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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Court Judge

Docket No. 2012-211047

Mark Schnee, ... Appellant.

v.

South Carolina Department of Motor Vehicles and West
Columbia Police Department

..... Respondents,

RECORD ON APPEAL

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SC Court of Appeals

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INDEX

INDEX	1
MARCH 9, 2012 ADMINISTRATIVE LAW COURT ORDER	2
ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND MOTION FOR REHEARING	8
INITIAL BRIEF OF APPELLANT TO ADMINISTRATIVE LAW COURT	10
BRIEF OF RESPONDENT TO ADMINISTRATIVE LAW COURT	21
REPLY BRIEF OF APPELLANT TO ADMINISTRATIVE LAW COURT	30
MOTION TO RECONSIDER AND MOTION FOR REHEARING	37
ORIGINAL ROA FROM OFFICE OF MOTOR VEHICLE HEARINGS	64
CERTIFICATION	117

**STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT**

Mark Schnee,

Appellant,

v.

South Carolina Department of Motor
Vehicles and West Columbia Police
Department,

Respondents.

Docket No. 11-ALJ-21-0501-AP

ORDER

STATEMENT OF THE CASE

This is an appeal filed by Mark Schnee (Appellant) from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings (OMVH) issued September 21, 2011. The OMVH's Final Order and Decision was issued following an administrative hearing held pursuant to S.C. Code Ann. § 56-5-2951 (Supp. 2011). Appellant contends that the OMVH Hearing Officer erroneously sustained his driver's license suspension. The Administrative Law Court (ALC or Court) has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 1-23-660 (Supp. 2011). Upon careful review of this matter, the OMVH's Final Order and Decision is affirmed.

BACKGROUND

Appellant was arrested on October 31, 2009 for an offense arising out of an act alleged to have been committed while he was driving a motor vehicle under the influence of alcohol, drugs, or a combination of alcohol or drugs. Appellant was taken in for a breath test. Upon refusal to submit to the breath test, Appellant was charged with a violation of S.C. Code Ann. § 56-5-2950. Appellant was issued a written notice of suspension at that time.

Appellant subsequently requested a hearing challenging the suspension. Pursuant to notice to the parties, a hearing was held on July 27, 2010 before Hearing Officer Robert Harley at the OMVH Offices in Columbia, South Carolina. The Hearing Officer issued a Final Order and Decision which sustained Appellant's suspension on September 21, 2011. Appellant filed this appeal to the ALC on September 26, 2011.

FILED

March 9, 2012

SC ADMIN. LAW COURT

ISSUES ON APPEAL

1. Did the OMVH hearing officer err in deciding that the Officer was trained and certified to administer breath tests by the South Carolina Criminal Justice Academy, pursuant to all applicable policies and S.C. Code Ann. § 56-5-2950(A) (Supp. 2011)?
2. Did the OMVH hearing officer err in deciding that probable cause existed for the arrest?

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the South Carolina Department of Motor Vehicles (Department). See S.C. Code Ann. § 1-23-660 (Supp. 2011). Therefore, the OMVH is an “agency” under the Administrative Procedures Act (APA). See S.C. Code Ann. § 1-23-310(2) (2005 & Supp. 2011). As such, the APA’s standard of review governs appeals from decisions of the OMVH. See S.C. Code Ann. § 1-23-380 (Supp. 2011); 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). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5). See S.C. Code Ann. § 1-23-600(D) (Supp. 2011) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). This section provides:

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 [of the agency] 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). Thus, pursuant to the APA, this court’s review is limited to deciding whether the OMVH’s Order of Dismissal is unsupported by substantial evidence or is affected by an error of law. Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 581 (Ct. App. 2005).

The findings of the agency are presumed correct and must be affirmed if supported by substantial evidence. Substantial evidence is something less than the weight of the evidence. It is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached. Jones v. Georgia-Pac. Corp., 355 S.C. 413, 417, 586 S.E.2d 111, 113 (2003); Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001); Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995).

An abuse of discretion occurs when an administrative agency's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). A decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment. A decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards. Converse Power Corp v. S.C. Dep't of Health and Envtl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002).

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 Service Commission, 294 S.C. 320, 364 S.E.2d 455 (1988).

DISCUSSION

Appellant contends that the OMVH Hearing Officer's Decision should be reversed due to the fact that the arresting officer failed to establish that he had been trained and certified in the proper procedure for the offering of a DataMaster test according to S.C. Code Ann. § 56-5-2930 et seq. and SLED policy and procedure. I disagree.

S.C. Code Ann. § 56-5-2951(F) states, in pertinent part: "The scope of the hearing must be limited to whether the person: (1) was lawfully arrested or detained; (2) was advised in

writing of the rights enumerated in Section 56-5-2950; (3) Refused to submit to a test pursuant to Section 56-5-2950;..." Appellant was lawfully arrested and advised of his implied consent rights, after which he refused to submit to a breath test. The question of compliance with Section 56-5-2950 in the administration of a test arises only if and when the motorist consents to the test procedure. In the instant case, there was no test administered, therefore the procedures for offering a DataMaster test according to Section 56-5-2930 et seq. and SLED policy and procedure are not at issue.

Appellant also contends that no probable cause existed to conduct a traffic stop. I disagree. The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. State v. Baccas, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. Id. Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal. Id. Probable cause is somewhere between suspicion and sufficient evidence to convict. Thompson v. Smith, 289 S.C. 334, 337, 345 S.E.2d 500, 502 (Ct. App. 1986), overruled in part on other grounds by Jones v. City of Columbia, 301 S.C. 62, 389 S.E.2d 662 (1990). "In determining the presence of probable cause for arrest, the probability cannot be technical, but must be factual and practical considerations of everyday life on which reasonable, prudent and cautious men, not legal technicians, act." Id. I find that in the instant case, there was sufficient evidence to support the finding of the Hearing Officer that probable cause existed to conduct a traffic stop.

Appellant contends that there was a lack of testimony from the arresting officer to provide probable cause for his arrest. I disagree. Officer Fair clearly testified that he observed Appellant driving without lights and driving erratically. The officer also observed Appellant making an unlawful turn, drifting across lanes, and failing to signal for a lane change. After the traffic stop, the Officer testified that he noted the smell of an alcoholic beverage coming from within the car. Officer Fair requested standard field sobriety tests after the stop and Appellant refused. The testimony of Officer Fair clearly demonstrates the lawfulness of the stop and probable cause for arrest for driving under the influence.

ORDER

For the foregoing reasons, **IT IS HEREBY ORDERED** that the OMVH's Final Order and Decision is **AFFIRMED** and the Department's suspension of Appellant's driver's license is upheld.

AND IT IS SO ORDERED.

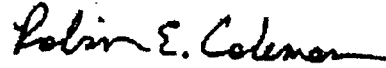
A handwritten signature in cursive script, reading "Deborah Brooks Durden".

Deborah Brooks Durden, Judge
Administrative Law Court

March 9, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

March 9, 2012
Columbia, South Carolina

FILED

March 9, 2012

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Mark Schnee,

Appellant,

vs.

South Carolina Department of Motor
Vehicles and West Columbia Police
Department,

Respondents.

Docket No. 11-ALJ-21-0501-AP

**ORDER DENYING APPELLANT'S
MOTION FOR RECONSIDERATION
AND MOTION FOR REHEARING**

This matter is before the Administrative Law Court (ALC or Court) pursuant to the motion of counsel for Appellant, Mark Schnee, seeking reconsideration of the Court's Order filed on March 9, 2012, and motion of rehearing. The argument in the motion merely reiterates the argument made in Appellant's Brief, which was carefully considered and ruled upon by this Court. This motion does not seek to correct manifest errors of law or fact or to present newly discovered evidence. Therefore,

IT IS HEREBY ORDERED that Appellant's Motion for Reconsideration and Motion to Alter for Rehearing is **DENIED**.

AND IT IS SO ORDERED.



Deborah Brooks Durden
Administrative Law Judge

March 28, 2012
Columbia, South Carolina

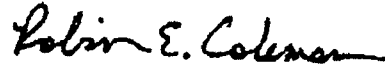
FILED

March 28, 2012

SC ADMIN. LAW COURT

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

March 28, 2012
Columbia, South Carolina

FILED

March 28, 2012

SC ADMIN. LAW COURT

THE STATE OF SOUTH CAROLINA
Administrative Law Court

APPEAL FROM THE OFFICE OF MOTOR VEHICLE HEARINGS

Robert F. Harley, Jr., Senior OMVH Hearing Officer

Docket No. 09-OMVH-01-5083-CC

South Carolina Department of Motor Vehicles, ...Respondent,

v.

Mark Schnee, ...Appellant.

INITIAL BRIEF OF APPELLANT

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INDEX

INDEX	1
TABLE OF AUTHORITIES	2
ISSUES PRESENTED	4
STATEMENT	4
ARGUMENT	5
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:

<u>Bilton v. Best Western Royal Motor Lodge</u> , 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984)	6
<u>Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n</u> , 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995)	5
<u>Grant v. S.C. Coastal Council</u> , 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995)	6
<u>Kearse v. State Health and Human Servs. Fin. Comm'n</u> , 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)	6
<u>Lark v. Bi-Lo, Inc.</u> , 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)	6
<u>Rodney v. Michelin Tire Co.</u> , 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996)	6
<u>South Carolina Department of Motor Vehicles v. Bauer</u> , 06-ALJ-21-0531-AP (2007)	7
<u>South Carolina Department of Motor Vehicles v. Ringlein</u> , 06-ALJ-21-0905-AP (2007)	7
<u>Waters v. S.C. Land Resources Conservation Comm'n</u> , 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996)	6

Statutes:

S.C. Code § 1-23-310	5
S.C. Code § 1-23-380	5, 6, 7
S.C. Code § 1-23-660	5
S.C. Code § 56-5-2950	3, 5, 7
S.C. Code § 56-5-2951	4, 5

ISSUES PRESENTED

1. Did the Department of Motor Vehicle Hearings err in deciding that Officer Ronald Fair was trained and certified to administer breath tests by the South Carolina Criminal Justice Academy, pursuant to SLED policies and S.C. Code §56-5-2950(A) as amended?

2. Did the Department of Motor Vehicle Hearings err in deciding that Officer Ronald Fair had probable cause for arrest?

STATEMENT

On October 31, 2009, Mark Schnee was arrested for suspicion of Driving Under the Influence (DUI) by Officer Ronald Fair of the West Columbia Police Department. Mr. Schnee was transported to the police department and Officer Fair requested a breath sample. Mr. Schnee refused.

On July 27, 2010, an administrative hearing pursuant to S.C. Code § 56-5-2951 was held to determine if the statutory requirements of implied consent were met. Officer Fair was the only witness to testify at this hearing.

The Final Order and Decision was filed September 21, 2011 and this appeal follows.

ARGUMENT

1. The Department of Motor Vehicle Hearings erred in deciding that Officer Ronald Fair was trained and certified to administer breath tests by the South Carolina Criminal Justice Academy, pursuant to SLED policies and S.C. Code §56-5-2950(A) as amended.

The Department of Motor Vehicle Hearings (DMVH) is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660. Therefore, the DMVH is an "agency" under the Administrative Procedures Act ("APA"). See S.C. Code Ann. §1-23-310(2). As such, the APA's standard of review governs appeals from decisions of the DMVH. See S.C. Code Ann. § 1-23-380(A); see also S.C. Code Ann. § 56-5-2951(G); (Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995)). The standard used by appellate bodies, including the ALC, to review agency decisions is provided by S.C. Code Ann. §1-23-380(A)(5). See S.C. Code Ann. §1-23-380(B) (directing Administrative Law Judges to conduct appellate review in the same manner prescribed in Section 1-23-380(A)). This section provides:

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 [of the agency] 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(A)(5).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984). A decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Resources Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). The party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917.

During the July 27, 2010 hearing, Officer Fair never testified or presented any evidence that he was trained and certified as a datamaster operator as required by S.C.

Code §56-5-2950(A) and SLED policies. After Officer Fair completed his testimony, Counsel for Appellant moved to rescind the suspension of Appellant's drivers license based on this lack of testimony. ROA pg. 17. Officer Fair attempted to offer evidence after the motions by Appellant's Counsel were made (see ROA pg. 19), but that evidence was properly excluded since it was not introduced in the Officer's actual testimony. ROA pg. 20. Without testimony or evidence showing Officer Fair was properly trained or certified, no valid test was ever offered to Mr. Schnee.

This Court has decided similar cases before and determined that a failure to provide testimony or evidence of datamaster training and certification requires the reversal of a suspension under implied consent. See South Carolina Department of Motor Vehicles v. Bauer, 06-ALJ-21-0531-AP (2007) and South Carolina Department of Motor Vehicles v. Ringlein, 06-ALJ-21-0905-AP (2007). In both Bauer and Ringlein, this Court upheld the rescission of the driver's license suspension for this exact issue.

The Final Order and Decision in this case states Officer Fair is a certified datamaster operator. ROA pg. 32. This factual finding is error as a review of the transcript clearly shows no evidence was introduced. Pursuant to S.C. Code §1-23-380(5)(e and f), this Court must reverse the decision to uphold the suspension since no valid test was ever offered without testimony or evidence of datamaster training and certification.

2. The Department of Motor Vehicle Hearings erred in deciding that Officer Ronald Fair had probable cause for arrest.

After the initial traffic stop, Officer Fair requested Mr. Schnee drive to a side street. ROA pg. 8. On cross-exam, Office Fair admitted he arrested Mr. Schnee without knowing if he "was okay to drive." ROA pg. 13. Officer Fair further admitted there was no safe distance a person could drive if they were impaired. ROA pg. 13-14. Officer Fair further stated in his arguments that he was unsure about impairment. ROA pg. 18.

As a result of the lack of testimony, probable cause for the arrest did not exist. This Court must, therefore, reverse the suspension.

CONCLUSION

Based on the arguments presented, the Final Order and Decision of the DMVH must be reversed and the driver's license of Mr. Schnee reinstated.



T. Micah Leddy, Attorney for Appellant
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This 6th day of January, 2012

THE STATE OF SOUTH CAROLINA
Administrative Law Court

APPEAL FROM THE OFFICE OF MOTOR VEHICLE HEARINGS

Robert F. Harley, Jr., Senior OMVH Hearing Officer

Docket No. 09-OMVH-01-5083-CC

West Columbia Police Department and
South Carolina Department of Motor Vehicles, ... Respondents,

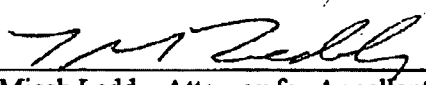
v.

Mark Schnee, ... Appellant.

CERTIFICATE OF SERVICE

I certify that on this date I served the Initial Brief of Appellant in this case on the South Carolina Department of Motor Vehicles by delivering same via U.S. mail to the following addresses:

South Carolina Department of Motor Vehicles
Office of General Counsel
Post Office Box 1498
Blythewood, South Carolina 29016


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This 6th day of January, 2012

**THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT
ALJ DOCKET NO: 11-ALJ-21-0501-AP**

**APPEAL FROM SOUTH CAROLINA
DIVISION OF MOTOR VEHICLES HEARINGS
DMVH DOCKET NO: 09-OMVH-01-5083-CC**

ROBERT HARLEY, HEARING OFFICER

MARK SCHNEE... APPELLANT

VS.

SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES ... RESPONDENT

BRIEF OF RESPONDENT

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Governor



Kevin A. Shwedo
Executive Director

State of South Carolina
Department of Motor Vehicles

January 23, 2012

The Honorable Deborah Brooks Durden
Administrative Law Judge
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

RE: *Mark Schnee vs. South Carolina Department of Motor Vehicles*
Docket No. 11-ALJ-21-0501-AP
OMVH Docket No. 09-OMVH-01-5083-CC
SCDL No. 100419165

Dear Judge Durden:

Enclosed for filing please find one original and two copies of the Brief of Respondent South Carolina Department of Motor Vehicles in the above-mentioned case. Please file the original and return a clocked copy to me in the self-addressed envelope.

If you have any questions, please contact me at 803.896.9900.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kristy L. Corley".

Kristy L. Corley
Administrative Specialist
Office of General Counsel

Enclosures

c: T. Micah Leddy, Esquire

**THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT**

Mark Schnee,

Appellants,

v.

South Carolina Department of Motor Vehicle,

Respondent.

Docket No. 11-ALJ-21-0501-AP
SCDL No. 100419165

**BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT
OF MOTOR VEHICLES**

This case comes before the Administrative Law Court pursuant to the appeal Mark Schnee, which seeks review of the orderdate Final Order & Decision sustaining the Appellant's implied consent suspension. The DMV seeks to have the Final Order & Decision affirmed and the suspension remain.

