of § 56-5-2950 in requesting a urine sample from the Appellant.

Before Officer Brigham administered the breath test, he supplied the Appellant with a written notice of his implied consent rights. The Appellant does not dispute that he was issued a written copy of these rights. However, Officer Brigham did not supply the Appellant with a second copy of his implied consent rights prior to requesting a urine sample from the Appellant. The Appellant then refused to provide a urine sample. The Appellant argues that Officer Brigham was required to provide the Appellant with a second notice of implied consent rights before he requested a urine sample and that, because he did not provide such notice, the Appellant's refusal to provide a urine sample cannot be used as a basis for suspension of his driving privileges.

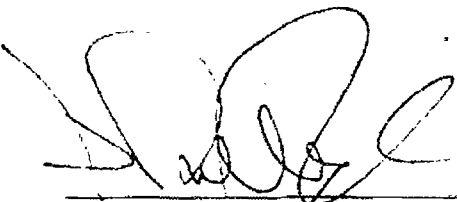
"[T]he implied consent rights provided under section 56-5-2950(a) inform the accused that he may refuse *any* test and refuse to give *any* samples." Jordan, 362 S.C. at 231-232, 607 S.E.2d at 89. One notice of an individual's implied consent rights informs the individual of his right to refuse any of the tests or samples requested and informs the individual of the consequences of refusing any tests or samples requested. *See Id.* There is no requirement that an additional notice of implied consent rights must be given after one has been provided for a breath test but before a urine sample is requested. On this point, the Hearing Officer's decision that Officer Brigham correctly provided a written copy of the implied consent rights and that it was unnecessary to provide a second notice of them before requesting a urine sample was not an error of law. Therefore, this court rejects the Appellant's argument.

The Hearing Officer's decision in this matter was not clearly erroneous and was supported by reliable, probative and substantial evidence on the whole record, and was not affected by any other error of law.

THEREFORE, IT IS HEREBY ORDERED that the Hearing Officer's Final Order and Decision is **AFFIRMED**.

AND IT IS SO ORDERED.

September 14, 2012
Columbia, South Carolina



S. Phillip Lerski
Administrative Law Judge

1 public record. All those present who intend to
2 testify in this matter, please identify
3 yourself for the record by your full name, your
4 address, and your position as related to this
5 matter. You are requested to raise your right
6 hand for administration of oath.

7 **TROOPER BRIGHAM:** My name is Trooper C.D. Brigham,
8 currently employed with the South Carolina
9 Highway Patrol located at 3415 East Palmetto
10 Street, Florence, South Carolina. I'm also a
11 certified police officer and Datamaster
12 operator.

13 **THE COURT:** Raise your right hand, please, sir. Do
14 you solemnly swear the testimony you're about
15 to give in this matter will be the truth, the
16 whole truth, and nothing but the truth?

17 **TROOPER BRIGHAM:** I do.

18 **THE COURT:** Okay. Arresting officer have testimony
19 he'd like to enter at this time?

20 **TROOPER BRIGHAM:** Yes, Your Honor.

21 **DIRECT TESTIMONY BY TROOPER BRIGHAM:**

22 **TROOPER BRIGHAM:** I'll go ahead and submit for the
23 Court, it's already been provided to the
24 defense, but I'll also provide another copy.
25 A copy of the charging document, as well as the

1 roadside field sobriety sheet, a copy of the
2 notes that's on the roadside field sobriety
3 check list, as well as a copy of the implied
4 consent rights, a copy of the breath analysis
5 report, copy of the notice of suspension, and
6 also there was a breath sample that was
7 provided, and a copy of my certification to
8 operate the Datamaster machine.

9 **THE COURT:** Okay. Those are the attorney's, okay.
10 Okay. Arresting officer.

11 **TROOPER BRIGHAM:** On October 28th, 2011, while
12 patrolling Horry County, I witnessed the driver
13 of a white Toyota vehicle not wearing a
14 seatbelt while traveling on S.C. 57.

15 **THE COURT:** 57?

16 **TROOPER BRIGHAM:** That's correct.

17 **THE COURT:** Continue.

18 **TROOPER BRIGHAM:** I then conducted a traffic stop on
19 S.C. 9 at S.C. 57.

20 **THE COURT:** Continue.

21 **TROOPER BRIGHAM:** Once approaching the vehicle, I
22 could smell a strong odor of alcohol coming
23 from inside the vehicle.

24 **THE COURT:** Continue.

25 **TROOPER BRIGHAM:** I identified the driver as a Mr.

1 Holdorf.

2 **THE COURT:** Continue.

3 **TROOPER BRIGHAM:** And asked Mr. Holdorf to step out
4 of the vehicle.

5 **THE COURT:** Continue.

6 **TROOPER BRIGHAM:** Once Mr. Holdorf got out of the
7 vehicle, I could still smell the odor of
8 alcohol coming from the driver.

9 **THE COURT:** Continue.

10 **TROOPER BRIGHAM:** I then asked Mr. Holdorf to
11 provide a standardized field sobriety test.
12 Prior to doing so, he was advised of his
13 Miranda rights.

14 **THE COURT:** Continue.

15 **TROOPER BRIGHAM:** Mr. Holdorf provided standardized
16 field sobriety tests and gave indicators on two
17 of the divided attention tests. However, he
18 would not participate with the -- the HGN,
19 would not follow the instructions.

