

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Appellate Case No: 2014-001025

Jennifer K. Salter,

Appellant,

v.

South Carolina Department of Motor Vehicles
and Conway Police Department, Of whom South
Carolina Department of Motor Vehicles is the

Respondent.

RECORD ON APPEAL

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SC Court of Appeals

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

Conway Police Department,	)	Docket No. 13-OMVH-01-2242-CC
and	)	
South Carolina Department of Motor	)	
Vehicles,	)	
	)	
Petitioners,	)	
	)	FINAL ORDER AND DECISION
vs.	)	
	)	
Jennifer K. Salter,	)	
	)	
Respondent.	)	
	)	

Appearances:

For the Respondent: Michael O'Sullivan, Esquire

Others: Jennifer K. Salter, Respondent

For the Petitioners: (Witness) Kendall Dixon, Conway Police Department

Other Information:

Respondent's Driver's License # 100461720

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

Respondent's alleged refusal to take chemical test(s)

INTRODUCTION

This matter is before the South Carolina Office of Motor Vehicle Hearings (OMVH) upon a request by Jennifer K. Salter for a contested case hearing. Respondent was arrested on April 11, 2013 for an offense arising out of an act alleged to have been committed while she was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol

and drugs. Upon refusal to submit to testing of her breath, blood or urine to determine her alcohol concentration, Respondent was charged with a violation of S. C. Code Ann. §56-5-2950 (Supp. 2012) and received a notice of suspension from the investigating officer. The matter was assigned to me to conduct a hearing.

Written notice of the hearing was sent to the Petitioners, (Conway Police Department and South Carolina Department of Motor Vehicles), and to the Respondent. It was held on July 16, 2013 at the Horry County Historical Court House in Conway, South Carolina. After reviewing the entire record and considering all the evidence, I find that the suspension of Respondent's driver's license or driving privilege is sustained.

ISSUES

Counsel for the Respondent stipulated the following issue:

1. The Respondent was lawfully arrested or detained.

Counsel for the Respondent contested the following issues:

1. Whether the Respondent was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950
2. Whether the Respondent refused to submit to a test pursuant to Section 56-5-2950.

FINDINGS OF FACT

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

1. Notice of the date, time, place, and subject matter of the hearing was timely given to the parties.

2. On April 11, 2013, Jennifer K. Salter, the Respondent, was lawfully arrested for Driving under the Influence by Officer Kendall Dixon of the Conway Police Department, as stipulated by counsel for the Respondent.
3. Officer Dixon transported the Respondent to the Horry County Detention Center for the offering of the breath test.
4. Counsel for the Respondent entered a copy of the DataMaster Test room videotape into the record as an exhibit.
5. At 5:13:49, the Respondent and Officer Dixon entered the DataMaster Test room.
6. At 5:14:02, the Respondent told Officer Dixon that her father had been a State Trooper.
7. At 5:15:05, Officer Dixon escorted the Respondent out of the observation room and moved her handcuffs from the front of her body to her back. He instructed her not to try to move them.
8. At 5:15:51, Officer Dixon advised the Respondent that she was being video-recorded.
9. At 5:15:54, Officer Dixon advised the Respondent that a breath sample was being requested. The Respondent replied: "We already know that isn't going to happen".
10. At 5:16:08, Officer Dixon read the Respondent the appropriate Implied Consent Advisement (Driving under the Influence Advisement).
11. While Officer Dixon read the Implied Consent Advisement, the Respondent made verbal "smart" remarks.
12. At 5:17:35, Officer Dixon asked the Respondent if she understood the Implied Consent Advisement, and she stated: "Unfortunately, yes".
13. At 5:17:43, the Respondent's mouth was checked for foreign material. The Respondent had jewelry in her lower lip. She sat down on the floor and moved her handcuffs from behind her body to her front and removed the jewelry inside her mouth.
14. At 5:21:17, Officer Dixon told the Respondent that she would be observed for twenty (20) minutes.
15. At 5:30:53, another officer and an arrestee entered the DataMaster Test room.
16. At 5:32:59, the other officer read and gave the arrestee a copy of the Implied Consent Advisement.