STATEMENT OF THE ISSUES ON APPEAL

1. Did the hearing officer err in deciding that Officer Ronald Fair was trained and certified to administer breath tests by the South Carolina Criminal Justice Academy, pursuant to SLED policies and SC Code 56-5-2950(A) as amended?
2. Did the hearing officer err in finding as a matter of law that sufficient evidence had been presented to establish probable cause for Appellant's arrest?

STATEMENT OF THE CASE

The Appellant was arrested on October 31, 2009 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 or drugs. Appellant refused to submit to a breath test. Appellant was issued a written notice of suspension of the driver's license or driving

126
20

privileges for violation of S.C. Code Ann. Section 56-5-2950. The Appellant requested an administrative hearing. Pursuant to notice to the parties, a hearing was held before OMVH Hearing Officer, Robert Harley on July 27, 2010. The Appellant did not appear and was represented by T. Micah Leddy, Esquire. By Final Order & Decision dated September 21, 2011, the suspension was sustained. The Appellant then filed this appeal.

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code Section 1-23-380(A)(6).

(A) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....

- (6) The court shall not substitute its judgment for that 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.

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

[Section 1-23-380(g)(5)] specifically states: "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.

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JH

We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of 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 action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990); *Lark v. Bi Lo, Inc.*, *supra*.

A court cannot weigh 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 & Telegraph Co.*, *supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 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 acts or orders of administrative agencies, the courts 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*

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Procedure Section 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 Service Commission*, 294 S.C. 320, 364 S.E.2d 455 (1988).

ARGUMENT

1. DID THE HEARING OFFICER ERR IN DECIDING THAT OFFICER RONALD FAIR WAS TRAINED AND CERTIFIED TO ADMINISTER BREATH TESTS BY THE SOUTH CAROLINA CRIMINAL JUSTICE ACADEMY, PURSUANT TO SLED POLICIES AND SC CODE 56-5-2950(A) AS AMENDED?

The Hearing Officer found that "the officer, a certified Datamaster operator, read the Advisement of Implied Consent Rights to Respondent" (ROA p.32). This finding was not error. The Breath Alcohol Analysis Test Report which was entered into evidence shows that Ronald W. Fair is a Test Operator and his South Carolina Law Enforcement Division Certification # is DMT000923 (ROA p.43) The record in this matter contains substantial evidence to support the finding of the Hearing Officer. An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990). Therefore, it was not error for the Hearing Officer to find that he is a certified Datamaster operator.

Furthermore, in this case, the Appellant refused the breath test (ROA p 10). Because there was no test, the certification of the Datamaster operator was not an issue.

2. DID THE HEARING OFFICER ERR IN FINDING AS A MATTER OF LAW THAT SUFFICIENT EVIDENCE HAD BEEN PRESENTED TO ESTABLISH APPELLANT HAD BEEN LAWFULLY ARRESTED?

The Appellant's assignment of error in the Hearing Officer's finding of lawful arrest has no merit. In the instance case, based upon his observations of Appellant driving without lights

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and driving erratically, the officer requested that the Appellant take some standard field sobriety tests. Appellant refused to submit to the requested sobriety testing (ROA p. 09). The officer observed the Appellant making an unlawful turn, drifting, sometimes abruptly, between the curbing and the lane divider, and failing to signal for a lane change ROA pp 07, 08) After the stop, the officer noted the smell of an alcoholic beverage coming from within the car (ROA p.08).

The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. *State v. Baccus*, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that the person being arrested has committed a crime. *Id.* Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal. *Id.*

The question before the Hearing Officer was not whether the Appellant was guilty of DUI, but merely whether the facts and circumstances within the trooper's knowledge were sufficient to lead a reasonable person to believe that he had committed the offense of DUI. *See Summersell v. S.C. Dep't of Pub. Safety*, 334 S.C. 357, 369, 513 S.E. 2d 619, 625 (Ct. App. 1999) (noting that an implied consent hearing "is *not* a trial in regard to the guilt or innocence of the defendant on a DUI charge"), vacated in part on other grounds, 337 S.C. 19, 522 S.E.2d 144 (1999). The question before the Hearing Officer was merely whether the circumstances within the officer's knowledge were sufficient to lead a reasonable person to believe that he had committed the offense of DUI. *See Baccus*, 367 S.C. at 49, 625 S.E. 2d at 220. The arrest of the Appellant was based upon the totality of the circumstances known to a seasoned officer who was

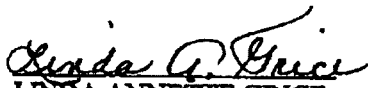
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certified in field sobriety testing and trained to identify signs of inebriation. Therefore, it is reasonable to assume that an arrest following a lawful stop and based upon the officer's professional assessment and determination that there was probable cause to believe that the driver was possibly under the influence of alcohol, drugs or a combination thereof. The hearing Officer correctly and reasonably found that the Respondent was lawfully arrested for driving under the influence.

CONCLUSION

Based upon the foregoing arguments, the Department of Motor Vehicles respectfully requests that the Final Order and Decision be affirmed and the suspensions remain.

Respectfully submitted,



LINDA ANNETTE GRICE

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January 20, 2012

Blythewood, South Carolina

**THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT**

Mark Schnee,

Petitioner,

v.

South Carolina Department of Motor Vehicle,

Respondent.

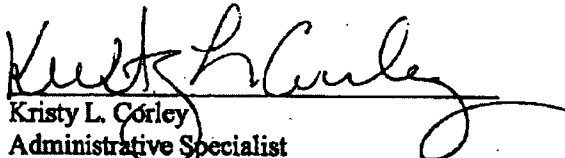
Docket No. 11-ALJ-21-0501-AP
SCDL No. 100419165

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the January 23, 2012, I mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing Brief to

T. Micah Leddy, Esquire
2008 Lincoln Street
Columbia, South Carolina 29201

as counsel of record for Mark Schnee.


Kristy L. Corley
Administrative Specialist
Office of General Counsel

January 23, 2012

Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
Administrative Law Court

APPEAL FROM THE OFFICE OF MOTOR VEHICLE HEARINGS

Robert F. Harley, Jr., Senior OMVH Hearing Officer

Docket No. 09-OMVH-01-5083-CC

West Columbia Police Department and
South Carolina Department of Motor Vehicles, ... Respondents,

v.

Mark Schnee, ... Appellant.

REPLY BRIEF OF APPELLANT

T. Micah Leddy, Attorney for Appellant
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THE STATE OF SOUTH CAROLINA
Administrative Law Court

APPEAL FROM THE OFFICE OF MOTOR VEHICLE HEARINGS

Robert F. Harley, Jr., Senior OMVH Hearing Officer

Docket No. 09-OMVH-01-5083-CC

West Columbia Police Department and
South Carolina Department of Motor Vehicles, ... Respondents,

v.

Mark Schnee, ... Appellant.

CERTIFICATE OF SERVICE

I certify that on this date I served the Reply Brief of Appellant in this case on the South Carolina Department of Motor Vehicles by delivering same via U.S. mail to the following address:

Office of Motor Vehicle Hearings
Edgar A. Brown Building, Suite 325
1205 Pendelton St.
Columbia, SC 29201


T. Micah Leddy, Attorney for Appellant
The Leddy Law Firm, LLC.
2008 Lincoln Street
Columbia, SC 29201
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This 7th day of February, 2012

ISSUES PRESENTED

1. Did the Department of Motor Vehicle Hearings err in deciding that Officer Ronald Fair was trained and certified to administer breath tests by the South Carolina Criminal Justice Academy, pursuant to SLED policies and S.C. Code §56-5-2950(A) as amended?

ARGUMENT

1. The Department of Motor Vehicle Hearings erred in deciding that Officer Ronald Fair was trained and certified to administer breath tests by the South Carolina Criminal Justice Academy, pursuant to SLED policies and S.C. Code §56-5-2950(A) as amended.

Respondent argues the admission of the "Breath Alcohol Analysis Test Report" provides substantial evidence that Officer Fair was certified to administer breath tests. There is, however, no factual support in the record of this case to support that assertion.

First and foremost, there is no testimony or proof that Officer Fair entering a "certification number" into the datamaster machine at the time of the test verifies the validity of the claimed certification. Simply put, entering a number into a machine is not substantial evidence of a valid certification as required by law. Further, there is no testimony or proof Officer Fair ever held a valid certification simply by typing in that number.

Respondent next argues that Appellant's refusal to take the test renders the issue of certification moot. This is not accurate under the law. South Carolina law requires that any test or offer of a test must be administered by a certified datamaster technician. See S.C. Code Ann. §56-5-2950(A) which states in relevant part:

The breath test **must** be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies. (emphasis added).

Without proof of datamaster certification at the time of the test, there was not a valid offer of a test. The refusal, therefore, is inconsequential in the determination of this appeal. Without proof of a valid offer to test, the automatic suspension is improper since the offer of a valid test is a prerequisite to an administrative suspension.

Pursuant to S.C. Code §1-23-380(5)(e and f), this Court must reverse the decision to uphold the suspension since no valid test was ever offered without testimony or evidence of datamaster training and certification.

CONCLUSION

Based on the arguments presented, the Final Order and Decision of the DMVH must be reversed and the driver's license of Mr. Schnee reinstated.



T. Micah Leddy, Attorney for Appellant
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This  day of February, 2012

STATE OF SOUTH CAROLINA	)	IN THE ADMINISTRATIVE LAW COURT
	)	Docket Number: 11-ALJ-21-0501-AP
Mark Schnee,	)	
Appellant,	)	
vs.	)	MOTION TO RECONSIDER AND MOTION
	)	FOR REHEARING
South Carolina Department	)	
of Motor Vehicles and West	)	
Columbia Police Department	)	
<u>Respondents.</u>	)	

Appellant, through his undersigned counsel, hereby moves pursuant to the South Carolina Appellate Court Rules for this Court to reconsider and/or for a rehearing of its Order for the following reasons:

SLED defines a "Breath Test Operator" as "an individual currently holding a valid permit from SLED to perform chemical analysis of the type set forth within the permit, under the provision of Sections 23-31-410, 50-21-114, 55-1-100, 56-1-286, 56-1-2130 and 56-5-2950." (emphasis added). See SLED 73-1.E, attached.

S.C. Code §56-5-2950(A) as amended states ONLY a SLED certified datamaster operator may administer any type of breath test. Inherent in the breath test procedure are the implied consent issues subject to this appeal. S.C. Code Ann. §56-5-2950(A) states in relevant part:

The breath test **must** be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies. (emphasis added).

S.C. Code Ann. § 56-5-2951(F) states, in pertinent part: "The scope of the hearing must be limited to whether the person: (1) was lawfully arrested or detained; (2) was advised in writing of the rights enumerated in Section 56-5-2950; (3) Refused to submit to a test pursuant to

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Section 56-5-2950;...” The only way to comply with § 56-5-2951(F)(2) and (3) is to follow SLED policy and procedure.

Specifically, SLED policy 8.12.4(C) states in relevant part “Only certified operators may perform tests on certified DataMaster DMTs.” SLED policy 8.12.5, titled “IMPLIED CONSENT – ADMINISTRATION OF BREATH ALCOHOL TEST” defines what is included in the breath testing procedure, which includes the requirements of the implied consent advisement.

SLED policy 8.12.5(C) addressed the sequence of events that **MUST** be completed before an implied consent advisement and test may be initiated. Included in this procedure is clear evidence that only the SLED certified operator may get to the point in the testing where implied consent rights are given to a person under suspicion of DUI.

SLED policy 8.12.5(D) addresses what advisement forms must be used in order for the implied consent to be valid. Specifically, it states in part “Based on the **type of test selected to be run**, the DataMaster DMT will print the applicable advisement forms utilizing the stand-alone printer.” (emphasis added). In order for the correct form and proper advisement to be given, the DataMaster must be provided with the correct information by the operator. Also see SLED policy 8.12.5(K)(5)(c), where almost half-way through the testing procedure the operator must select the type of test to be run and, therefore, which advisement process must be completed. As already established, only a SLED certified operator can get to this point in the advisement and testing procedure.

SLED policy 8.12.5(K) provides a detailed explanation of the exact protocol a certified test operator must follow in order to either complete a full breath test or get to the point where are refusal can exist. SLED policy 8.12.5(K)(1-6) details the exact information about the

“subject” that MUST be entered into the DataMaster prior to the start of any “test.” The word “Operator,” as defined in SLED 73-1.E, is used multiple times in those six sections, clearly indicating SLED regulation regarding who may and may not perform these tasks.

SLED policy 8.12.5(K)(6)(h) is the first and only time in the procedure where a SLED certified operator can establish ANY proof that implied consent laws pursuant to S.C. Code §56-5-2950 have been met. SLED policy 8.12.5(K)(6)(p)(i), which is almost near the end of the SLED mandated procedure, is the ONLY place where a SLED certified operator may determine a person “refused” to provide a sample pursuant to the implied consent laws. When one looks at the “Notice of Suspension” (ROA pg. 56), the only place for a law enforcement signature and name states “Signature of DataMaster Operator” and “Printed Name of DataMaster Operator.” It is, therefore, very clear that only a SLED certified datamaster operator can give the required implied consent to a person, determine if there is a refusal and, ultimately, request the Department of Motor Vehicles to suspend a person’s driver’s license.

In conclusion, it is clear the requirements of S.C. Code §56-5-2950 were not met in this case since there is no evidence that Officer Fair was as SLED certified datamaster operator. Officer Fair, therefore, could not have complied with the requirements of the statute nor SLED policies and procedures in order to complete the implied consent process. Without a proper implied consent process, there can be no license suspension.

Appellant, therefore, respectfully requests this Court modify the Order issued March 9, 2012 and address the legal issues set-forth above.

s/ T. Micah Leddy
T. Micah Leddy, Attorney for Appellant
The Leddy Law Firm, LLC.

2008 Lincoln Street
Columbia, SC 29201
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This 26 day of March, 2012

STATE OF SOUTH CAROLINA)

IN THE ADMINISTRATIVE LAW COURT

Docket Number: 11-ALJ-21-0501-AP

Mark Schnee,

Appellant,

vs.

CERTIFICATE OF SERVICE

South Carolina Department
of Motor Vehicles and West
Columbia Police Department

Respondents.

I certify that on this date I served the Reply Brief of Appellant in this case on the South Carolina Department of Motor Vehicles by delivering same via hand delivery to the following address:

Office of Motor Vehicle Hearings
Edgar A. Brown Building, Suite 325
1205 Pendleton St.
Columbia, SC 29201

s/ T. Micah Leddy

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This 26 day of March, 2012

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SC ADMIN. LAW COURT

REGULATIONS

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SOUTH CAROLINA LAW ENFORCEMENT DIVISION

CHAPTER 73

ARTICLE 1

IMPLIED CONSENT TESTS

Statutory Authority: 1976 Code §§ 17-7-780, 23-3-130, 23-3-600 through 23-3-690 and 56-5-2950 and Article 1 of Chapter 23 of Title 16, Article 3 of Chapter 31 of Title 23 and Chapter 17 of Title 40.

73-1. Definitions. [SC ADC 73-1]

73-2. Methods of Making Chemical Analyses. [SC ADC 73-2]

73-3. Certification of Breath Test Operators. [SC ADC 73-3]

73-4. Advisory Board (Repeal). [SC ADC 73-4]

73-5. Videotaping at Breath-Test Sites. [SC ADC 73-5]

73-1. Definitions.

- | | |
|----------------------------------|---|
| A. SLED. | The term "SLED" shall mean the South Carolina Law Enforcement Division. |
| B. Chemical Analysis. | The term "chemical analysis" shall mean a chemical analysis of a person's breath to determine alcohol concentration. |
| C. Alcohol Concentration. | The term "alcohol concentration" shall mean the number of grams of alcohol for each one hundred milliliters of blood by weight or the number of grams of alcohol for each two hundred and ten liters of breath by weight. |
| D. Breath-Testing Device. | The term "breath-testing device" shall mean an instrument for |

E. Breath Test Operator.

making a chemical analysis and giving the resultant alcohol concentration based on an alveolar air/blood ratio of 2.100:1. The term "breath test operator" shall mean an individual currently holding a valid permit from SLED to perform chemical analysis, of the type set forth within the permit, under the provisions of Sections 23-31-410, 50-21-114, 55-1-100, 56-1-286, 56-1-2130, and 56-5-2950 Code of Laws of South Carolina, 1976, as amended.