20 **THE COURT:** Continue.

21 **TROOPER BRIGHAM:** Based upon the odor of alcohol --

22 **THE COURT:** Continue.

23 **TROOPER BRIGHAM:** -- and the field sobriety test
24 that was conducted, he was placed under arrest
25 for driving under the influence and advised of

1 his roadside advisements.

2 **THE COURT:** Continue.

3 **TROOPER BRIGHAM:** Upon doing inventory of the
4 vehicle, found a plastic cup in the center
5 console containing a liquor beverage.

6 **THE COURT:** Continue.

7 **TROOPER BRIGHAM:** Mr. Holdorf was transported to the
8 nearest Datamaster facility.

9 **THE COURT:** Continue.

10 **TROOPER BRIGHAM:** Once at the nearest facility, we
11 went to the Datamaster room.

12 **THE COURT:** And where was that?

13 **TROOPER BRIGHAM:** North Myrtle Beach.

14 **THE COURT:** Okay. Continue.

15 **TROOPER BRIGHAM:** Once in the Datamaster room where
16 everything was conducted to SLED policies and
17 procedures --

18 **THE COURT:** Continue.

19 **TROOPER BRIGHAM:** -- he was provided a copy of his
20 implied consent rights and he was advised that
21 the South Carolina Highway Patrol at that given
22 time was requesting a breath sample be
23 provided. He was advised he was being video
24 recorded. He was provided a copy of his
25 implied consent rights and were read on video.

1 THE COURT: Continue.

2 TROOPER BRIGHAM: His mouth was checked for any
3 foreign objects. He did provide a breath
4 sample after 20 minute observation period
5 lapsing of .05.

6 THE COURT: Continue.

7 TROOPER BRIGHAM: Due to my experience and training,
8 I felt that there was other things involved,
9 possibly narcotics. Advised Mr. Holdorf that
10 his implied consent rights still applied and
11 that the South Carolina Highway Patrol was
12 requesting that a urine sample be provided.
13 I've already provided to the Court a copy of
14 his Datamaster breath analysis report, as well
15 as a copy of his implied consent rights.

16 THE COURT: Continue.

17 TROOPER BRIGHAM: His notice of suspension was
18 provided to Mr. Holdorf and which he signed
19 for. His notice of suspension -- as indicated
20 in his notice of suspension, refusing to submit
21 to a urine sample.

22 THE COURT: How did he refuse?

23 TROOPER BRIGHAM: Verbally. He was not taken to a
24 facility.

25 THE COURT: Continue.

1 **TROOPER BRIGHAM:** He was provided a copy of his
2 notice of suspension. He was advised that he
3 could not drive until a license had been issued
4 to him due to the fact of him refusing to
5 submit to a urine sample as a reflection to the
6 notice of suspension, and which he signed for
7 that copy. He was provided all three copies.
8 He was released to North Myrtle Beach Police
9 Department and he was cited for driving under
10 the influence, refusing to submit to a urine
11 sample, as well as ABC violation.

12 **THE COURT:** Any further?

13 **TROOPER BRIGHAM:** No, sir.

14 **THE COURT:** Cross?

15 **TROOPER BRIGHAM - CROSS-EXAMINATION BY MR. TRUSLOW:**

16 Q: All right. I'm looking at what you handed me,
17 the advisement of implied consent rights, and
18 Your Honor has that, I believe. And that --
19 those implied consent rights where it says that
20 breath is circled, is that correct?

21 A: That is correct.

22 Q: All right. So he submitted a breath sample and
23 you said it was a .05?

24 A: That is correct.

25 Q: And at that point, you decided that you were

1 going to administer a urine test?

2 A: That is correct.

3 Q: Did you re-advise him of the rights?

4 A: I advised him that his implied consent rights
5 still applied.

6 Q: Okay. But did you -- did you fill out another
7 form that had -- that asks -- says that you
8 were going to ask for a urine sample?

9 A: The law requires me to advise them of their
10 implied consent rights and advise them of what
11 we're requesting at that point in time.

12 Q: Okay. But did you do that a separate time on
13 the second test?

14 A: No, we don't have to advise them of a second
15 advisement. He was advised that his implied
16 consent rights still applied for the urine
17 sample.

18 Q: All right. And do you have an implied consent
19 rights form that had urine circled?

20 A: No, I do not.

21 Q: All right. That's all I've got.

22 **THE COURT:** At this time we'll go to closing. No
23 new evidence or testimony will be entered into
24 the record. Attorney Truslow, do you have a
25 closing?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. TRUSLOW: I don't.

THE COURT: Does the State?

TROOPER BRIGHAM: State feels its met its burden of proof based upon Section 56-5-2950 and SLED policies. He was advised on video that he was being video recorded. He was advised of all of his implied consent rights. He was offered a breath sample and he was also requested that a urine sample be provided, which he refused to do so. He was given notification of his notice of suspension and which he signed for refusing to submit to a urine sample.

THE COURT: This hearing is now concluded.

(There being nothing further, the hearing was concluded.)

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Date 1/24/13



T. Kirk Truslow
Post Office Box 238
North Myrtle Beach, South Carolina 29597
(843) 280-9438
Attorney for Appellant