17. At 5:33:36, Officer Dixon handed the Respondent a copy of her Implied Consent Advisement in writing.
18. At 5:33:50, the Respondent asked Officer Dixon what she was suppose to do with the copy of the advisement, and she pushed the copy of the advisement back through an opening in the window separating them. The Respondent told Officer Dixon to keep the copy of the advisement for her.
19. At 5:38:18, Officer Dixon asked the Respondent to step to the opening in the window. He stated that he wished to show her how to give a breath sample even though she had already refused the test.
20. At 5:40:23, Officer Dixon pushed the breath tube connected to the DataMaster Test machine through the opening in the window. The Respondent walked away from the opening in the window and leaned against the adjacent wall. Officer Dixon held the breath tube through the window opening until the DataMaster Test machine timed out after two (2) minutes.
21. The Respondent refused to approach the breath tube and submit to the breath test offered to her by Officer Dixon.
22. At 5:43:23, the Respondent stated that she was going through the motions, but that the test was "bull ____". (expletive)
23. At 5:47:09, Officer Dixon read the Respondent her Notice of Suspension.
24. At 5:48:51, Officer Dixon asked the Respondent if she was willing to sign for copies of the Advisement of Implied Consent Rights, the Breath Alcohol Analysis Test Report, and the Notice of Suspension.
25. The Respondent talked to herself or attempted to talk with Officer Dixon "on and off" during the entire testing procedure. She also attempted to open the door separating her and Officer Dixon three (3) times. Officer Dixon had to advise the Respondent to remain inside the observation room until she was instructed to leave.
26. Officer Dixon is a certified DataMaster Test Operator.
27. The Respondent was charged with a violation of S.C. Code Ann. §56-5-2950 for refusing to submit to a breath test.

28. On April 11, 2013, the Respondent was issued a Notice of Suspension by Officer Dixon which suspended her driver's license or driving privilege.

CONCLUSIONS OF LAW

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

General

1. In S. C. Code Ann. §1-23-600 (Supp. 2012), the General Assembly provided for the creation of the South Carolina Division of Motor Vehicle Hearings. Effective January 1, 2006, the DMVH was authorized to employ Hearing Officers to preside over contested case hearings involving suspensions, cancellations, or revocations of drivers' licenses. The name of the DMVH was changed to the Office of Motor Vehicle Hearings (OMVH) effective October 1, 2008.
2. All hearings presided over by Hearing Officers of the OMVH must be conducted in accordance with the Administrative Procedures Act (APA) and the rules of procedure of the OMVH. A filing of a request for a hearing stays the suspension until a final decision is issued. S. C. Code Ann. §56-5-2951(G).
3. Appeals from final decisions of the Hearing Officers will be to the SCALC in accordance with S. C. Code Ann. § 1-23-600 (Supp. 2012).
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 Pembury 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. 2012), it is unlawful for a person to drive a motor vehicle within this State while:

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

Implied consent to submit to testing

7. S.C. Code Ann. § 56-5-2950(A) (Supp. 2012) 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. 2012).

8. S.C. Code Ann. § 56-5-2950(B) (Supp. 2012) 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. 2012).

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. 2012).

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.2012). 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. Counsel for the Respondent argued that the suspension of Respondent's driver's license or driving privilege should be rescinded based on Officer Dixon not giving the Respondent a copy of the Implied Consent Advisement in writing prior to the commencement of the testing procedure as required by Section 56-5-2950 (B) and SLED guidelines.

Based on the DataMaster Test room video submitted by counsel for the Respondent as an exhibit for the record, Officer Dixon read the appropriate Implied Consent Advisement (Driving under the Influence Advisement) to the Respondent at 5:16:08; however, he did not give the Respondent a copy of the advisement until 5:33:36. The Respondent stated that she understood the advisement after it had been read to her by Officer Dixon. Counsel argued that the officer's failure to give the Respondent a copy of the Implied Consent Advisement as it was read to her did not follow SLED guidelines or the requirements set forth in Section 56-5-2950(B). However, counsel offered no evidence that the Respondent was prejudiced by the sequence of events. Counsel offered no such evidence. The Respondent was present for the administrative hearing; however, no testimony was heard from her concerning prejudice. Counsel did not argue any view of the record by which prejudice might be inferred. In the absence of evidence that the alleged error could have prejudiced the Respondent, or cause him to make any decision differently than he did, he can not prevail. Taylor v. S.C. Dep't of Motor Vehicles, 337 S.C. 567, 677 S.E.2d 588 (2009).

I find the Respondent was properly advised of her Implied Consent Rights. Accordingly, the relief requested by the Respondent must be denied.

13. I conclude as a matter of law that the Petitioners have met the burden of proof pursuant to Section 56-5-2950. The Respondent was lawfully arrested for Driving under the Influence, as stipulated by counsel for the Respondent; the Respondent was read and later given a copy of the appropriate Implied Consent Advisement (Driving under the Influence Advisement) in writing; and the Respondent refused the breath test by verbally stating that she would not submit to the

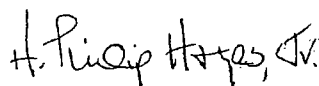
breath test and later walking away from the breath tube connected to the DataMaster Test machine when it was time to give the machine a breath sample. Accordingly, the relief requested by the Respondent is denied.

ORDER

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

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

AND IT IS SO ORDERED.