F. Videotaping System.

The term "videotaping system" shall mean the video equipment, audio equipment, and related hardware used to record breath tests.

Amended by State Register Volume 24, Issue No. 4, eff April 28, 2000.

[\[Back To Top\]](#)

73-2. Methods of Making Chemical Analyses.

A. Methods.

SLED shall approve such methods of performing chemical analysis as are demonstrated to the satisfaction of SLED to produce accurate and reliable determinations of alcohol concentration in a reasonable, convenient, and efficient manner.

B. Breath-Testing Devices.

SLED hereby approves the method of performing chemical breath analysis to determine alcohol concentration by using breath-testing devices. SLED will consider for approval only devices that first have been tested and approved for their accuracy and reliability by the National Highway Traffic and Safety Administration of the United States Department of Transportation. All approved devices will be specified in the SLED Policy and Procedures Manual.

C. Certifications.

SLED shall certify each breath-testing device. This certification shall include the calibration of the device with an external standard and the verification of the device's calibration with an internal and or external standard. Whenever a breath-testing device is certified, this certification will also constitute an inspection of the breath-testing device. For an instrument whose testing station is a mobile van, once the instrument is certified for use in the van, it remains certified regardless of the physical location of the van. Additionally, the certification tests and certification do not have to be repeated if the instrument and or its software are upgraded.

D. Inspections.

SLED shall inspect each certified breath testing device (either remotely via computer modem or on-site) at least once every three months. In addition, an inspection is performed after any repair is completed. This inspection shall include the verification of the

device's calibration with an internal and/or external standard. The inspection may begin before three months has elapsed and not be completed until after the three-month period. In this case, the time lapse between inspections may exceed three months. This occurrence is acceptable as long as no subject tests are performed until the inspection is completed. Therefore, at least one SLED inspection must be performed in the three months before a subject test. Failure to have an inspection within the required time does not cause revocation of certification for that instrument but signifies that proper procedures for that time were not followed.

E. Records.

Certification, inspection, and database records shall be maintained by SLED for a minimum of five years. However, the accidental/unavoidable loss of data does not invalidate any breath tests.

[\[Back To Top\]](#)

73-2.1. Suggested Procedures for Obtaining and Handling Blood and Urine Samples. [sc ADC 73-2.1]

A. Obtaining and Handling Blood and Urine Samples.

The South Carolina Law Enforcement Division (SLED) recommends the following procedures by which blood and urine samples are to be obtained and handled if such samples are taken from persons arrested for DUI (1976 Code 56-5-2930 or 56-5-2950, as amended) and are taken under authority of 1976 Code 56-5-2950, as amended. Other procedures that meet appropriate medical standards are acceptable as well.

B. Reimbursement Procedures. The cost for obtaining a urine or blood sample shall be set by the Chief of SLED. Reimbursement for obtaining samples shall be made by mailing a copy of the SLED Urine/Blood Collection Report form for each sample collected. More than one collection report may be submitted with each invoice.

C. Suggested Procedures for Obtaining and Handling Urine Samples by Individuals so Authorized, Using Appropriate Collection Materials.

Note: Step 2 should be performed in view of subject and a witness of same sex.

1. Take an unused, uncontaminated container and remove cap or lid.
2. Hand the container to subject with instructions to fill container.
3. Have subject immediately return filled urine container. Replace cap or lid on container and tighten down to prevent leakage.
4. Label container with the following information: Name of subject, time and date of sample

- collection, and name of person collecting sample.
5. Place a piece of tape across cap or lid and seal to sides of container. Person sealing container should initial tape.
 6. Fill out all information on Urine/Blood Collection Report Sheet.
 7. As soon as possible after specimen collection, deliver sealed sample and Urine/Blood Collection Report to SLED Chemistry Laboratory for analysis.

D. Suggested Procedures for Obtaining and Handling Blood Samples by Individuals so Authorized, Using Appropriate Collection Materials.

1. Clear venipuncture site with non-ethanol skin preparation.
2. Withdraw blood and place in an unused, uncontaminated vial. Vials that contain both an anticoagulant and a preservative are preferred.
3. Cap vial securely.
4. Place following information on label: Name of subject, time and date of blood withdrawal, and name of person withdrawing blood.
5. Fill out information on Urine/Blood Collection Report.
6. Wrap blood vial securely in suitable material for transport.
7. As soon as possible after specimen collection, deliver sealed sample and Urine/Blood Collection Report to SLED Chemistry Laboratory for analysis.

[\[Back To Top\]](#)

73-3. Certification of Breath Test Operators.

A. Duty of the Chief of SLED.

The Chief of SLED shall certify breath test operators. In addition, the Chief shall issue, deny, renew, terminate, or revoke certifications of individuals to perform chemical analysis because of standards herein set forth.

B. Ability and Good Character.

Permits shall be granted to individuals who (1) demonstrate the ability to perform chemical analyses accurately and reliably in accordance with a method or methods approved by SLED; (2) offer satisfactory proof of good character to the Chief of South Carolina Law Enforcement Division.

C. Course of Instruction.

Individuals successfully completing courses held by the South Carolina Law Enforcement Division on chemical tests for intoxication, with a minimum number of course hours and with a curriculum approved in consultation with the Chief or his designated representative, shall be deemed to have demonstrated sufficient ability to qualify for the issuance of a permit. SLED may accomplish part of its statutory responsibilities by administratively delegating the training of

breath test operators to the South Carolina Criminal Justice Academy.

D. Limitation of Permits.

Permits may be limited in scope to the methods or devices for performing chemical analysis to those in which individual applying for a permit has demonstrated competence.

E. Terms/Conditions of Permits.

Permits shall state the date upon which they are to expire, which date shall in no event be longer than twenty-four months from the date of issuance. Permits shall be subject to renewal at expiration, or at such time before expiration as is convenient for the Chief of SLED. The breath test operator may be required to show continuing ability to perform accurate and reliable chemical analysis and renewed proof of good character, if desired by the Chief of SLED. The Chief of SLED or his representative may at any time examine operators to determine such continuing ability. Permits shall be terminated or revoked by the Chief of SLED upon his finding that the breath test operator does not meet, or no longer meets, the qualifications necessary for the issuance of a permit.

[\[Back To Top\]](#)

73-4. Deleted by State Register Volume 24, Issue No. 4, effective April 28, 2000.

73-5. Videotaping at Breath-Test Sites.

A. Methods.

SLED will approve such methods for performing videotaping that are demonstrated to the satisfaction of SLED to produce quality reproductions in a reasonable, convenient, and efficient manner.

B. Videotaping Systems.

SLED will consider for approval only videotaping systems that have been approved for their quality and reliability by SLED. All approved systems will be specified in the SLED Policy and Procedures Manual.

C. Certifications.

Pursuant to Section 56-5-2953, SLED will equip all SLED certified breath-testing sites with videotaping systems. SLED shall certify each videotaping system for recording breath tests. Videotaping systems, not certified by SLED, may be used only until SLED certified videotaping systems are installed. To obtain certification, a videotaping system must provide quality playback of a recording.

Whenever a videotaping system is certified, this certification will also constitute an inspection of the videotaping system. For a videotaping system whose testing station is a mobile van, once the videotaping system is certified for use in the van, it remains certified regardless of the physical location of the van.

D. Inspections.

SLED shall inspect every certified videotaping system on-site at least once every twelve months. However, the inspection may begin before twelve months has elapsed and not be completed until after the twelve-month period. In this situation, the time lapse between inspections may exceed one year. This occurrence is acceptable as long as no subject recordings are performed until the inspection is completed. Therefore, at least one SLED inspection must be performed in the twelve months before a subject recording. Failure to have an inspection within the required time does not cause revocation of certification for that videotaping system but signifies that proper procedures for that time were not followed.

E. Records.

Certification and inspection records shall be maintained by SLED for a minimum of five years. However, the accidental/unavoidable loss of these records does not invalidate any videotape recordings or breath test results.

Added by State Register Volume 24, Issue No. 4, effective April 28, 2000.

[\[Back To Top\]](#)

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

4400 BROAD RIVER ROAD
COLUMBIA, SOUTH CAROLINA 29210



8.12.4 IMPLIED CONSENT - OPERATOR CERTIFICATION

POLICY: 8.12.4	DATE: SEPTEMBER 1, 1993	REVISION DATE: FEBRUARY 10, 2009
TITLE: IMPLIED CONSENT - OPERATOR CERTIFICATION		PAGE 1 OF 2

RESPONSIBLE AUTHORITY: DIRECTOR OF THE FORENSIC SERVICES LABORATORY

RELATED STANDARDS/STATUTES/REFERENCES: S.C. CODE OF LAWS, SECTIONS 23-31-410, 50-21-114, 55-1-100, 56-1-10, 56-1-286, 56-1-2130, 56-5-2950, 56-5-2953; S.C. CODE OF REGULATIONS, CHAPTER 73, ARTICLE I

THE LANGUAGE USED IN THIS DOCUMENT DOES NOT CREATE AN EMPLOYMENT CONTRACT BETWEEN THE EMPLOYEE AND THE AGENCY. THIS DOCUMENT DOES NOT CREATE ANY CONTRACTUAL RIGHTS OR ENTITLEMENTS. THE AGENCY RESERVES THE RIGHT TO REVISE THE CONTENT OF THIS DOCUMENT, IN WHOLE OR IN PART. NO PROMISES OR ASSURANCES, WHETHER WRITTEN OR ORAL, WHICH ARE CONTRARY TO OR INCONSISTENT WITH THE TERMS OF THIS PARAGRAPH CREATE ANY CONTRACT OF EMPLOYMENT.

GENERAL PURPOSE: To set forth policies for the administration of implied consent breath alcohol tests.

POLICY: The Division will assist the South Carolina Criminal Justice Academy with operator certification/recertification.

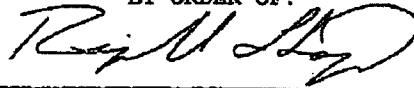
SPECIFIC PROCEDURES:

A. The South Carolina Criminal Justice Academy, in consultation with SLED, is responsible for establishing eligibility requirements for DataMaster DMT operator training.

B. The South Carolina Criminal Justice Academy provides training for DataMaster DMT operator certification and recertification pursuant to SLED policies.

C. The certification period begins at 12:01 A.M. on the certification date and ends at 11:59 P.M. on the expiration date. Operator recertification will be conducted every two years. Only certified operators may perform tests on certified DataMaster DMTs.

BY ORDER OF:

A handwritten signature in dark ink, appearing to read "Reginald I. Lloyd", is written over a horizontal line.

REGINALD I. LLOYD
DIRECTOR OF SLED

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

4400 BROAD RIVER ROAD
COLUMBIA, SOUTH CAROLINA 29210



8.12.5 IMPLIED CONSENT – ADMINISTRATION OF BREATH ALCOHOL TESTS

POLICY: 8.12.5	DATE: SEPTEMBER 1, 1993	REVISION DATE: FEBRUARY 10, 2009
TITLE: IMPLIED CONSENT – ADMINISTRATION OF BREATH ALCOHOL TEST		PAGE 1 OF 14

RESPONSIBLE AUTHORITY: DIRECTOR OF THE FORENSIC SERVICES LABORATORY

RELATED STANDARDS/STATUTES/REFERENCES: S.C. CODE OF LAWS, SECTIONS 23-31-410, 50-21-114, 55-1-100, 56-1-10, 56-1-286, 56-1-2130, 56-5-2950, 56-5-2953; S.C. CODE OF REGULATIONS, CHAPTER 73, ARTICLE I

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GENERAL PURPOSE: To set forth policies for the administration of implied consent breath alcohol tests.

POLICY: The Division will establish procedures for properly conducting implied consent and non-implied consent DataMaster DMT breath alcohol tests.

SPECIFIC PROCEDURES:

A. IMPLIED CONSENT TESTS

1. Any arresting and/or primary investigating officer may direct that a subject under arrest or detained for an implied consent related offense submit to a breath alcohol test.
2. Except for Flying Under the Influence (FUI), any officer (if a certified operator), including the arresting and/or primary investigating officer, may administer the breath test if the observation period is video recorded.
3. SLED approved methods do not require the breath test be administered within any particular time after the arrest. The test should be

administered as soon as practicable without undue delay. However, statutory time requirements do exist for some implied consent offenses.

B. NON-IMPLIED CONSENT TESTS

1. A non-implied consent test is any breath test on a SLED certified instrument not performed under the authority of the implied consent laws of South Carolina.
2. After a high reading on an implied consent test, the operator may perform a non-implied consent test if he/she is concerned about the subject's health. A high reading is defined as any significant reading that gives the operator concern regarding the subject's welfare. This reading is typically 0.35% alcohol concentration or greater. The results of this second test should not be used for court purposes. The operator does not have to wait to perform a second test before seeking medical attention for a subject.
3. To perform a non-implied consent test, the operator will activate the appropriate icon on the DataMaster DMT touch-screen labeled as "Non-Implied Consent."
4. During a non-implied consent test, only minimal test questions will be prompted. The operational protocol may be the same as in an implied consent test. If a non-implied consent test is performed, the instrument will denote this type of test on the Breath Alcohol Analysis Test Report/Evidence Ticket.

C. BREATH TEST SEQUENCE

1. The breath test sequence for an implied consent test encompasses the following events: video recording of the breath test (if applicable), advisement process (Implied Consent Rights, if applicable), checking of the mouth, data entry, observation period, operational protocol, and printout of the Breath Alcohol Analysis Test Report/Evidence Ticket. (The DataMaster DMT performs the start of the observation period/timestamp function automatically; therefore, the operator no longer manually activates this function.) To ensure a proper test is administered, a test is considered complete only after the operational protocol has finished and the signature lines are printed on the Breath Alcohol Analysis Test Report/Evidence Ticket. (For a non-implied consent test, video recording of the breath test, advisement process, checking of the mouth, and observation period are not required. However, to ensure an accurate test, checking of the mouth and the observation period are recommended.)
2. If a statute requires a video recording of the breath test, the test operator will activate the video recording equipment, advise the subject they are being video recorded, and inform the subject verbally and in writing of their Implied Consent Rights. If a video recording is not required, the operator is only required to inform the subject verbally and in writing of their Implied Consent Rights.
3. It is recommended, but not required, that the advisement process occur before checking of the mouth and the start of the observation period, however, it is a requirement that the subject be advised of his/her applicable Implied Consent Rights prior to providing a breath sample. A

typical order of events would be advisement process, checking of the mouth, and start of the observation period.

4. Checking of the mouth will occur before the start of the observation period. The observation period is initiated at the point the operator answers the question, "Subject's Mouth Checked?" (The time the observation period begins is electronically stored by the DMT.) This question should be answered with a "Yes" only after the operator has checked the mouth for any foreign material and/or removable dental work. However, if the observation period is initiated before checking of the mouth, the operator will abort/cancel the test and begin a new breath test sequence.
5. The test operator will begin the testing protocol/data entry process by touching the DataMaster DMT screen and entering the password. After all questions have been answered and all data has been entered and reviewed, the instrument begins the operational protocol. If all steps pass in the operational protocol, the subject is requested to provide a sample. After sample collection, the instrument completes the final steps of the operational protocol and prints the Breath Alcohol Analysis Test Report/Evidence Ticket.
6. The test operator and the arresting officer should sign the completed Breath Alcohol Analysis Test Report/Evidence Ticket on any implied consent test or refusal. (It is not required that the "Subject Copy" be signed.) Unless the subject is unruly, he/she should be given the opportunity to sign the test Breath Alcohol Analysis Test Report/Evidence Ticket and receive a copy, regardless of whether it is a test or refusal. (It is not required that the subject be given a copy of aborted tests.) The DataMaster DMT will print two copies of the Breath Alcohol Analysis Test Report/Evidence Ticket, one (1) for the testing/arresting officer and the second (2) for the subject. (It is not required that the "Subject Copy" be signed.)

D. ADVISEMENT FORMS

1. SLED will provide rights advisement forms for implied consent tests. Based on the type of test selected to be run, the DataMaster DMT will print the applicable advisement forms utilizing a stand-alone printer. Advisement forms will be printed in a Standard English version, and some forms may include a Spanish version. In applicable circumstances, a Spanish version may be used in lieu of or in addition to the English version. The DataMaster DMT will print two copies of the applicable advisement, one (1) for the testing/arresting officer and the second (2) for the subject. If additional advisement forms are needed, press the touch-screen icon "Additional Advisements" on the main menu screen.
2. SLED's "DRIVING UNDER THE INFLUENCE ADVISEMENT" is to be read to subjects given breath alcohol tests for Driving Under the Influence (DUI) violations. The "FELONY DRIVING UNDER THE INFLUENCE ADVISEMENT" is to be read to subjects given breath alcohol tests for Felony DUI violations.
3. SLED's "COMMERCIAL DRIVER'S LICENSE ADVISEMENT" is to be read to subjects given breath alcohol tests for Commercial Driver's License (CDL) violations. If a DUI or Felony DUI charge is also involved, that applicable advisement should also be read to the subject. However, if no

DUI or Felony DUI charge is involved, only the CDL advisement should be read to the subject.

4. SLED's "ZERO TOLERANCE ADVISEMENT" is to be read to subjects given breath alcohol tests for zero tolerance violations. If a DUI or Felony DUI charge is involved, that applicable advisement should be read to the subject in lieu of the zero tolerance advisement. If no DUI or Felony DUI charge is involved, only the zero tolerance advisement should be read to the subject.
5. SLED's "BOATING UNDER THE INFLUENCE (BUI) ADVISEMENT" is to be read to subjects given breath alcohol tests for applicable Boating Under the Influence (BUI) violations.
6. SLED's "BUI INVOLVING DEATH, BODILY INJURY, OR PROPERTY DAMAGE ADVISEMENT" is to be read to subjects given breath alcohol tests for applicable BUI violations.
7. SLED's "FLYING UNDER THE INFLUENCE ADVISEMENT" is to be read to subjects given breath alcohol tests for Flying Under the Influence (FUI) violations.
8. SLED's "SHOOTING UNDER THE INFLUENCE ADVISEMENT" is to be read to subjects given breath alcohol tests for shooting under the influence violations.

E. ADVISEMENT PROCESS

1. The advisement process consists of the officer reading any applicable advisements and furnishing the subject a copy. The reading of any applicable rights advisements and furnishing the subject a copy should be completed as soon as practical after the subject arrives at the testing site. The advisement process will be completed before the subject is requested to blow into the instrument. (The DataMaster DMT automatically prints two copies of the applicable advisement of rights form. One copy will be the Operator/Officer's copy that will be signed by the Subject and the Operator/Officer. This copy should also have the date/time recorded by the Operator/Officer. The second copy will be labeled in bold, "Subject Copy". This should be given to or placed in close proximity to the subject for his/her perusal. Only the Operator/Officer's copy needs to be signed.)
2. Unless the subject is unruly, he/she should be given the opportunity to sign the testing/arresting officer's copy of the advisement form. The only advisement form that needs to be filled out and signed is the copy that is retained by the testing/arresting officer. The subject needs to be furnished only a copy of the applicable advisement form.
3. The subject's signature only signifies that he/she received a copy of the form. When the subject is provided a copy of the form, the subject has been informed in writing of his/her rights whether or not he/she signs the testing/arresting officer's copy of the advisement form.
4. The subject may sign the advisement form after the test as long as he/she is provided a copy before being requested to blow into the instrument. A subject is provided a copy if a copy is either given to him/her or made available by placing in his/her proximity where he/she can read it.

5. Whether or not the subject signs the advisement form, he/she will be furnished with a copy or a copy left with his/her items at the detention facility or other applicable location.

F. REFUSAL

1. A subject may be removed from the testing site at any time after a refusal occurs. If a subject gives the test operator a refusal after the advisement process, the checking of the mouth and/or observation period may be waived.
2. In the event a refusal occurs during the observation period, this period may be terminated. The operator can terminate the observation period by pressing the touch-screen icon "Abort Observation" displayed on the screen during the observation period. If the "Abort Observation" icon is activated, the instrument will display the question "Did the subject refuse?" If the operator answers this question with a "Yes", the instrument will print "REFUSED" by the subject sample on the Breath Alcohol Analysis Test Report/Evidence Ticket.
3. Regardless of the type of refusal, the operator will proceed with the applicable breath test sequence on the DataMaster DMT. Unless unusual circumstances exist, all refusals will be entered into the DataMaster DMT. This action is done solely for documentary and statistical purposes, not to check the instrument.
4. A refusal to submit to a breath test can occur in any of the following ways:
 - a. The subject expresses a refusal to take the test after being advised of his/her implied consent rights.
 - b. The subject refuses to cooperate or interferes with the administration of the test.
 - c. The subject acts unruly while the test is being administered. This includes the entire process from the time the subject encounters the operator until the test is complete.
 - d. The subject delays the administration of the test. The test operator is not required to wait until an attorney or other individual arrives at the test site.
 - e. The subject does not cooperate in the checking of his/her mouth. This includes, but is not limited to, failure to open mouth, failure to accurately answer questions about foreign material and/or dental work, and failure to remove foreign material and/or removable dental work.
 - f. The subject ingests prohibited substances during the observation period. This prohibition includes smoking during the observation period.
 - g. The subject intentionally regurgitates or refuses to rinse out his/her mouth after unintentional regurgitation.

- h. The subject refuses to answer or incorrectly answers biographical information required by the operator. The operator, may at his/her discretion, test a subject without complete biographical information, as long as the operator has sufficient information to identify the subject.
- i. The subject does not attempt to blow, pretends to blow, or does not blow an adequate sample, as determined by the instrument. Any subject will be able to provide an adequate sample, as determined by the instrument.
- j. The subject intentionally causes the instrument to have an error or failure.

G. CHECKING OF THE SUBJECT'S MOUTH FOR FOREIGN MATERIAL

- 1. The operator will look inside the subject's mouth and/or ask the subject if he/she has any foreign material and/or removable dental work in his/her mouth.
- 2. Dental work (removable or permanent) is not considered foreign material. Even though the presence of dental work will not affect the breath test when a minimum twenty-minute observation period is utilized, any removable dental work discovered in the mouth will be removed as a precaution.
- 3. If any foreign material and/or dental work is discovered and removed, it is neither necessary nor required the mouth be rinsed out, as long as the observation period is used.
- 4. Any foreign material and/or removable dental work discovered in the mouth will be removed before the observation period begins. If foreign material and/or removable dental work discovered in the mouth is removed, it is not required the operator denote what foreign material was removed.
- 5. If a subject intentionally misleads an operator concerning any foreign material and/or removable dental work, the subject has forfeited his/her right to have it removed. Permanent dental work or dental work that is difficult to remove (such that a dentist is required to safely remove it) will be left in the mouth, because it will not affect breath test results when a minimum twenty-minute observation period is used.

H. BREATH ALCOHOL ANALYSIS TEST REPORT/EVIDENCE TICKET

- 1. Utilizing a stand-alone printer, the DataMaster DMT will print the Breath Alcohol Analysis Test Report/Evidence Ticket on standard 8½" x 11" copy paper. A copy of every Breath Alcohol Analysis Test Report/Evidence Ticket, used in an implied consent test, including aborted tests, should be saved.
- 2. Whether or not the subject signs the Breath Alcohol Analysis Test Report/Evidence Ticket, he/she should be furnished with a copy or a copy left with his/her items at the detention facility. (The DataMaster DMT automatically prints two copies of the Breath Alcohol Analysis Test Report/Evidence Ticket. One copy will be the Officer's copy that will be signed by the Subject and the Officer. This copy should also have the

date/time recorded by the Officer. The second copy will be labeled in bold, "Subject Copy". Only the Officer's copy needs to be signed.)

3. If extra copies of the Breath Alcohol Analysis Test Report/Evidence Ticket are needed, the operator may press the "Copy" icon on the DataMaster DMT screen. The instrument will print a copy of the last test performed.

I. OBSERVATION PERIOD START TIME

1. The time the observation period begins is electronically stored by the DMT. The DataMaster DMT will denote the beginning of the observation period on the Breath Alcohol Analysis Test Report/Evidence Ticket unless a refusal has already occurred. This time is captured by the DataMaster DMT based on the operator answering "Yes" to the question prompted by the instrument, "Subject's Mouth Checked?" This question should only be answered with a "Yes" after the operator has looked inside the subject's mouth and/or asked the subject if he/she has any foreign material and/or removable dental work in his/her mouth.
2. The DataMaster DMT will not denote the beginning of the observation period on the Breath Alcohol Analysis Test Report/Evidence Ticket if the question prompted by the instrument, "Subject's Mouth Checked?" is answered with "No", followed by answering the question "Subject Refused?" with a "Yes".
3. If the operator answers "Yes" to the question "Subject's Mouth Checked?" the instrument will capture this time as the start of the observation period and automatically lock-out the operator for a minimum of 20 minutes before allowing a breath sample to be given.
4. If the operator answers "No" to the question "Subject's Mouth Checked?" followed by answering the question "Subject Refused?" with a "Yes", the instrument will not capture or record a time for the start of the observation period and the instrument will skip the 20 minute observation period and will not allow a breath sample to be given.
5. For breath testing purposes, the "official time" is the time recorded by the DataMaster DMT. This time is recorded on both the Breath Alcohol Analysis Test Report/Evidence Ticket and internal memory of the DataMaster DMT and is used to establish if the operator has followed proper protocol.

J. OBSERVATION PERIOD

1. The purpose of the observation period is to allow for the deprivation of mouth alcohol. While the DataMaster DMT has the capability to detect the presence of mouth alcohol and will abort the test if significant mouth alcohol is detected, an observation period of a minimum of twenty minutes will be used as a precaution.
2. The operator is not required to maintain eye contact with the subject, but the operator will monitor the subject to ensure no external liquids and/or solids are ingested before providing a breath sample.

3. The DataMaster DMT will automatically lock-out the operator for a minimum of 20 minutes before allowing a breath sample to be given. Except in refusals, there will be a minimum of twenty minutes between the observation start time and the time listed by the subject's sample on the Breath Analysis Test Report/Evidence Ticket.
4. The subject may not smoke during the observation period. If ingestion of prohibited substances or any other type of compromise of the observation period occurs and the operator proceeds with the test, he/she will abort the current observation period and restart the testing protocol over again. Check the mouth, and begin another observation period. The advisement of Implied Consent Rights would not have to be repeated. If the observation period must be restarted, the original Breath Alcohol Analysis Test Report/Evidence Ticket should be saved.
5. Merely belching during the observation period will not affect the test results and therefore the mouth does not have to be rinsed out or another observation period begun.
6. If a subject regurgitates significant (as determined by the operator) solid and/or liquid matter into the mouth during the observation period, the operator will have the subject rinse his/her mouth out with water, check the mouth and restart the testing protocol over again (unless a refusal occurs). If significant regurgitation that could affect the test went undetected by the operator, the instrument's mouth alcohol detection system should abort the test.
7. The operator can terminate the observation period by pressing the abort button displayed on the screen during the observation period. If the abort button is activated, the instrument will display the question "Subject Refused?" If the operator answers this question with a "No", the instrument will print "INCOMPLETE SUBJECT TEST" by the subject sample on the Breath Alcohol Analysis Test Report/Evidence Ticket. The operator can then restart the testing protocol over again. The advisement of Implied Consent Rights would not have to be repeated. However, all other data entry would have to be repeated. If the observation period must be restarted, the original Breath Alcohol Analysis Test Report/Evidence Ticket should be saved.

K. DATA ENTRY

1. For all displayed questions, except middle initials, the test operator is required to enter data. If an initial is not known or does not exist, press the enter tab to by-pass that particular data entry field.
2. Data entry errors or omissions will not affect the accuracy of the test results or invalidate the test; however, the data should be entered accurately for documentary and statistical reasons.
3. The instrument will not accept entries of the wrong format for that particular question or obvious errors. If a question, other than initials or date of birth, cannot be answered for whatever reason (unknown, not relevant to subject, etc.), "NA" (for non-applicable or not available) should be entered. For a date of birth that is unknown or unavailable, the operator should enter an arbitrary date of 01/01/0100. If an answer is too long to enter completely, the information should be entered to the extent possible.

4. After proper entry into the computerized database, data will not be changed. If an operator discovers that incorrect data was entered either by error or incorrect information supplied by the subject, he/she should make the proper notations in his/her records. SLED does not need to be notified.
5. The operator has approximately three minutes to choose a function or answer each question or the test will abort.
 - a. Using the keyboard, enter password to access DataMaster DMT. Press touch-screen icon "OK".
 - b. Main Menu gives operator ability to choose, by touch-screen activation, one of the following functions:
 - i. "RUN" - Operator can conduct a breath test.
 - ii. "Help/Information" - Operator can get a copy of helpful information about the running of a breath test.
 - iii. "Solution Change" - Operator can conduct a solution change.
 - iv. "Inquiry Complaint" - Operator can enter an inquiry/ complaint about testing.
 - v. "Additional Forms" - Operator can print additional advisement forms.
 - vi. "Copy" - Operator can print a copy of last breath test.
 - vii. "Log Off" - Logs operator out of instrument.
 - c. If the "RUN" function is chosen, the next screen will display the types of breath tests available. Choose one of the following types of tests by touch-screen activation:
 - "Driving Under the Influence"
 - "Felony Driving Under the Influence"
 - "Zero Tolerance" (Under 21)
 - "Boating Under the Influence"
 - "Felony Boating Under the Influence"
 - "Commercial Drivers License" (CDL)
 - "Shooting Under the Influence"
 - "Flying Under the Influence"
 - "Non-Implied Consent"
6. Once a type of breath test is selected, the following sequence of questions is prompted using a combination of touch-screen and keyboard activation:
 - a. "Is Video Activated?" - Press applicable touch-screen icon: "Yes" or "No"
 - i. If "Yes", the next screen prompts Officer to enter the video code (SLED ID) located on video monitor.

- ii. If "No", then the DataMaster DMT will prompt the question, "Do you need Affidavit Failure to Produce?", if type breath test being run has a statutory requirement to be video recorded.
- b. "Enter Video Code Below" - Using keyboard, enter the unique alpha numeric code (SLED ID) provided on the video monitor. If code is entered correctly, press "OK" using the touch-screen. If code is entered incorrectly, the DMT will prompt you to re-enter code by refreshing the screen.
- c. "Print Video Code on Subject's Test Report?" - Press applicable touch-screen icon: "Yes" or "No"
 - i. If "Yes", a unique Subject ID and Subject Password will be generated and printed on the bottom of the Breath Alcohol Analysis Test Report/Evidence Ticket.
 - ii. If "No", the Subject ID and Subject Password will be printed only on the Officer's copy of the Breath Analysis Test Report/Evidence Ticket. The "Subject Copy" will have printed, "Contact officer for video code information."
- d. Two copies of the applicable "Advisement of Implied Consent Rights" form will be printed at this time. One copy will be the Officer's copy that will be signed by the Subject and the Officer. This copy should also have the date/time recorded by the Officer. The second copy will be labeled in bold, "Subject Copy". This should be given to the subject for his/her perusal. Only the Officer's copy needs to be signed.
- e. "Advisement Form Printed?" - Press applicable touch-screen icon: "Yes" or "No"
- f. "Subject Advised of Video Recording?" - This question will be asked only if Officer answers "Yes" to question, "Is Video Activated?" This question can only be answered with a "Yes."
- g. "Subject Advised that a Breath Sample is being Requested?" - This question can only be answered with a "Yes."
- h. "Subject Advised of Applicable Rights?" - This question can only be answered with a "Yes."
- i. "Subject's Mouth Checked?" - Press applicable touch-screen icon: "Yes" or "No"
 - i. If "Yes", the DataMaster DMT will record this time as the start of the observation period and proceed to the next question.
 - ii. If "No", the DataMaster DMT prompts the question, "Subject Refused?"
- j. "Scan Driver's License?" - Press applicable touch-screen icon: "Yes" or "No"
- k. "Insert License into slot and hit OK."

- l. "Subject Information" Screen asks for the following information to be entered utilizing the keyboard:

- Subject Name (F/M/L)
- Street/Apt/Box
- City/Town
- State
- Zip Code
- Date of Birth
- Race (drop down box provided)
- Sex (drop down box provided)
- License Number
- State Licensed (two letter state abbreviation)

Press applicable touch-screen icon: "Cancel" or "Next>"

- m. "Arrest Information" Screen asks for the following information to be entered utilizing the keyboard:

- Arresting Officer Name (F/M/L)
- County Code of Arrest (drop down box provided)
- Agency ORI #
- Traffic Ticket #
- Accident Involved? (drop down box provided)
- # of Injuries
- Arrest Date
- Arrest Time (24-Hour)

Press applicable touch-screen icon: "<Prev", "Cancel", or "Next>"

- n. "Operator Information" and "Solution Information" Screen asks for the following information to be entered utilizing the keyboard:

Operator Information

- Operator Name (F/M/L)
- Certification #
- Agency ORI #

Solution Information

- Lot #
- Bottle#
- Expiration Date

NOTE: This information is automatically populated from data entered during last solution change.