H. Philip Hayes, Jr.
OMVH Hearing Officer

July 31, 2012
Florence, South Carolina

CERTIFICATE OF SERVICE

I, Frances L. Inabinet, hereby certify that I have this date served this Order upon all parties to this caused 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).

A handwritten signature in cursive script that reads "Frances L. Inabinet". The signature is written in dark ink and is positioned above a horizontal line.

Frances L. Inabinet

July 31, 2013

Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Jennifer K. Salter,

Appellant,

vs.

South Carolina Department of Motor
Vehicles, and Conway Police Department,

Respondents.

Docket No. 13-ALJ-21-0428-AP

ORDER

This is an appeal by Jennifer K. Salter (Appellant) from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings (OMVH) following an administrative hearing held pursuant to S.C. Code Ann. § 56-5-2951 (Supp. 2013) upholding the decision of the South Carolina Department of Motor Vehicles (DMV) suspending Appellant's driver's license. The Administrative Law Court (ALC or Court) has jurisdiction to review this matter pursuant to S.C. Code Ann. § 1-23-600 (Supp. 2013). Upon review of this matter, the OMVH's Final Order and Decision is affirmed.

BACKGROUND

On April 11, 2013, Officer Kendall Dixon of the Conway Police Department arrested and charged the Appellant with driving under the influence of alcohol, drugs, or a combination of alcohol and drugs. Officer Dixon then transported Appellant to the Horry County Detention Center. Once in the Breath Analysis/DataMaster Room, Appellant was advised that she was being audio and video recorded and her Implied Consent Rights were read to her, but she was not given a written copy at that time. During the twenty-minute waiting period, Officer Dixon observed another individual being advised and given a written copy of the Implied Consent Rights. Officer Dixon then provided Appellant with her written Implied Consent Rights, seventeen minutes after beginning the test procedure. Appellant refused to submit to a breath analysis testing. Officer Dixon issued a written Notice of Suspension of Appellant's driver's license and Appellant was charged with a violation of S.C. Code Ann. § 56-5-2950 for refusing to submit to a chemical test of her breath. Appellant timely requested a hearing before the OMVH. Appellant's hearing was held on July 16, 2013, before

FILED

April 9, 2014

SC ADMIN. LAW COURT

Hearing Officer H. Philip Hayes, Jr. Officer Dixon initially testified that he provided Appellant with her Implied Consent Rights, and they were read to her. The Breath Analysis Room video was reviewed, and upon cross examination, Officer Dixon admitted that he had not provided Appellant with her Implied Consent Rights in writing prior to reading them. He also admitted that he failed to comply with written SLED procedures and South Carolina Code 56-5-2950 (2009). On July 31, 2013, the OMVH issued the decision sustaining Appellant's suspension. Appellant filed an appeal with the ALC on August 26, 2013.

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660 (Supp. 2013). Therefore, the OMVH is an "agency" under the Administrative Procedures Act (APA). See S.C. Code Ann. § 1-23-310(2) (2005). As such, the APA's standard of review governs appeals from decisions of the OMVH. See S.C. Code Ann. § 1-23-380 (Supp. 2013); 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, including the ALC, to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2013). 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) (Supp. 2013).

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. 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 Res. 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.

ISSUE ON APPEAL

Did the hearing officer err in finding that Appellant was properly advised of her Implied Consent Rights and in sustaining the suspension of Appellant's driving privileges?

DISCUSSION

Appellant argues that the Final Order and Decision of the Hearing Officer should be reversed and the driver's license suspension should be rescinded because the evidence showed Officer Dixon failed to follow SLED procedures. Officer Dixon admitted that he failed to comply with S.C. Code Ann. § 56-5-2950(B) when he did not provide Appellant with her Implied Consent Rights in writing prior to beginning the testing procedure.

The Department concedes that the officer failed to give Appellant a written copy of the Implied Consent Rights prior to the commencement of the testing procedure. The Department contends, however, that the Hearing Officer correctly found the Appellant was properly advised of her rights in that they were read to Appellant and she was given a written copy later. Because there was no showing of prejudice to the Appellant as a result of the officer's failure to provide the written copy of the Implied Consent Rights prior to beginning the testing procedure, such failure does not require the recession of the suspension. Taylor v. S.C. Dept. of Motor Vehicles, 382 S.C. 567, 677

S.E.2d 588 (2009). (“Given that it is undisputed [Appellant] was advised of the implied consent warning, the Court of Appeals properly found he suffered no prejudice from the officer’s lack of written notice.”)

In order for Appellant to prevail because the written copy of the implied consent warning was given to her belatedly, there must be a showing of prejudice. The South Carolina Supreme Court has held that “the criterion in § 56-5-2951(f) are simply factors which the DMV may consider in determining whether to uphold a suspension....[A]n examination of the four factors with an eye toward prejudice is the proper inquiry.” Id. The Appellant made no showing that the failure of the officer to provide the written copy of the Implied Consent Rights prior to beginning the testing procedure materially affected the fairness of the testing procedure.

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.

Deborah Brooks Durden
Administrative Law Judge

April 9, 2014
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

April 9, 2014
Columbia, South Carolina

FILED

April 9, 2014

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Jennifer K. Salter,

Appellant,

V.

Conway Police Department
and South Carolina Department of
Motor Vehicles,

Respondent,

Docket No.: 13-OMVH-01-2242-CC

NOTICE OF APPEAL

On or about July 31, 2013, counsel for Appellant received the Final Order and Decision in the above referenced matter issued on July 31, 2013 resulting from a hearing held on July 16, 2013, before Hearing Officer H. Phillip Hayes, Jr.. Appellant respectfully petitions this Court for review and reversal of the Final Order and Decision based upon the following:

1. The OMVH Hearing Officer erred in finding that Appellant was properly advised of her Implied Consent Rights even though the arresting officer admitted he failed to follow SLED procedures and admitted he failed to comply with South Carolina Code Section 56-5-2950(B) when he did not provide Appellant with her Implied Consent Rights in writing; and
2. The OMVH Hearing Officer erred in finding that Appellant was not prejudiced when the arresting officer failed to properly advise Appellant of his implied consent rights in writing; and
3. Any and all other properly preserved issues as permitted by SCALC Rules 33 and 37.

Respectfully Submitted,

THE LAW OFFICE OF MICHAEL J. O'SULLIVAN

Michael J. Baller

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Appellant

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Telephone: (843) 957-9279
Email: mosullivanlaw@gmail.com
Attorney for Appellant

This 26th day of August, 2013.

AUG 26 2013

SCOMVH

STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT

Jennifer K. Salter,	)	Docket No.: 13-ALJ-21-0428-AP
	)	
	)	
Appellant,	)	
	)	
v.	)	BRIEF OF APPELLANT
	)	
Conway Police Department	)	
and South Carolina Department of	)	
Motor Vehicles,	)	
	)	
Respondent,	)	
	)	

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ATTORNEY FOR APPELLANT

Jennifer K. Salter,

Appellant,

v.

Conway Police Department
and South Carolina Department of
Motor Vehicles,

Respondent,

Docket No.: 13-ALJ-21-0428-AP

BRIEF OF APPELLANT

STATEMENT OF ISSUES ON APPEAL

- ## STATEMENT OF THE CASE

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she was not provided with a written copy of these Implied Consent Rights. **(R. p. 10, and p. 14)**. After Officer Dixon had Appellant remove a lip ring from her mouth, he commenced the twenty minute waiting period. **(R. p. 10 – 11)**. Upon observing another individual being properly advised of her Implied Consent Rights and being handed those rights in writing on the other side of the Breath Analysis Room, Officer Dixon then provided Appellant with her written Implied Consent Rights seventeen minutes after beginning the testing procedure. **(R. p. 18-19)**. Officer Dixon alleged Appellant refused to submit to breath analysis testing, and her license was suspended. **(R. p. 11)**.

Appellant timely requested an administrative hearing pursuant to S.C. Code Section 56-5-2951. A hearing was held before OMVH Hearing Officer H. Phillip Hayes, Jr. on July 16, 2013. Officer Dixon initially testified that he provided Appellant with her Implied Consent Rights, and they were read to her. **(R. p. 10)**. The Breath Analysis Room video recording was reviewed. **(R. p. 16-21)**. On cross-examination, Officer Dixon admitted that he had not provided Appellant with her Implied Consent Rights in writing prior to reading them to her. **(R. p. 14)**. He further admitted he did not comply with the written SLED procedures or South Carolina Code 56-5-2950 (2009). **(R. p. 22)**.

Counsel for Appellant argued that because Appellant was not advised of her Implied Consent Rights in writing prior to the commencement of the testing procedure as required by South Carolina Code 56-5-2950 (2009), the suspension should be rescinded. **(R. p. 24)**. In an order dated July 31, 2013, OMVH Hearing Officer Hayes ruled that Appellant had been properly advised of her Implied Consent Rights and her driving privileges should remain suspended. **(R. p. 37)**. Notice of Appeal to this court was filed on August 26, 2013. **(R. p. 29)**.

ARGUMENT

- I. The OMVH Hearing Officer erred in finding that Appellant was properly advised of her Implied Consent Rights and in sustaining the suspension of Appellant's driving privileges even though the evidence showed and the officer admitted he failed to follow SLED procedures and admitted he failed to comply with South Carolina Code Section 56-5-2950(B) when he did not provide Appellant with her Implied Consent Rights in writing prior to beginning the testing procedure.**

South Carolina Code Section 56-5-2950 is titled "Implied Consent to testing for alcohol or drugs; procedures; inference of DUI," and subsection (B) of this section states:

(B) 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 test 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.