Press applicable touch-screen icon: "<Prev", "Cancel", or "Next>"

- o. "Verify Data" Screen asks the following question: "Would you like to review the data that you have entered?" The operator must press the "Yes" icon in order to continue. The operator will then have the ability to check all information entered for accuracy. Corrections to data entry would be made at this time. After each screen is reviewed press the touch-screen icon "Next>" to scroll to next page.

- p. "Subject Test: Observation Period" Screen - During this screen, the mandatory 20 minute observation period is being counted down by the DataMaster DMT. The "Status Box", indicating minutes/seconds remaining, appears in the lower left-hand corner of the screen. The "Abort Observation" icon is located in the upper right-hand corner of the screen. The "Abort Observation" icon is available in refusals situations and other exigent circumstances in which the observation period needs to be terminated.

If the "Abort Observation" icon is pressed, the DMT will prompt the question, "Did the subject refuse?" Press the touch-screen icon: "Yes" or "No" to proceed.

- i. If "Yes" is pressed, the observation period is aborted and the operational protocol is completed. "SUBJECT REFUSED" is printed by "SUBJECT SAMPLE" on Breath Alcohol Analysis Test Report/Evidence Ticket. This is considered a completed test and signature lines will be printed on the Breath Alcohol Analysis Test Report/Evidence Ticket.
- ii. If "No" is pressed, the result is an "INCOMPLETE SUBJECT TEST" which is printed on the Breath Alcohol Analysis Test Report/Evidence Ticket. This is not a completed test and no signature lines will be printed.

L. OPERATIONAL PROTOCOL

1. The DataMaster DMT operational protocol consists of the following steps in this order:
 - a. PURGING
 - b. AMBIENT ZEROING
 - c. BLANK TEST
 - d. INTERNAL STANDARD
 - e. EXTERNAL STANDARD
 - f. PURGING
 - g. AMBIENT ZEROING
 - h. BLANK TEST
 - i. PLEASE BLOW
 - j. PURGING
 - k. BLANK TEST
 - l. INTERNAL STANDARD
2. These steps are defined as follows:
 - a. PURGING - Flushes sample chamber with room air.
 - b. AMBIENT ZEROING - Establishes a reference point for measurements. The test will abort if significant alcohol and/or interference are present in the room air and/or sample chamber.
 - c. BLANK TEST - A test to ensure no significant alcohol and/or interference is present in the room air and/or sample chamber. The test will abort if significant alcohol and/or interference are present.

- d. INTERNAL STANDARD - A check of optical and electronic accuracy by using a quartz plate of known infrared absorption.
- e. EXTERNAL STANDARD (0.08% SIMULATOR) - A reading of 0.076% through 0.084%, inclusive, constitutes a 0.08% alcohol concentration reading according to SLED policy and passes test. Any reading outside this range constitutes a failure and the test aborts. The external standard (simulator) test serves as a calibration check for the system and shows whether the instrument is functioning properly (along with the other checks).
- f. PLEASE BLOW - The instrument will display, "PLEASE BLOW", at the time for the subject to blow. The test operator will ensure a new mouthpiece is placed on the breath tube, unless a refusal has already occurred. The subject may use the same mouthpiece in the event the test is aborted and must be started again. The subject is given approximately two minutes to provide an acceptable breath sample.
 - i. The subject will provide a continuous breath sample, acceptable to the instrument, containing a minimum of approximately one and one half liters. "PLEASE BLOW" will display until an adequate sample is obtained or time expires.
 - ii. The instrument will indicate if the subject has significant mouth alcohol on his/her breath. Belching during the process of providing a breath sample will have no effect on the breath test reading.
 - iii. Regurgitating during the process of providing a breath sample, to an extent that would affect the test results, would cause the instrument to abort the test.
 - iv. An "INVALID SAMPLE DETECTED" or "DETECTOR OVERFLOW DETECTED" reading is not a completed test. Additionally, an "INVALID SAMPLE DETECTED" or "DETECTOR OVERFLOW DETECTED" reading, by itself, is not a refusal situation. If an "INVALID SAMPLE DETECTED" or "DETECTOR OVERFLOW DETECTED" reading is obtained and the arresting officer still desires a breath test, the checking of the mouth and the start of a new observation period are required to be repeated. However, the advisement process is not required to be repeated.
 - v. The instrument will indicate if significant interference is present in the subject's breath. In this case, the breath sample is not acceptable, and the instrument will display "INTERFERENCE DETECTED".
 - vi. An "INTERFERENCE DETECTED" reading is not a completed test and, by itself, is not a refusal situation. If necessary, medical attention should be given to the subject. The operator may elect to continue to administer a breath test. In this case, the advisement process, checking of the mouth, and observation period are not required to be repeated.
 - vii. If an acceptable breath sample is not provided in two minutes, the instrument will display "Did the subject refuse?" When question is prompted, press the touch-screen icon, "Yes" or "No". If "Yes" is answered, the instrument will print "REFUSED"

by "SUBJECT SAMPLE", after the final steps of the operational protocol are completed. This is considered a completed test and signature lines will be printed on the Breath Alcohol Analysis Test Report/Evidence Ticket. If "No" is answered, the test will abort and the instrument will print "INCOMPLETE SUBJECT TEST" on the Breath Alcohol Analysis Test Report/Evidence Ticket. An "INCOMPLETE SUBJECT TEST" reading, by itself, is not a refusal situation. (A "NO" should only be entered if the subject failed to provide an acceptable breath sample through no fault of his/her own.) In the event of an "INCOMPLETE SUBJECT TEST", the breath test sequence may be repeated, except the advisement process is not required to be repeated. This is not a completed test and no signature lines will be printed.

M. BREATH ALCOHOL ANALYSIS TEST REPORT/EVIDENCE TICKET PRINTOUT

1. The start of the observation period and instrument serial number will be printed on the Breath Alcohol Analysis Breath Report/Evidence Ticket. With the exception of accident and injury data, all other entered biographical data will be printed on the Breath Alcohol Analysis Test Report/Evidence Ticket. If applicable and per Officer discretion, Subject ID and Subject Password will be printed at the bottom of the Breath Alcohol Analysis Test Report/Evidence Ticket, which is used to access the breath test video recording. Simulator test results will be displayed in thousandths of a percent. Blank tests and subject test results will be truncated and displayed in hundredths of a percent.
2. Alcohol concentration is used for reporting results of breath alcohol tests. Alcohol concentration is the number of grams of alcohol for each two hundred and ten liters of breath by weight (pursuant to Section 56-1-10, S.C. Code of Laws, 1976, as amended for breath, a bodily fluid other than blood). The forensically and medically accepted alveolar air to blood conversion factor of 2100 to 1 is used in converting breath alcohol measurements to blood alcohol measurements. This ratio means that 1 milliliter of blood contains approximately the same amount of alcohol as 2100 milliliters of alveolar air.

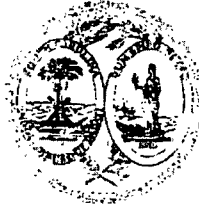
BY ORDER OF:



REGINALD I. LLOYD
DIRECTOR OF SLED

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
OFFICE OF MOTOR VEHICLE HEARINGS**

RALPH K. ANDERSON, III
Director



(803) 734-3201
FAX (803) 734-3200
WWW.SCOMVH.NET

December 1, 2011

Jana Shealy, Clerk
SC Administrative Law Court
1205 Pendleton Street, Ste 224
Columbia, SC 29201

Re: S.C. Dept of Motor Vehicles
vs
March Schnee
SCDL/Customer NO.: 100419165

Dear Ms. Shealy:

In compliance with Section 1-23-380 (d) of the 1976 Code of Laws of South Carolina, please find enclosed a certified copy of the record for the Judge's review. Please file in the appropriate case file. This is a petition for judicial review of the administrative decision, which was filed in the South Carolina Administrative Law Court.

If we can be of any further assistance, please advise.

Sincerely,


Yolanda P. Williams
Administrative Coordinator, OMVH

Cc: T. Micah Leddy, Esquire
Frank L. Valenta, SCDMV General Counsel

000003

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Mark Schnee,

Appellant,

vs.

South Carolina Department of Motor
Vehicles and West Columbia Police
Department,

Respondents.

NOTICE OF ASSIGNMENT
(Appeal)

DOCKET NO: 11-ALJ-21-0501-AP

NOTICE IS GIVEN that a notice of appeal seeking review of a decision of the Office of Motor Vehicle Hearings was filed on September 26, 2011. In accordance with S.C. Code Ann. § 1-23-570 (Supp. 2010), the **Honorable Deborah Brooks Durden**, Administrative Law Judge, has been assigned to preside in this appeal. The Administrative Law Judge may be contacted by mail at 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201, and by telephone at (803) 734-0550.

Rules of Procedure governing matters before the Court may be obtained from the Clerk of Court or on the Court's website, www.scalc.net.

The parties are directed to the relevant provisions of the Rules of Procedure for deadlines for perfecting the appeal and briefing the issues on appeal.

This the sixth day of October, 2011.

Ralph King Anderson, III
Chief Administrative Law Judge

By: Jana E. Shealy
Jana E. Shealy, Clerk
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

FILED

OCT 06 2011

000004

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

COPY

West Columbia Police
Department,

Petitioner,

vs.

Mark Schnee,

Respondent.

TRANSCRIPT OF
HEARING
July 27, 2010

THE COURT: My name is Robert Harley. I've been appointed by the South Carolina Office of Motor Vehicle Hearings to preside at this implied consent hearing scheduled for the 27th of July, 2010, at the Edgar A. Brown Building, Suite 325, Columbia, South Carolina. For the record, the petitioner in this matter is the West Columbia Police Department. Their witness is present. The respondent, Mr. Mark Schnee, is present and represented by Attorney Michael Leddy. At this time, we'll swear in the petitioner's witness, the investigating officer. State for the record, your full name, sir.

OFFICER FAIR: Ronald William Fair.

1 **THE COURT:** All right. Please raise your right
2 hand. Solemnly swear your testimony in this
3 matter will be the truth, the whole truth, and
4 nothing but the whole truth?

5 **OFFICER FAIR:** I do.

6 **THE COURT:** All right. Any witnesses, counsel? Any
7 witnesses?

8 **MR. LEDDY:** No, Your Honor.

9 **THE COURT:** All right. At this time we'll move
10 forward with testimony from the investigating
11 officer, Officer Perry.

12 **OFFICER FAIR:** Fair, F-A-I-R.

13 **THE COURT:** Fair, I'm sorry. F-A-I-R?

14 **OFFICER FAIR:** Yes, sir.

15 **DIRECT TESTIMONY BY OFFICER FAIR:**

16 **OFFICER FAIR:** Your Honor, before I begin, I'd like
17 to submit as evidence a copy of a report, the
18 SLED breath alcohol analysis test report,
19 notice of suspension, and the advisement of
20 implied consent right form.

21 **THE COURT:** Objections?

22 **MR. LEDDY:** I don't think he's laid a foundation.

23 **THE COURT:** Just after you testify, you can present
24 them then.

25 **OFFICER FAIR:** Okay. Okay.

1 **THE COURT:** Present (inaudible) testimony.

2 **OFFICER FAIR:** This incident took place on
3 10/31/2009, approximately 2:00 in the morning
4 within the City Limits of West Columbia. I was
5 on patrol. I was leaving the Police Department
6 Headquarters, which is located at 200 North
7 Twelfth Street. Observed a blue in color 2010
8 Honda Civic traveling North on Twelfth Street
9 without any lights. I called to the vehicle
10 around the 400 block of North Twelfth Street,
11 at which time the driver of the vehicle turned
12 on the lights. I activated my in-car camera,
13 continued to follow the vehicle and monitor it.
14 The vehicle made a right-hand turn turning
15 westbound onto Sunset Boulevard. Made an
16 improper turn by turning into lane one, which
17 is the interior lane, versus turning into the
18 closest lane available to him, which would have
19 been lane two. I continued to follow the
20 vehicle as it traveled on Sunset Boulevard. At
21 the 1000 block of Sunset, the vehicle signaled
22 and changed into lane two, which is the outside
23 lane. Continued to monitor the vehicle. 1000
24 block of Sunset, observed the vehicle travel
25 over towards the curb and abruptly turn back to

1 the left. The vehicle continued to drift back
2 ... drift back and forth between the curbing
3 and the lane divider line. The vehicle then
4 traveled onto the on ramp to Jarvis Klapman
5 Boulevard headed into Columbia. As the vehicle
6 began to accelerate, it crossed the lane
7 divider with both its left tires, didn't signal
8 as he changed ... or as he crossed the lane
9 divider. I conducted a traffic stop. Went up
10 and made a ... approached the vehicle and made
11 contact with Mr. Schnee. He was the driver of
12 the vehicle and the only person in the vehicle.
13 I asked him for his driver's license, which he
14 provided. He asked me if I'd like his
15 registration, at which time I could smell the
16 odor of an alcoholic beverage coming from
17 within the car. I asked Mr. Schnee if he had
18 had anything to drink. He stated "Not for
19 quite a while." He provided me his insurance
20 card and I requested him to proceed down
21 Klapman Boulevard and pull off to the next road
22 to the right for the safety of myself and him
23 due to the fact that we're on the Jarvis
24 Klapman Boulevard in a high speed area. We
25 relocated, at which time I asked Officer Hicks

1 to back me up. I then reapproached and asked
2 for the sale paperwork. He had paper tags on
3 his vehicle. I asked Mr. Schnee where he was
4 coming from. He stated he came from a place in
5 Five Points to Triple Crown and now he was
6 headed back to home. I explained the reason
7 for the stop which was the no lights. Mr.
8 Schnee stated he had his headlights on when he
9 left Triple Crown. He further stated that he'd
10 just bought the vehicle and wasn't sure ... or
11 wasn't used to driving it. I believe he said
12 he had a Dodge Ram that he was driving. I
13 asked him how much he had to drink. He stated
14 he had about two or three drinks, but it was a
15 long time prior to being stopped. I asked him
16 what a long time was and he said 6:00 at night.
17 He stated exactly 6:00 at night. I asked him
18 to exit the vehicle pretty much at this time,
19 got him back to the back of the vehicle. His
20 speech was slurred. I asked him to perform
21 some standardized field sobriety tests, which I
22 am certified and qualified by the Criminal
23 Justice Academy, at which time he refused. He
24 was placed under arrest for driving under the
25 influence. Prior to asking for the field

1 sobriety tests, he was advised of the video
2 recording my in-car. After the arrest, he was
3 mirandized and advised of the DUI advisement,
4 taken back to my Police Department. We entered
5 the Datamaster room. I activated the video
6 recording. I allowed him to get some water
7 prior to starting the test. He was given a
8 copy of implied consent right form, which I
9 read to him as he followed with his copy. And
10 I also read him his Miranda rights again. He
11 was advised of the video recording. When I
12 asked him ... when I advised him of the breath
13 sample I was requesting, he refused to give it.
14 The test was documented as a refusal. He then
15 asked for a blood test, which I'm not required
16 to give, but I was willing to take him to the
17 hospital. He asked which one was the closest.
18 I told him Lexington Medical, which at that
19 time I took him there. While we were in there,
20 he ... like I said, it was his own request for
21 the blood test. He refused to give the blood
22 because he wanted his attorney present. I
23 advised him that he could call his attorney
24 when he got to Lexington County Detention
25 Center. Any time we place somebody under

1 arrest, they're not allowed to make their phone
2 call until they get there. He again ... he
3 said that he wanted a blood test. This was all
4 observed by a Corporal Mark Tyner, who is a
5 certified police officer, he works for
6 Lexington Medical Center. He ... again, he
7 kept refusing until his attorney got there, at
8 which time he was transported to Lexington
9 County Detention Center. And, again, I'd like
10 to submit as evidence the aforementioned
11 paperwork, along with a copy of the report.

12 **THE COURT:** If you don't mind, let counsel have a
13 look at it if he wants to. Okay. Thank you,
14 sir.

15 **MR. LEDDY:** Thank you.

16 **THE COURT:** Please answer any questions Attorney
17 Leddy may have.

18 **OFFICER FAIR - EXAMINATION BY ATTORNEY LEDDY:**

19 **Q:** Officer Fair, when you start the test, the
20 machine keeps track of when that starts, right?

21 **A:** It does.

22 **Q:** And it says on your report that that was at
23 2:33:05, is that right?

24 **A:** Observation start time was 2:33, yes, sir.