The failure of Officer Dixon to provide Appellant with her Implied Consent

Rights in writing prior to the commencement of the testing procedure is a statutory violation of South Carolina law and resulted in Appellant not being lawfully and properly advised of her rights as intended by the legislature in promulgating this statute. In fact, “SLED Forensic Form # ICS 010, February 2009” entitled “ADVISEMENT OF IMPLIED CONSENT RIGHTS” instructs the officer on the proper legal procedure for advising a subject of his or her Implied Consent Rights, and it clearly instructs the officer to “(B) Provide subject with a written copy of the following advisement and read the advisement to the subject.” (R. p. 43). On cross-examination during the administrative hearing, Officer Dixon admitted that he had not provided Appellant with her Implied Consent Rights in writing prior to reading them to her. (R. p. 14). He further admitted he did not comply with the written SLED procedures or South Carolina Code 56-5-2950 (2009). (R. p. 22). In fact, it wasn’t until seventeen minutes after beginning the testing procedure that Officer Dixon provided Appellant with her Implied Consent Rights in writing. (R. p. 37). Despite the officer and Appellant agreeing there was not a proper advisement of Implied Consent Rights and the video evidence clearly showing the officer’s failure to properly advise, the hearing officer somehow found Appellant was “properly advised of her Implied Consent Rights.” (R. p. 37). The hearing officer appears to rely on Taylor v. S.C. Dep’t of Motor Vehicles, 382 S.C. 567, 677 S.E.2d 588 (2009), to support his findings.

In the Taylor case, our state Supreme Court decided in a 3-2 decision that a reading of the appropriate Implied Consent Rights form was all that was necessary to properly advise a defendant of his or her Implied Consent Rights absent a showing of prejudice by the suspended driver. However, reliance upon this case as precedential law

governing this matter is misguided. The Taylor case interpreted a statute which no longer exists (56-5-2950 (2006)) and has not existed since it was replaced with the current S.C. Code Section 56-5-2950 in February of 2009. The current S.C. Code Section 56-5-2950 (2009) (of note because it is the applicable law governing this matter) has yet to be interpreted by our state Appellate Courts.

The language of the no longer viable S.C. Code § 56-5-2950 (2006) stated “No tests may be administered or samples obtained unless the person has been informed in writing that” The current S.C. Code § 56-5-2950 (2009) advances the severity and specificity of this requirement by noting a specific time for when the written rights must be provided in stating “**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” (**Emphasis added**).

The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002). The determination of legislative intent is a matter of law. Charleston County Parks & Recreation Comm’n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995). The legislature’s intent should be ascertained primarily from the plain language of the statute. State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002). If a statute’s language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Paschal v. State Election Comm’n, 317 S.C. 434, 454 S.E.2d 890 (1995); Cowan v. Allstate Ins. Co., 351 S.C. 626, 631, 571 S.E.2d 715, 717 (Ct. App. 2002). When the terms of a statute are

clear, the court must apply those terms according to their literal meaning. Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

There is absolutely nothing ambiguous about S.C. Code § 56-5-2950 (B) (2009), and the legislative intent has been made even more lucid through the current increased specificity of the statute. If upon activation of the video recording equipment and **prior to the commencement of the testing procedure** the person has not been given a written copy of **and** verbally informed of his or her Implied Consent Rights, **no tests may be administered** or samples obtained. The statute does not state the person must be advised in writing **or** verbally informed nor does it state that tests may be administered if there is no prejudice to the accused. This code section is a requirement placed upon law enforcement to ensure the protection of our citizens in a process where legal counsel is not permitted to aid the accused, and to shift the burden to the citizen to show prejudice where law enforcement has been derelict in their duties is a miscarriage of justice. South Carolina Code § 56-5-2950 (B) (2009) in and of itself provides required actions on behalf of the State and the consequences for failing to perform those required actions. If you don't provide Implied Consent Rights verbally and in writing prior to commencing the testing procedure, you may not administer any test. Clearly, if a test cannot lawfully be administered by law enforcement, then there cannot be a penalty to a citizen who refuses the unlawful test. In fact, Justice Beatty's dissenting opinion (concurring with Justice Pleicones) in Taylor, specifically states "In my view, the Department of Motor Vehicles

cannot suspend a driver's license because driver refused to take a test that the law enforcement officer was not authorized to administer." Taylor, 382 S.C. at 571.