25 **Q:** Okay. And then the refusal time states that it

1 was at 2:38:01?

2 A: Yes, sir.

3 Q: Okay. And in the box above there it says that

4 the subject was observed for a minimum of 20

5 minutes, is that right?

6 A: What box are you looking at, sir?

7 Q: Right here, on this other section.

8 A: Yes, sir, it does say that.

9 Q: And that's because the machine asks you that?

10 A: Yes, sir.

11 Q: And you wrote what?

12 A: I wrote yes.

13 Q: Okay.

14 A: Apparently.

15 Q: Okay. Now, you said that you followed him for

16 quite some time, is that right?

17 A: I did.

18 Q: Okay. So it was ... you saw him make several

19 turns, is that right?

20 A: I observed him make one turn and then get onto

21 the on ramp to Klapman.

22 Q: Okay. And you didn't see him ever hit

23 anything, right?

24 A: No, sir.

25 Q: Okay. And do you recall when you had Mr.

1 Schnee outside of his car, do you recall when
2 you asked him if he would take the field
3 sobriety tests and he said no?
4 A: Right.
5 Q: Do you recall saying something to the effect of
6 "You're giving me the choice of arresting you
7 without knowing if you're okay to drive?"
8 A: Something to that effect, yes, sir.
9 Q: Okay. So what you were saying is you didn't
10 know if he was okay to drive.
11 A: What I'm saying is I smelled alcohol coming
12 from him ...
13 Q: Uh-huh (affirmative response).
14 A: ... okay, and based on state law, it's a
15 privilege to drive in South Carolina and he
16 should submit to these tests based on the fact
17 that I could smell alcohol.
18 Q: Okay. So now, you would agree that anybody who
19 is impaired isn't safe to drive?
20 A: It depends on their level of impairment.
21 Q: Okay. So if somebody is impaired, though, it
22 means that they're not just drinking, but that
23 they're impaired, right?
24 A: Yes, sir.
25 Q: They can't operate safely?

1 A: Yes, sir.

2 Q: Okay. And there's no ... would you agree that

3 there's no safe distance to drive when you're

4 impaired?

5 A: There were no other vehicles on the road at the

6 time ...

7 Q: Would you agree with that? There's no safe

8 distance? It's not okay to drive 100 feet when

9 you're impaired, right?

10 A: No, sir. (Inaudible)

11 Q: Okay. I don't have any further questions. I

12 just have a couple motions.

13 THE COURT: All right. Anything you want to say in

14 response to that?

15 OFFICER FAIR: Yes, sir.

16 THE COURT: To his questions.

17 OFFICER FAIR: Yes, sir. It's in reference to the

18 20 minutes, I'm not exactly sure when

19 (inaudible) asked that question. However, this

20 was aborted when he refused to provide a breath

21 sample during that 20 minute observation. This

22 may have been ... I'm not real sure the exact

23 ... where this is actually going in, based on

24 what its telling, it says subject informed of

25 type sample requested, which is yes, then

1 observed for 20 minutes. It obviously shows
2 that it was aborted. The 20 minute observation
3 was aborted based on his refusal. And he also
4 refused to sign any of the paperwork.
5 **THE COURT:** All right. Thank you, sir. Any closing
6 remarks, statements? Anything else?
7 **MR. LEDDY:** No, just my motions here.
8 **THE COURT:** Okay.
9 **MR. LEDDY:** Well, you know, the test has to be
10 offered in order to be refused and before it's
11 offered, you have to follow the correct
12 procedures. One of the correct procedures is
13 that you have to do a 20 minute pre-test
14 waiting period. And it's clear from the
15 officer's testimony, as much as ... as good of
16 a job as he did trying to clean it up, but it's
17 not 20 minutes. It's less than five minutes.
18 And that's not the proper procedure. If you
19 don't follow the proper procedure, then the
20 test hasn't been offered. If the test isn't
21 offered, you can't refuse. So that would be my
22 first motion, that, you know, you can't abort
23 the test in the middle of it. It says you have
24 to do a 20 minute pre-test waiting period. And
25 in spite of his answer that that was done, it

1 obviously wasn't because there's not but five
2 minutes of time between the two. So that would
3 be my first motion. If you want me to just
4 give you everything at once?

5 **THE COURT:** Yeah, that's fine.

6 **MR. LEDDY:** All right. My other motion would be
7 that it doesn't appear there would be probable
8 cause to arrest him because, you know, he told
9 him to get back in his car and drive. I think
10 if he were ... really, if there probable cause
11 to think that somebody is a danger to
12 everybody, you wouldn't tell them to get in the
13 car and drive. Imagine if somebody had been
14 actually impaired and a police officer told
15 them to get in their car and drive and they hit
16 a kid walking across the street. I would
17 imagine that would be a pretty bad negligence
18 case for the State. So that doesn't seem to me
19 to add up. And the whole point of the field
20 sobriety tests is to develop probable cause, to
21 see if somebody has symptoms of a measurable
22 amount of alcohol and, you know, you're not
23 required to take tests or answer questions.
24 That's just because, you know, it's the United
25 States, but if you don't give those tests, if

1 you didn't hit anything, if he's not plowing
2 over parking meters or swerving all over the
3 place, and just the odor of alcohol is going to
4 be on anybody that has anything to drink with
5 dinner, and that's not illegal. I mean, if you
6 drink a beer, you're going to smell like a
7 beer. And if everybody who drank a beer and
8 smelled like a beer had to go to jail for DUI
9 just because they didn't feel like standing on
10 one leg off the side of the road, then I don't
11 think that that would be a proper result of the
12 balancing test between, you know, an
13 individual's right to be free from unreasonable
14 search and seizure versus the State's interest
15 in keeping the road safe. So I would say that
16 there's not probable cause to arrest him based
17 on the testimony given. And then the third
18 thing would be that there's no testimony or
19 evidence that Officer Fair is certified to give
20 a DMT test, a Datamaster test, so since that's
21 not in the evidence, I would say that again
22 there's no evidence of one of the primary
23 procedures being followed, and without that,
24 you can't have a proper offering. Without a
25 proper offering, you can't have a refusal. So

1 those would be my three motions.
2 **THE COURT:** Okay. All right. I'll note them for the
3 record. Motions, arguments?
4 **OFFICER FAIR:** I'd like to give an argument to
5 those, if you don't mind.
6 **THE COURT:** All right.
7 **OFFICER FAIR:** Your Honor, as far as the observation
8 for 20 minutes. At any time that the test is
9 refused by the person who is taking the test or
10 who is given the opportunity to provide a
11 breath sample, you can abort the test, okay.
12 It has the option on there of aborting the
13 test. You do not have to wait 20 minutes if
14 they refuse the test and tell you they're not
15 going to give you a breath sample. I never
16 told him ... I never told him to get back into
17 his car and drive. Upon the traffic stop, he
18 was still seated in his vehicle. I did smell
19 alcohol. However, as far as the level of
20 impairment, I didn't know, okay. I don't think
21 him driving 100 or 200 yards when there's no
22 traffic at the time in the right-hand lane to
23 make a right-hand turn to a secondary street,
24 there is no way to cross Jarvis Klapman
25 Boulevard as far as pedestrian traffic, so I

1 don't think ... I don't think that was an
2 unreasonable risk. However, trying to perform
3 field sobriety tests on a bridge that is
4 traveled occasionally, especially at high
5 speeds of 55, 60 miles an hour, I think is a
6 danger to myself, as well as Mr. Schnee. As
7 far as the PC to arrest, I had PC to stop the
8 vehicle for the improper turn, as well as it is
9 documented that the headlights were off, okay.
10 It is conclusive that there's a percentage of
11 people who are considered to be under the
12 impairment if they have several traffic
13 violations, i.e., driving without their
14 headlights, improper turns, swerving inside
15 their lane, as well as crossing over lane ...
16 lane dividers without signaling. That combined
17 with his alcohol ... the smell of alcohol
18 coming from his breath and his slurred speech,
19 I feel that I had PC to arrest Mr. Schnee.
20 Again, driving in the State of South Carolina
21 is a privilege, it is not a right, and he is to
22 submit to these tests based on that privilege.
23 I am a certified Datamaster operator.
24 MR. LEDDY: That's not in evidence.
25 OFFICER FAIR: And I can submit my Datamaster card

1 right now if you'd like to see it.
2 **THE COURT:** I don't believe you testified to it
3 originally the first time, so we won't ...
4 **OFFICER FAIR:** Yes, sir.
5 **THE COURT:** ... won't allow it in. That's State's
6 (inaudible). Anything else, Officer Fair?
7 **OFFICER FAIR:** No, sir.
8 **THE COURT:** All right. This hearing is now closed.
9 (There being nothing further, the hearing was
10 concluded.)
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CERTIFICATE

This is to certify that the within hearing in the matter of West Columbia Police Department vs. Mark Schnee, consisting of Sixteen (16) pages, is a true and correct transcript and was prepared by me from an audio recording provided to me. This transcript was prepared by me without the benefit of my being present at the hearing of this matter.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on November 29, 2011.

Carenn N. Moore
Carenn N. Moore
Court Reporter

Notary Public for South Carolina
My Commission Expires: 3/24/2019

Yolanda Williams

Transcript Request

Appeal

From: Yolanda Williams
Sent: Tuesday, September 27, 2011 8:40 AM
To: 'Leah Creel'
Subject: Transcript Request for Mark Schnee
Attachments: schnee, mark [ic]_20100727-1340_01cb2d9154fb8a30.trm; schnee, mark [ic]_20100727-1340_01cb2d91546b0a00.trs; schnee, mark [ic]_20100727-1345_01cb2d9208a160a0.trm; schnee, mark [ic]_20100727-1350_01cb2d92bbbc8340.trm; schnee, mark [ic]_20100727-1355_01cb2d936ed90570.trm

Importance: High

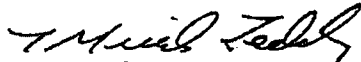
Attached please find the transcript request for Mark Schnee. Below is the contact information for the attorney that requested the transcript. If you have any question please let me know.

T. Micah Leddy
Attorney at Law
2008 Lincoln Street
Columbia, SC 29201
803-779-9966

Yolanda P. Williams
Administrative Coordinator
South Carolina Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton Street, Ste 325
Columbia, SC 29201
803-734-3201
803-734-3200 fax

Office of Motor Vehicle Hearings
Edgar A. Brown Building, Suite 325
1205 Pendelton St.
Columbia, SC 29201

Request for Transcript of Record


I, Mark Schnee, request the Transcript of the Record for the case of West Columbia Police Department and South Carolina Department of Motor Vehicles v. Mark Schnee. Docket No. 09-OMVH-01-5083-CC. The hearing in this matter was held on July 27, 2010 before the Honorable Robert F. Harley, Jr., Senior OMVH Hearing Officer.

I understand that I am responsible for all costs associated with the preparation of this transcript pursuant to Rule 32 of the Rules of Procedure for the Administrative Law Court.

²⁶
September 27, 2011


T. Micah Leddy
The Leddy Law Firm, LLC.
2008 Lincoln Street
Columbia, SC 29201
micah@leddy law.com
Attorney for Appellant

FILED

SEP 26 2011

SCOMVH

THE STATE OF SOUTH CAROLINA
Administrative Law Court

APPEAL FROM THE OFFICE OF MOTOR VEHICLE HEARINGS

Robert F. Harley, Jr., Senior OMVH Hearing Officer

Docket No. 09-OMVH-01-5083-CC

West Columbia Police Department and
South Carolina Department of Motor Vehicles, ... Respondents,

v.

Mark Schnee, ... Appellant.

NOTICE OF APPEAL

Mark Schnee appeals the Final Order and Decision upholding the suspension of Appellant's Driver's License. The Administrative Hearing was held on July 27, 2010. The Final Order and Decision was imposed by Senior OMVH Hearing Officer Robert F. Harley, Jr. on September 21, 2011 and was received by Appellant on September 21, 2011.

Appellant asserts the following grounds for appeal:

1. During the July 27, 2010 hearing, Respondents failed to present any evidence the arresting officer was trained and certified to administer breath tests by the South Carolina Criminal Justice Academy, pursuant to SLED policies. The Final Order and Decision, therefore, violates S.C. Code §56-5-2950(A) as amended.
2. During the July 27, 2010 hearing, the arresting officer specifically stated he was "not sure if appellant was drunk." The initial arrest for Driving Under the Influence was, therefore, without probable cause.

Appellant hereby reserves the right to amend this notice after the transcript of the July 27, 2010 hearing is obtained. Pursuant to ALC Rule 33, Appellant's contact information is:

Mark Schnee

FILED

SEP 26 2011

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3905 Marsteller Street
Columbia, SC 29203
(803)238-3108

26
September 22, 2011


T. Micah Leddy
The Leddy Law Firm, LLC.
2008 Lincoln Street
Columbia, SC 29201
micah@leddyllaw.com
Attorney for Appellant

000025

STATE OF SOUTH CAROLINA)

IN THE ADMINISTRATIVE LAW COURT

Docket Number: 09-OMVH-01-5083-CC

West Columbia Police Department)
and South Carolina Department)
of Motor Vehicles)

Respondents,)

vs.)

Mark Schnee,)

Appellant.)

CERTIFICATE OF SERVICE

I certify that on this date I served the Notice of Appeal and related documents in this case on the West Columbia Police Department, the South Carolina Department of Motor Vehicles and the Office of Motor Vehicle Hearings by delivering same via U.S. mail to the following addresses:

West Columbia Police Department
200 N 12th Street
West Columbia, SC 29169-6458

South Carolina Department of Motor Vehicles
Post Office Box 1498
Blythewood, South Carolina 29016

Office of Motor Vehicle Hearings
Edgar A. Brown Building, Suite 325
1205 Pendelton St.
Columbia, SC 29201

Respectfully,



T. Micah Leddy, Attorney For Appellant

The Leddy Law Firm, LLC

2008 Lincoln Street

Columbia, SC 29201

FILED

SEP 26 2011

000026

micah@leddylaw.com
(803)771-0075

This 26 day of September, ²⁰¹¹~~2010~~

STATE OF SOUTH CAROLINA)

IN THE OFFICE OF MOTOR VEHICLE
HEARINGS

Docket Number: 09-OMVH-01-5083-CC

West Columbia Police Department)
and South Carolina Department)
of Motor Vehicles)

Petitioners,)

vs.)

MOTION TO STAY DRIVER'S
LICENSE SUSPENSION

Mark Schnee,)

Respondent.)

TO: The Honorable Robert F. Harley, Jr., Senior OMVH Hearing Officer:

The Respondent, Mark Schnee, hereby moves for an Order to Stay the effect of the Final Order and Decision in the above-referenced case pursuant to OMVH Rule 15(E).

S.C. Code §56-5-2951(G) as amended states:

(G) An administrative hearing is a contested case proceeding under the Administrative Procedures Act, and a person has a right to appeal the decision of the hearing officer pursuant to that act to the Administrative Law Court in accordance with its appellate rules. **The filing of an appeal stays the suspension until a final decision is issued on appeal. (emphasis added).**

Attached to this motion is the Notice of Appeal and related documents.

The Respondent, therefore requests the Office of Motor Vehicle Hearings stay the suspension of Appellant's driver's license and notify the South Carolina Department of Motor Vehicles that the license is not suspended.

Respectfully,



000028

T. Micah Leddy, Attorney for
Appellant
The Leddy Law Firm, LLC.
2008 Lincoln Street
Columbia, SC 29201
micah@leddyllaw.com

This 20 day of September, ~~2010~~²⁰¹⁴

Pursuant to written notice to the parties, a hearing was held before me on July 27, 2010 at the Edgar A. Brown Building – Suite 325, 1205 Pendleton Street, Columbia, 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.

EVIDENCE OFFERED INTO THE RECORD

Petitioner's Exhibits

- Exhibit no. 1: SCDMV Official Notice of Suspension
- Exhibit no. 2: Advisement of Implied Consent Rights
- Exhibit no. 3: SLED Breath Alcohol Analysis Test Report

Respondent's Exhibits

None.

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:

General

1. Notice of the date, time, place and nature of the hearing was given to all the parties.
2. Mark Schnee was born on December 27, 1978 and was over 21 years of age on October 31, 2009.

Lawful Arrest or Detention

3. On October 31, 2009, the investigating officer witnessed a blue Honda vehicle traveling without its headlights on as it traveled on 12th Street within the jurisdiction of West Columbia. The officer activated his in-car video camera and continued to monitor the vehicle's movements. The officers followed the vehicle for several blocks and witnessed the vehicle drifting in its lane of travel and make several improper turns. The officer conducted a traffic stop and identified Respondent as the driver. The officer detected an odor of an alcoholic beverage on Respondent's person and he admitted he had been drinking at a bar in Five Points in Columbia.

The officer offered Respondent an opportunity to perform field sobriety tests. Respondent refused to perform the tests. The officer placed Respondent under arrest for Driving under the influence and transported him to a breath test site.

Advisement of Implied Consent Rights

The officer, a certified Datamaster operator, read the Advisement of Implied Consent Rights to Respondent and informed him that he was requesting a breath. He informed him that the testing procedure was being video recorded. The officer provided Respondent with a copy of the Advisement.

Refusing to submit to a chemical (breath test -

Respondent refused to submit to a breath test. The officer concluded Respondent violated the Implied Consent Law and issued a Notice of Suspension.

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. 2008), the General Assembly provided for the creation of the South Carolina DMVH. Effective January 1, 2006, the DMVH was authorized to employ Hearing Officers to preside over contested case hearings involving suspensions, cancellations, or revocations of driver's licenses. Effective October 1, 2008, the General Assembly changed the name to the Office of Motor Vehicle Hearings (OMVH).
2. All hearings presided over by Hearing Officers of OMVH must be conducted in accordance with the Administrative Procedures Act (APA) and the rules of procedure of the South Carolina Administrative Law Court (SCALC). 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. 2008).
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. 2008), 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 appreciable 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 appreciable 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 is materially and appreciable impaired.

Implied consent to submit to testing

7. S.C. Code Ann. § 56-5-2950(A) (Supp. 2008) 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....

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. 2008).

8. S.C. Code Ann. § 56-5-2950(B) (Supp. 2008) 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;

(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.2008).

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. 2008)

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.2008). 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.

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. Discussion

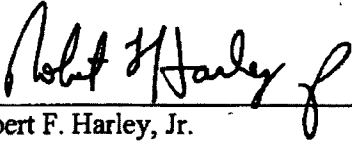
I conclude that the Respondent was lawfully arrested for driving under the influence. The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested. Id. Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal. Id.

Here, the officer witnessed a vehicle traveling erratically and conducted a traffic stop. He identified Respondent as the driver of the vehicle. The officer observed several factors which persuaded him that Respondent was under the influence of alcohol and unable to safely operate a motor vehicle. He placed him under arrest for Driving Under the Influence and transported him to a local breath test site.

The officer read the Advisement of Implied Consent Rights to Respondent and informed him that he was requesting a breath test. Respondent refused to submit to a breath test. The officer concluded Respondent violated the Implied Consent Law and issued a Notice of Suspension.

ORDER

Based upon the above findings of facts 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.

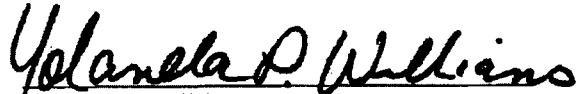


Robert F. Harley, Jr.
Senior OMVH Hearing Officer

September 21 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Yolanda P. Williams, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).


Yolanda P. Williams

September 20, 2011
Columbia, South Carolina

Yolanda Williams

From: Yolanda Williams
Sent: Wednesday, September 21, 2011 4:14 PM
To: T. Micah Leddy (micah@leddy.com); West Columbia PD (smorrison@westcolumbiasc.gov); HPU@scdmv.net
Cc: Brenda
Subject: 09-21-11 Mark Schnee's IC Final Order
Attachments: 1 Reconsideration-appeal instructions 09-07-11.pdf; 09-20-11 Cert. of Serv..pdf; Mark Schnee.pdf

Attached is a copy of the hearing officer's decision. Your client will receive additional information via mail from the DMV regarding their driving privileges.

Yolanda P. Williams
Administrative Coordinator
South Carolina Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton Street, Ste 325
Columbia, SC 29201
803-734-3201
803-734-3200 fax

ADVISEMENT OF IMPLIED CONSENT RIGHTS

Mark Edward Schnee
Subject's Name (Print)

12-27-1978
Date of Birth

160419165
Driver's License Number



South Carolina
State Licensed

DRIVING UNDER THE INFLUENCE ADVISEMENT

- (A) Will test be video recorded? If answer is Yes, start here → - Inform subject of video recording.
If answer is No, start here → - Inform subject of type samples requested (i.e. breath, blood, urine).
- (B) Provide subject with a written copy of the following advisement and read the advisement to the subject:
- You are under arrest for Driving Under the Influence (DUI), Section 56-5-2930, South Carolina Code of Laws 1976, as amended.
 - The arresting officer has directed that samples be taken for alcohol and/or drug testing.
 - The samples will be taken and tested according to Section 56-5-2950 and SLED policies.
 - You do not have to take the tests or give the samples, but if you refuse to submit to the tests, your privilege to drive in South Carolina must be suspended or denied for at least six (6) months and your refusal may be used against you in court.
 - If you take the tests or give the samples and have an alcohol concentration of eight one-hundredths of one percent (0.08%) or more, you may instead be charged with Driving with an Unlawful Alcohol Concentration (DUAC), Section 56-5-2933.
 - If you have an alcohol concentration of fifteen one-hundredths of one percent (0.15%) or more, your privilege to drive in South Carolina must be suspended for at least one (1) month.
 - You have the right to have a qualified person of your own choosing conduct additional independent tests at your expense and the officer, upon request, must provide you affirmative assistance.
 - You have the right to request an administrative hearing within thirty (30) days of the issuance of the notice of suspension.
 - If you do not request an administrative hearing or if your suspension is upheld at the administrative hearing, you must enroll in an Alcohol and Drug Safety Action Program.

If applicable, perform the following procedures:

- (C) Check subject's mouth and remove any foreign material. (Not required if a refusal has occurred.)
(D) Enter biographical data into DataMaster DMT. (Required for all tests, including refusals.)
(E) Observe subject for a minimum of twenty (20) minutes before collecting breath sample. (Not required if a refusal has occurred.)

ADVERTENCIA PORMANEJAR BAJOS LOS EFECTOS DE ALCOHOL O DROGAS(DUI)

- (A) ¿Se grabará en video el análisis? Si la respuesta es Si, empieza aquí → - Informe al sujeto que va a ser grabado en video.
Si la respuesta es No, empieza aquí → - Informe al sujeto de lo que se requiere (ejemplo: soplar, sangre, urina.)
- (B) De al sujeto una copia escrita de la siguiente advertencia y lea la advertencia al sujeto:
- Usted queda detenido por Manejar Bajo los Efectos de Alcohol o Drogas (DUI), Sección 56-5-2930, del Código de Leyes de Carolina del Sur de 1976, según su enmienda.
 - El agente que efectuó la detención dispuso que se sacaran muestras de alcohol y/o drogas para ser analizadas(s).
 - Se obtendrán y se analizarán las muestras según la Sección 56-5-2950 y las normas de SLED.
 - Usted no está obligado a hacerse los análisis ni a sacarse las muestras, pero si se niega a someterse a estos análisis, se le tendrá que suspender o negar el derecho de manejar en Carolina del Sur por lo menos durante seis (6) meses y el hecho de que usted se niega, podrá usarse en su contra en un tribunal.
 - Si usted se somete a los análisis o se saca las muestras y tiene una concentración de alcohol de ocho centésimos del uno por ciento (0.08%) o más, entonces se lo podría acusar de Manejar con una Concentración Ilegal de Alcohol (DUAC), según la Sección 56-5-2933.
 - Si usted tiene una concentración de alcohol de quince centésimos del uno por ciento (0.15%) o más, se le deberá suspender el derecho de manejar en Carolina del Sur por lo menos durante un (1) mes.
 - Usted tiene el derecho de que una persona que usted elija y que esté capacitada para hacerlo, realice sus propios análisis adicionales, los cuales usted mismo tiene que pagar y en ese caso, el agente debe brindarle ayuda si usted lo solicita.
 - Usted tiene el derecho de solicitar una audiencia administrativa dentro de los treinta (30) días de la fecha en que se emitió la notificación de la suspensión.
 - Si usted no solicita una audiencia administrativa o si se le confirma la suspensión en la audiencia administrativa, usted tiene que matricularse en un Programa de Medidas Contra el Abuso del Consumo del Alcohol y las Drogas.

Si aplica, efectúe los siguientes procedimientos:

- (C) Inspecciona la boca del sujeto y quite material extraño de la boca. (Ignora si se niega el sujeto.)
(D) Anade datos biograficos en el DataMaster DMT. (Esto es requerido para todos los exámenes aunque se niege el sujeto.)
(E) Observe al sujeto un minimo de (20) minutos antes de obtener un ejemplar de su respiro. (Ignora si se niega.)

0000 1

Refused
Subject's Signature
Firma del Sujeto (Recibió una copia)

Ronald L.
Officer's Signature
Firma del Agente
10-31-09 0236
date/time
fecha/hora

SLED Forensics Form # ICS 010, February 2009



SOUTH CAROLINA LAW ENFORCEMENT DIVISION
BREATH ALCOHOL ANALYSIS TEST REPORT
DRIVING UNDER THE INFLUENCE



SUBJECT BIOGRAPHICAL INFORMATION

SUBJECT NAME: MARK/E/SCHNEE
RACE: WHITE
SEX: M
DOB: 12/27/1978

DL NUMBER: 100419165
DRIVER'S LICENSE: SC
SUBJECT ADDRESS: 3905 MARSTELLER ST
COLUMBIA, SC

ARREST INFORMATION

OFFICER NAME: RONALD/W/FAIR
TICKET NUMBER: 53889DK
ARREST DATE: 10/31/2009

AGENCY ORI: SC0320500
COUNTY OF ARREST: 32 - LEXINGTON
ARREST TIME: 02:10

OPERATOR INFORMATION

TEST OPERATOR: RONALD/W/FAIR
CERTIFICATION #: DMT000923
SOLUTION LOT #: 08803
BREATH TEST VIDEO RECORDED? YES
SUBJECT'S MOUTH CHECKED AND
ANY FOREIGN MATERIAL REMOVED? YES
SUBJECT ADVISED OF APPLICABLE RIGHTS? YES

AGENCY ORI: SC0320500
EXPIRATION DATE: 02/10/2010
BOTTLE: 0327
SUBJECT INFORMED OF VIDEO RECORDING? YES
SUBJECT INFORMED OF TYPE SAMPLE REQUESTED? YES
SUBJECT OBSERVED FOR A MINIMUM OF (20)
TWENTY MINUTES? YES

SUBJECT'S BREATH ALCOHOL TEST RESULTS

DATAMASTER DMT SERIAL #115607

TEST DATE:		10/31/2009
OBSERVATION START TIME:		02:33:05
BLANK TEST	0.00	02:36:45
INTERNAL STANDARD	VERIFIED	02:36:51
0.08% SIMULATOR TEMPERATURE	33.99°C	02:37:10
0.08% SIMULATOR VERIFICATION	0.078	02:37:10
BLANK TEST	0.00	02:37:56
~~SUBJECT SAMPLE~~	~~0.00~~	~~02:38:07~~
BLANK TEST	0.00	02:38:33
INTERNAL STANDARD	VERIFIED	02:38:40

Refused

Subject's Signature

10-31-2009 0243

(Received Copy) Date/Time

Ronald Fair

Arresting Officer's Signature

Ronald Fair

Test Operator's Signature

VISIT WWW.SLED.SC.GOV AND CLICK ON IMPLIED CONSENT. THEN CLICK ON BREATH SITE VIDEO RECORDINGS. ENTER THE REQUESTED INFORMATION FROM THE BOX BELOW TO ACCESS THE VIDEO RECORDING OF THIS BREATH TEST:

SUBJECT ID: 002E884593
SUBJECT PASSWORD: 6019B

000043

IMPORTANT NOTICE

INFORMATION FROM THIS REPORT WILL BE USED TO ACCESS THE BREATH TEST VIDEO. ANYONE WITH THIS INFORMATION WILL HAVE ACCESS TO THE VIDEO. PROTECT THIS REPORT AS YOU WOULD ANY IMPORTANT DOCUMENT. SLED ASSUMES NO RESPONSIBILITY FOR UNAUTHORIZED ACCESS.

SLED Form 918, February 2009

STATE OF SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS

West Columbia Police Department
and
South Carolina Department of Motor
Vehicles,

Petitioner,

vs.

Mark Schnee,

Respondent.

Docket No. 09-OMVH-01-5083-CC
DL# 100419165

ORDER OF CONTINUANCE AND
NOTICE OF HEARING

This matter was previously scheduled to be heard on the merits before Hearing Officer Robert Harley at 2:00 pm on May 4, 2010. On April 28, 2010 Attorney T Micah Leddy requested a continuance due to being in court. There being good cause shown, this case is continued until a later date and time. Accordingly,

IT IS HEREBY NOTICED that this case is rescheduled for 1:30 pm on Tuesday, July 27, 2010 at SC ALC OMVH Edgar A Brown Bldg, 1205 Pendleton St Ste. 325 Columbia SC. All other provisions of the original Notice of Hearing remain in effect.

Yolanda P. Williams, Administrative Coordinator, OMVH

By: Frances L. Inabnet

Scheduling Assistant

May 3, 2010
Columbia, South Carolina

Cc: Officer, Ronald Dair

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this notice/order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 3 day of May

By: [Signature]

41

FILED

MAY - 3 2010

SCOMVH

000044



LEDDEY AND COLLINS, LLC.

ATTORNEYS AND COUNSELORS AT LAW

2008 LINCOLN STREET

COLUMBIA, SC 29201

(803) 779 - 9966

(803) 753 - 0837 (fax)

28 April 2010

South Carolina Office of Motor Vehicle Hearings
Edgar A. Brown Building
1205 Pendleton Street, Suite 325
Columbia, SC 29201
Facsimile: 803-734-3200

Re: *Docket No. 09-OMVH-01-5083-CC*

To Whom It May Concern:

We would like to request a continuance in the case of Mark E. Schnee. His hearing is scheduled for Tuesday, May 4, 2010 at 9:00 a.m. Mr. Leddy and Mr. Collins are scheduled to be in Federal Court for a trial beginning April 29, 2010 that is expected to run into the next week. Attached, please find a scheduling order to that effect.

Please do not hesitate to contact me if I may be of any further assistance in this matter.

Very truly yours,

Hannah C. Honeycutt
Paralegal
Leddy & Collins, LLC

VIA FACSIMILE & U.S. MAIL

CC: Officer Ronal Fair, West Columbia Police Department
SCOMVH Office of General Counsel

APNOR - via Fax *HC*

Granted/Denied	
<i>Robert Harley</i>	<i>4-28-10</i>
OMVH Hearing Officer	Date

Tues
7-27
1:30

West Cols PD - 739-2662

Atty - 753-0837

000045

3:09-cr-01174-CMC Date Filed 02/18/10 Entry Number 265 Page 1 of 2



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA

vs.

MICHAEL MONROE GROOMS
MICHAEL T RODGERS
LESLIE WAYNE PEELER
JEFFREY BRIAN GIBERT
GERALD BENFIELD
JOHNNY JUNIOR HARRISON
JOHN CARLTON THURMAN HOOVER
COY DALE ROBINSON
SCOTT EDWARD LAWSON
JIMMIE JESSE HICKS
GEORGE WILLIAM KELLY

CR. NO: 3:09-1174-CMC

REVISED
SCHEDULING NOTICE

(Note new Pretrial/Jury Selection Dates)

MOTIONS HEARING: A final motions hearing is scheduled for April 6, 2010 at 10:00 a.m.

PRETRIAL CONFERENCES: Pretrial conferences is scheduled before The Honorable Cameron McGowan Currie for the following dates at the United States Courthouse in Columbia, SC. NOTE: If a Plea Agreement has been reached, the Change of Plea hearing will be held at this time.

April 6, 2010 at 2:00 p.m.

April 15, 2010 at 9:30 a.m.

JURY SELECTION: A jury will be selected for the trial of this case on April 29, 2010 at 9:30 a.m. Requests to Strike are due by 12:00 Noon the date prior to Jury Selection.

JURY TRIAL: A jury trial is scheduled before The Honorable Cameron McGowan Currie beginning on April 29, 2010 following Jury Selection at the United States Courthouse in Columbia, SC.

Pursuant to the Local Rules of this court, counsel must submit any proposed voir dire questions and special jury instructions to the court (with a copy being sent to opposing counsel) at least five business days prior to jury selection. If such requests are not made by the deadline, counsel shall have waived the right to submit them.