Although the Taylor case is not binding precedent in this matter because it interpreted a statute which no longer exists, it is possible this court may be influenced by that decision in its interpretation of South Carolina Code § 56-5-2950 (2009). I respectfully submit that for this court, in interpreting the current South Carolina Code § 56-5-2950 (B) (2009), to follow in the footsteps of the Taylor Court's interpretation of South Carolina Code § 56-5-2950 (2006) would be to repeat an error. The Taylor court ignored the rules of statutory interpretation by ignoring the plain language "No tests may be administered" and instead found a different subsection of the statute to impose a requirement that prejudice be shown. The Taylor court utilized the catch all provision of South Carolina Code § 56-5-2950 (2006) (Subsection (e)), to require prejudice be shown. This catch all provision (subsection (J) in the current South Carolina Code § 56-5-2950 (2009)) is included in the statute to encompass the consequences for violations of provisions in the statute where no consequence for failure to comply are noted. This catch all provision was properly applied in State v. Huntley, 349 S.C. 1, 562 S.E. 2d 472 (2002). In that case, the wrong concentration of test solution was used to calibrate the machine and because no specific remedy is proscribed for this violation of the statute, a prejudice analysis under the catch all provision was proper. However, both South Carolina Code § 56-5-2950 (2006) and South Carolina Code § 56-5-2950 (B) (2009), specifically note the consequence for failure to comply with the Implied Consent advisement requirements: "No tests may be administered or samples obtained."

Since the consequence for failure to properly advise of Implied Consent Rights is specifically noted in South Carolina Code § 56-5-2950 (B) (2009), the analysis in Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) is more appropriately compared to this matter than would be the Huntley case. In Suchenski, the Court refused to apply the prejudice analysis noted in Huntley because the statute in question (S.C. Code § 56-5-2953) specifically noted the consequence for failure to comply with statutory requirements and therefore, there was no requirement to show prejudice.

It is note worthy that the catch all provision (South Carolina Code § 56-5-2950 (J) (2009)), provides for the exclusion of “any test results.” It would appear it specifically notes exclusion of test **results** in contemplation of the fact that if Implied Consent Rights were not properly advised, no tests would be authorized under South Carolina Code § 56-5-2950 (B) (2009) and there would be no results to exclude.

Lastly, if the legislature had intended for the catch all provision (South Carolina Code § 56-5-2950 (J) (2009)) to apply to the failure to advise individuals of their Implied Consent Rights under South Carolina Code § 56-5-2950 (B) (2009), there would be no reason to include the language “No tests may be administered or samples obtained unless.” If the catch all provision of subsection “J” applied, it would render that language meaningless and futile. The court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something. See State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). It is presumed that the General Assembly intended to accomplish something by its choice of words and would not do a futile thing. Gordon v. Phillips Utils., Inc., 362 S.C. 403, 608 S.E.2d 425 (2005).

CONCLUSION

Based upon the foregoing, the July 31, 2013 Final Order and Decision of the OMVH Hearing Officer should be reversed, and the driver's license suspension of Appellant should be rescinded.

Respectfully Submitted,

Law Office of Michael J. O'Sullivan

Michael J. O'Sullivan
P.O. Box 1785
Conway, South Carolina 29528
Telephone: (843) 957 – 9279
E-mail: mosullivanlaw@gmail.com
ATTORNEY FOR APPELLANT

This 6th day of November, 2013.

THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT
ALJ DOCKET NO. 13-ALT-21-0428-AP

H. PHILLIP HAYES, JR., HEARING OFFICER

JENNIFER K. SALTER APPELLANT

VS

SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES RESPONDENT

BRIEF OF RESPONDENT

LINDA ANNETTE GRICE SC Bar # 2260
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PHILIP S. PORTER
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Counsel for the Respondent

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

Jennifer K. Salter,

Appellants,

v.

South Carolina Department of Motor Vehicle,

Respondent.

Docket No. 13-ALJ-21-0428-AP
SCDL No. 100461720

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

This case comes before the Administrative Law Court pursuant to the appeal Jennifer K. Salter, which seeks review of the July 01, 2013 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 ISSUE ON APPEAL

The hearing officer did not err in finding that Appellant was properly advised of her Implied Consent Rights and in sustaining the suspension of Appellant's driving privileges.

STATEMENT OF THE CASE

The Appellant was arrested for on April 11, 2013 for an offense arising out of an act alleged to have been committed while she was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. Upon refusal to submit to testing of breath, blood or urine to determine her alcohol concentration Appellant was charged with a violation of S.C. Code Ann. § 56-5-2950. A notice of suspension was issued by the investigating officer. Appellant timely requested a hearing which was held, after notice to the parties, on July 16, 2013. After reviewing the record and considering all the evidence, the hearing officer sustained the suspension of the Appellant's driving license or driving privileges.

The Appellant then timely 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.