All parties are advised that they must get the court's approval to receive a jury list. The jury clerk will send each juror a written questionnaire to be completed and returned prior to jury selection. Copies of these questionnaire responses will be available for purchase at Franklin's Printing, 114 Washington Street, Columbia, SC (803/252-6310) seven working days prior to jury selection; a Juror Questionnaire/List Request Form may be accessed on the web at http://www.scd.uscourts.gov/Forms/Jury/Standard_Jury_Questionnaire.pdf. The originals of the questionnaire responses will be available for inspection in the clerk's office during the same time period. The questionnaires ask many of the same questions that are traditionally asked of the jurors during voir dire at jury selection. All parties are responsible for obtaining copies of the

FAX COVER SHEET

TO	{SCOMVH}
COMPANY	SCOMVH
FAX NUMBER	18037343200
FROM	Hannah Honeycutt
DATE	2010-04-28 17:39:47 GMT
RE	Continuance Request

COVER MESSAGE

Please see attached.

STATE OF SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS

West Columbia Police Department
and
South Carolina Department of Motor
Vehicles,

Petitioner,

vs.

Mark Edward Schnee,

Respondent.

Docket No. 09-OMVH-01-5083-CC

DL# 100419165

ORDER OF CONTINUANCE AND
NOTICE OF HEARING

This matter was previously scheduled to be heard on the merits before Hearing Officer Robert Harley at 2:00 pm on February 9, 2010. On February 4, 2010 Attorney T Micah Leddy requested a continuance due to respondent being in court. There being good cause shown, this case is continued until a later date and time. Accordingly,

IT IS HEREBY NOTICED that this case is rescheduled for **9:15 am on Tuesday, May 4, 2010 at SC ALC OMVH Edgar A Brown Bldg, 1205 Pendleton St Ste.325 Columbia SC.** All other provisions of the original Notice of Hearing remain in effect.

Yolanda P. Williams, Administrative Coordinator, OMVH

By: Frances L. Inabinet

Scheduling Assistant

February 12, 2010
Columbia, South Carolina

Cc: Officer, Ronald Fair

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this notice/order in the above entitled action upon all parties to this cause by depositing a copy hereto, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 12 day of Feb

By: [Signature] OMVH

FILED

FEB 12 2010 000050

SCOMVH



LEDDY AND COLLINS, LLC.

ATTORNEYS AND COUNSELORS AT LAW

2008 LINCOLN STREET

COLUMBIA, SC 29201

(803) 779 - 9966

(803) 753 - 0837 (fax)

4 February 2010

South Carolina Office of Motor Vehicle Hearings
Edgar A. Brown Building
1205 Pendleton Street, Suite 325
Columbia, SC 29201
Facsimile: 803-734-3200

Re: Docket No. 09-OMVH-01-5083-CC

To Whom It May Concern:

We would like to request a continuance in the case of Mark E. Schnee. His hearing is scheduled for February 9, 2010 at 2:00 p.m. Mr Schnee is a practicing attorney and is scheduled to be in trial for the entirety of that week.

Please do not hesitate to contact me if I may be of any further assistance in this matter.

Very truly yours,

T. Micah Leddy
Leddy & Collins, LLC
2008 Lincoln Street
Columbia, SC 29201

803-779-9966

803-753-0837 (fax)

VIA FACSIMILE & U.S. MAIL

CC: Officer Ronal Fair, West Columbia Police Department

Spoke w/ Hanna @ atty office
SC to GC today

Hanna @ atty
APNOR via Delosier
@ PO

~~Granted~~ Denied
Robert H. [Signature] 2-9-10
OMVH Hearing Officer Date

Tues
5-4
9:15

000051

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

West Columbia Police Department
and
South Carolina Department of Motor
Vehicles,

Petitioner,

vs.

Mark Edward Schnee,

Respondent.

Docket No. 09-OMVH-01-5083-CC
DL# 100419165

**ORDER OF CONTINUANCE AND
NOTICE OF HEARING**

This matter was previously scheduled to be heard on the merits before Hearing Officer Robert Harley at 1:30 pm on January 12, 2010. On December 15, 2009 Attorney T Micah Leddy requested a continuance due to being out of town. There being good cause shown, this case is continued until a later date and time. Accordingly,

IT IS HEREBY NOTICED that this case is rescheduled for **2:00 pm on Tuesday, February 9, 2010 at SC ALC OMVH Edgar A Brown Bldg, 1205 Pendleton St Ste.325 Columbia SC.** All other provisions of the original Notice of Hearing remain in effect.

Yolanda P. Williams, Administrative Coordinator, OMVH

By: Frances L Gribelin

Scheduling Assistant

December 18, 2009
Columbia, South Carolina

Cc: Officer, Ronald Fair

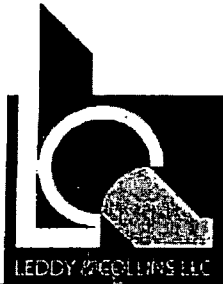
CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this notice/order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 18 day of Dec
By: [Signature] 48/AM

FILED

DEC 18 2009

SCOMVH
000052



LEDDY AND COLLINS, LLC.

ATTORNEYS AND COUNSELORS AT LAW

2008 LINCOLN STREET

COLUMBIA, SC 29201

(803) 779 - 9966

(803) 753 - 0837 (fax)

December 15, 2009

South Carolina Office of Motor Vehicle Hearings
Edgar A. Brown Building
1205 Pendleton Street, Suite 325
Columbia, SC 29201

Re: *State of South Carolina v. Mark Schnee*

To Whom It May Concern:

~~Granted/Denied~~	
<i>Robert Hardy</i>	12-18-09
OMVH Hearing Officer	Date

It has become apparent that I am scheduled to be out of town beginning 10-16 January 2010. This conflicts with the hearing date for the above-mentioned defendant, which is set for 12 January 2010. Therefore, I am requesting a continuance for this hearing, and that you reschedule it for a later date.

Please do not hesitate to contact me if I may be of any further assistance in this matter.

Very truly yours,

T. Micah Leddy
Leddy & Collins, LLC
2008 Lincoln Street
Columbia, SC 29201

803-779-9966

803-753-0837 (fax)

VIA FACSIMILE & U.S. MAIL

CC: Officer Ronal Fair, West Columbia Police Department

5083

RECEIVED

DEC 17 2009

SCOMVH

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Tues 2-9 2:50

Mark Edward Schnee,
Respondent.

112

Intake & Search & Generate & Tools & Accounts Receivable &

Case

Search

Case Information

Number:	09M5083	Status:	Filed
Title:	South Carolina Department of Motor Vehicles v. Mark Edward Schnee		
Invoice			
Number:	NV0911-0116	Posted:	No
Entry Type	Request for CC Hearing - \$150	Quantity:	1
Item Type	Case Filing Fee - \$150	Unit Price:	\$150.00
Customer:	Schnee, Mark Edward	Total	\$150.00
Invoice Date:	11-06-2009	Paid:	\$150.00
Due Date:	11-06-2009	Due:	\$0.00

Void Information

Void Method:		Voided:	No
Void Posted:	No		
Void Explanation:			

Collections Information

Collection Agency:	Date:
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Number	Date	Paid
CRO911-0116	11-06-2009	\$150.00

000055



09-AMVH-01-3083

South Carolina Department of Motor Vehicles
Notice of Suspension

MV-65
Rev. 3/06

Merk Edward Schnee
Defendant's Name

3905 Mersteller Street
Address

100419165
BP/DL Number

SC
State

29203
Zip Code

12-27-1978
Date of Birth

Vehicle: License Plate Number NA Vehicle Type: Commercial ☐ Yes ☒ No Hazardous Material ☐ Yes ☐ No

**YOUR PRIVILEGE TO DRIVE IN SOUTH CAROLINA IS SUSPENDED IMMEDIATELY FOR THE FOLLOWING:
(CHECK ONLY ONE BOX)**

**UNDER THE AGE OF TWENTY-ONE (21)
AND NOT UNDER ARREST FOR DUI***

- ☐ Registering an alcohol concentration of .02 or greater*
☐ Refusing to submit to a breath, blood or urine test*

ANY AGE UNDER ARREST FOR DUI

- ☐ Registering an alcohol concentration of .15 or greater
☒ Refusing to submit to a breath, blood or urine test

*A person who is taken for testing under 56-1-286 cannot be prosecuted under 20-7-8920, 20-7-8925, 56-5-2930 or 56-5-2933. Everyone who receives this Notice of Suspension can have a hearing to challenge the suspension. A hearing will be scheduled if within thirty days of the date on this notice of suspension the South Carolina Administrative Law Court RECEIVES your written request for a hearing. There is a \$150.00 filing fee for a hearing. (Personal checks not accepted.) See the back of this form for more information on how to ask for a hearing.

If a hearing is scheduled, you may be able to get a temporary alcohol restricted license. The temporary alcohol restricted license costs \$100.00 and allows you to drive without restrictions until the hearing results are mailed to you. See the back of this form for instructions on how to get a temporary alcohol restricted license.

If you do not get a temporary alcohol restricted license, your suspension continues. You cannot drive until your suspension period ends and you: 1) enroll in ADSAP [if you do not complete ADSAP, your driver's license will again be suspended]; 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you do get a temporary alcohol restricted license and the hearing officer rules against you after your hearing, your suspension will go back into effect. If you were suspended after having been arrested for DUI, you may be eligible for a route-restricted license to allow you to drive for the remainder of the suspension. There are instructions on the back of this form to explain how to get a route-restricted license. If you do not get a route-restricted license or if you are under the age of twenty-one and were not arrested for DUI, you cannot drive until your suspension period ends and you: 1) enroll in ADSAP [if you do not complete ADSAP, your driver's license will again be suspended]; 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you do get a temporary alcohol restricted license and the hearing officer rules in your favor, the suspension will be cancelled. Your driving privileges will be reinstated. However, you must go to a DMV office and have a regular license issued to you.

If you were suspended after having been arrested for DUI, you may be entitled to have a route-restricted license during your suspension period. You do not have to request a hearing to be eligible for a route-restricted license. The route-restricted license costs \$100.00 and allows you to drive only to and from work, college, ADSAP classes, and a court-ordered drug program, plus during the course of your employment or college. However, you must enroll in ADSAP before a route-restricted license will be issued. See the back of this form for instructions on how to get a route-restricted license.

I understand that I cannot drive until a license has been issued to me. X Refused

Signature of Defendant

Defendant's license or permit surrendered (yes or no) yes (If yes, license must be attached to yellow copy of this form)

10-31-2009
Date

Ronald Fair
Signature of Arresting Officer

Ronald Fair
Printed Name of Arresting Officer

West Columbia Police Dept
Agency Name

SC0320500
Agency Code

803-794-0721
Agency Telephone Number

10-31-2009
Date

Ronald Fair
Signature of DataMaster Operator

Ronald Fair
Printed Name of DataMaster Operator

West Columbia Police Dept
Agency Name

SC0320500
Agency Code

803-794-0721 000056
Agency Telephone Number

14 Copy-Defendant

Yellow Copy-DMV/Driver Records

52 Green Copy-Officer

White Copy-Officer's Agency

HEARING REQUEST

I am requesting an administrative hearing. I understand that if the SC Administrative Law Court does not receive my request within thirty days of the date on this notice of suspension, I will not be given a hearing and I will lose my current restricted license.

11/8/09

Date

Signature of Defendant

3905 Marsteller St. Columbia SC 29203

Defendant's Current Address

(803) 238-7105

Phone Number

Leddy & Collins, LLC

Attorney's Name

2008 Lincoln St. Columbia SC 29201

Attorney's Address

(803) 779-9966

Phone Number

If you do not list an attorney above, you must tell your attorney when your hearing is scheduled.

INSTRUCTIONS FOR USING THIS FORM TO REQUEST A HEARING

1. Complete the Hearing Request part of this form, giving the current address and telephone number where you can be reached. There is a \$150.00 filing fee for a hearing. (Personal checks not accepted.)
2. Bring or mail this completed form, plus the filing fee, to the South Carolina Administrative Law Court, 1205 Boulevard St., Suite 325, Columbia, SC 29201. The completed form and the fee must be RECEIVED by the Administrative Law Court within thirty days of the date on this notice of suspension for a hearing to be scheduled.

INSTRUCTIONS FOR REQUESTING A HEARING WHEN NOT USING THIS FORM

1. Submit a written request that includes all information that is requested in the blanks on this form: your name, date of birth, driver's license number, state in which licensed, current address, telephone number where you can be reached, license plate number of vehicle, whether it was a commercial vehicle, whether you surrendered your license, whether you were under arrest for DUI, and whether you were suspended for refusing the test or for taking the test and having too high a reading. You must also include the names and agencies of the arresting officer and of the DataMaster operator, plus contact information for your attorney.
2. There is a \$150.00 filing fee for a hearing. (Personal checks not accepted.)
3. Bring or mail your completed request, plus the filing fee, to the South Carolina Administrative Law Court, 1205 Boulevard St., Suite 325, Columbia, SC 29201. The completed request and the fee must be RECEIVED by the Administrative Law Court within thirty days of the date of your suspension for a hearing to be scheduled.

INSTRUCTIONS FOR GETTING A TEMPORARY ALCOHOL RESTRICTED LICENSE

1. If you meet the deadline for requesting a hearing, you may be eligible for a non-commercial temporary alcohol restricted license. Temporary alcohol restricted licenses are not available in Class A, B or C commercial driver licenses.
2. The fee for the temporary alcohol restricted license is \$100.00.
3. After you file your request for a hearing, the Department of Motor Vehicles will determine whether you are eligible for a temporary alcohol restricted license. If you are eligible, DMV will mail you a letter stating your eligibility.
4. IF YOU ARE A SOUTH CAROLINA LICENSED DRIVER, you may take that letter to any DMV office in the state, pay the \$100.00 license fee, and have the temporary alcohol restricted license issued.
5. IF YOU ARE A LICENSED DRIVER FROM ANOTHER STATE, you may take that letter and the \$100.00 license fee to DMV Specialized Services, 1630 Shop Road, Columbia, SC (2 miles north of I-57 exit 6). That office can issue the temporary alcohol restricted license. You may also mail that letter, a completed Driver's License Application Form 447 (available on the Internet at <http://www.scdmvonline.com>), and the \$100.00 license fee to DMV Driver Records, P.O. Box 1498, Blythewood, SC 29016. That office will mail you the temporary alcohol restricted license.

INSTRUCTIONS FOR GETTING A ROUTE-RESTRICTED LICENSE

1. If you were suspended after having been arrested for DUI, you may be eligible for a non-commercial route-restricted license. Route-restricted licenses are not available in Class A, B or C commercial driver licenses.
2. A route-restricted license allows you to drive only to and from work, college, ADSAP classes, and a court-ordered treatment program, plus during the course of your employment or college.
3. The fee for the route-restricted license is \$100.00. If you are licensed in another state, you must also pay the re-statement fee.
4. You must enroll in ADSAP before a route-restricted license will be issued.
5. You do not have to request a hearing to be eligible for a route-restricted license.
6. You must apply for a route-restricted license by submitting an application (Form DL-117). This application will be mailed with your suspension notice. It is also available on the Internet at <http://www.scdmvonline.com>.
7. You are advised to complete the application and bring it, with the \$100.00 license fee, to DMV Specialized Services, 1630 Shop Road, Columbia, SC (two miles north of I-57 exit 6). Once the application and the route are approved, that office can issue the route-restricted license. You may also mail the application, a completed Driver's License Application Form 447 (available on the Internet at <http://www.scdmvonline.com>), the \$100.00 license fee and the \$100.00 re-statement fee if you are licensed in another state to DMV Driver Records, P.O. Box 1498, Blythewood, SC 29016. That office will mail you the route-restricted license.

ADSAP is an abbreviation for Alcohol and Drug Safety Action Program, which is part of the South Carolina Department of Motor Vehicles. For more information, visit www.scdmvonline.com or call 1-800-447-0000. You may also contact the ADSAP office for more information. The ADSAP office is located at 1630 Shop Road, Columbia, SC 29201. For more information, visit www.scdmvonline.com or call 1-800-447-0000.

Certificate of Service

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage aid, or in the interagency Mail Service addressed to the party (ies) or their attorney(s).

This 15th day of December 2011

By: 

Title: Administrative Coordinator, OMVH

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Court Judge

Docket No. 2012-211047

Mark Schnee, ... Appellant.

v.

West Columbia Police Department and
South Carolina Department of Motor Vehicles, ... Respondents,

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.

April 10, 2013


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The Leddy Law Firm, LLC.
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Other Counsel of Record:
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Columbia, SC 29201

RECEIVED

APR 12 2013

SC Court of Appeals