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*. In *Lark*, our Supreme Court quoted *Consolo v. Federal Maritime Commission*, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966), to define substantial evidence:

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

Lark, 276 S.C. at 136, 276 S.E.2d at 311. *See, also*, *Dorman v. DHEC*, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002); *Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc.*, 311 S.C. 295, 422 S.E.2d 118 (1992).

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 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

THE HEARING OFFICER DID NOT ERR IN FINDING THAT APPELLANT WAS PROPERLY ADVISED OF HER IMPLIED CONSENT RIGHTS AND IN SUSTAINING THE SUSPENSION OF APPELLANT'S DRIVING PRIVILEGES.

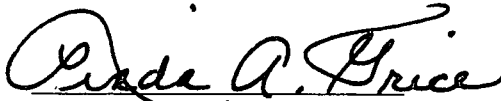
The Department concedes that in the instance case, the officer did not give the Appellant a written copy of the Implied Consent Rights *prior* to the commencement of the testing procedure. However, the Hearing Officer correctly found that the Appellant was properly advised of her rights in that they were read to her and she was given a written copy later. The Hearing Officer concluded that the Appellant "stated that she understood the advisement after it had been read to her by Officer Dixon (ROA p. 37). Appellant argues that the Final Order and Decision of the OMVH Hearing Officer should be reversed, and the driver's license suspension of Appellant should be rescinded because the evidence showed and the officer admitted that he failed to follow SLED procedures and admitted he failed to comply with South Carolina Code Section 56-5-2950 (B) when he did not provide Appellant with her Implied Consent Rights in writing prior to beginning the testing procedure. This argument has no merit, as it is established law that in order for the Appellant to prevail with this argument, there must be a showing of prejudice. The Appellant made no showing that the failure of the officer to follow the procedures as outlined in the statute materially affected the fairness of the testing procedure. Pursuant to 56-5-2950(J), a Hearing Officer must not only find that there was a failure to follow any policies, procedures, regulations, there must also be a ruling as to the specific manner in which such failure materially affected the accuracy of any test results or the fairness of the procedures.

Therefore, because there was no showing of prejudice to the Appellant as a result of the officer's failure to provide the written copy to the Appellant prior to beginning the testing procedure, such failure does not result in rescission of the suspension without resulting prejudice. *See. Taylor v. S.C. Dep't of Motor Vehicles*, 382 S.C. 567, 677 S.E.2d 588 (2009) Thus, there are no grounds upon which to rescind Appellant's suspension.

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,

A handwritten signature in black ink, appearing to read "Linda A. Grice", written in a cursive style.

LINDA ANNETTE GRICE SC Bar # 2260

Assistant General Counsel

PHILIP S. PORTER

Deputy General Counsel

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November 21, 2013

Blythewood, South Carolina

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

Jennifer K. Salter,

Petitioner,

v.

South Carolina Department of Motor Vehicle,

Respondent.

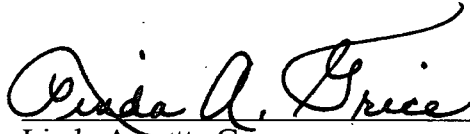
Docket No. 13-ALJ-21-0428-AP
SCDL No. 100461720

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the November 21, 2013, I mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing Brief to

Michael J. O'Sullivan, Esquire
Post Office Box 1785
Conway, South Carolina 29528

as counsel of record for Jennifer K. Salter.



Linda Annette Grice
Office of General Counsel

November 21, 2013

Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 13-ALJ-21-0428-AP

Jennifer K. Salter..... Appellant

v.

Conway Police Department and South Carolina Department of Motor Vehicles of
whom South Carolina Department of Motor Vehicles is the Respondent

NOTICE OF APPEAL

Jennifer K. Salter appeals the decision of the Honorable Deborah Brooks Durden dated April 9, 2014. Appellant received notice of this decision via electronic mail on April 10, 2014.

May 6, 2014



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Attorney for Appellant

Other Counsel of Record:

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Attorney for Respondent SCDMV

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 13-ALJ-21-0428-AP

Jennifer K. Salter..... Appellant

v.

Conway Police Department and South Carolina Department of Motor Vehicles of
whom South Carolina Department of Motor Vehicles is the Respondent

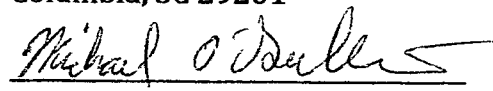
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the South Carolina Department of Motor Vehicles by depositing a copy of it in the United States Mail, postage prepaid, on May 6, 2014, addressed to the attorney of record, Frank L. Valenta, Jr. at the below noted address. Further, in accordance with SCACR 203 (d)(2)(B), I have served the Administrative Law Court by depositing a copy of the Notice of Appeal in the United States Mail, postage prepaid, on May 6, 2014, addressed as indicated below.

Frank L. Valenta, Jr.
Post Office Box 1498
Blythewood, SC 29016

May 6, 2014

S.C. Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201


Michael J. O'Sullivan
Post Office Box 1785
Conway, SC 29528
Attorney for the Appellant

Jennifer K. Salter,
Appellant,

VS.

South Carolina Department of Motor
Vehicles,

RECORD ON APPEAL

In The Administrative Law Court

Phil Hayes, Hearing Officer

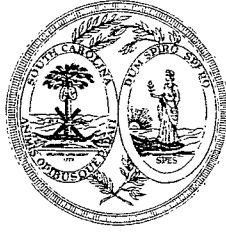
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Attorney for Appellant

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

RALPH K. ANDERSON, III
Director



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October 9, 2013

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

Re: S.C. Dept of Motor Vehicles
vs
Jennifer K. Salter
SCDL/Customer NO.: 100461720

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: Michael J. O'Sullivan, Esquire
Frank L. Valenta, SCDMV General Counsel

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Jennifer K. Salter,

Appellant,

v.

South Carolina Department of Motor
Vehicles and Conway Police Department,

Respondents.

NOTICE OF ASSIGNMENT

DOCKET NO. 13-ALJ-21-0428-AP

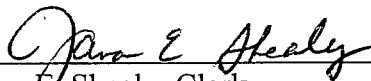
NOTICE IS GIVEN that a notice of appeal seeking review of agency action was filed on August 26, 2013. In accordance with S.C. Code Ann. § 1-23-570 (Supp. 2012), the **Honorable Deborah Brooks Durden**, Administrative Law Judge, has been assigned to preside in this appeal. The Administrative Law Judge 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 September, 2013.

Ralph King Anderson, III
Chief Administrative Law Judge

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

FILED

SEP 06 2013

40
SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department)
of Motor Vehicles,)
Appellant,)
vs.)
Jennifer Salter,)
Respondent.)
-----)

COPY

TRANSCRIPT OF AUDIO FILE



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1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

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1 **HEARING OFFICER:** I am Phil Hayes and I've
2 appointed by the South Carolina Administrative
3 Law Court to preside at this implied consent
4 hearing held in conjunction with the
5 respondent's alleged refusal to submit to tests
6 at the request of the arresting officer.
7 Attorney O'Sullivan, of the issues to be
8 decided here today, are any or all contested?

9 **MR. O'SULLIVAN:** Yes, Your Honor.

10 **HEARING OFFICER:** All contested?

11 **MR. O'SULLIVAN:** We contest that implied consent
12 was complied.

13 **HEARING OFFICER:** Okay. So you are stipulating to
14 the lawful arrest and the refusal?

15 **MR. O'SULLIVAN:** Yes, we're not arguing -- we're
16 not arguing the arrest. We are arguing the
17 refusal because we believe that the implied
18 consent --

19 **HEARING OFFICER:** Okay. So you're contested issues
20 will be the implied consent advisement --

21 **MR. O'SULLIVAN:** Yes.

22 **HEARING OFFICER:** -- and the refusal, is that
23 correct?

24 **MR. O'SULLIVAN:** Yes, sir.

25 **HEARING OFFICER:** And you are stipulating to the



1 lawful arrest?

2 **MR. O'SULLIVAN:** We are not contesting the arrest.

3 **HEARING OFFICER:** Okay. For the State, the only
4 contested issues is the implied consent
5 advisement and the refusal. Let the record
6 show that the respondent, Jennifer K. Salter,
7 is represented by Attorney Michael O'Sullivan.
8 The entire proceedings are being tape recorded
9 for departmental reference and are a matter of
10 public record. All those present who intend to
11 testify in this matter, please identify
12 yourself for the record by your full name, your
13 address, and your position as related to this
14 matter. You are requested to raise your right
15 hand for administration of oath. Your name,
16 sir?

17 **OFFICER DIXON:** Officer Kendall Dixon.

18 **HEARING OFFICER:** Work address?

19 **OFFICER DIXON:** 200 Laurel Street.

20 **HEARING OFFICER:** And you are the arresting officer
21 and Datamaster operator?

22 **OFFICER DIXON:** Yes, sir.

23 **HEARING OFFICER:** Do you solemnly swear that the
24 testimony you're about to give in this matter
25 will be the truth, the whole truth, and nothing



1 but the truth?

2 **OFFICER DIXON:** Yes, sir.

3 **HEARING OFFICER:** Okay. And Attorney O'Sullivan,
4 is the respondent going to enter testimony?

5 **MR. O'SULLIVAN:** Your Honor, I -- if it pleases the
6 Court, I would like her to be sworn in for that
7 possibility.

8 **HEARING OFFICER:** Okay. Ma'am, your name?

9 **MS. SALTER:** Jennifer K. Salter.

10 **HEARING OFFICER:** If you'll speak up, please.

11 **MS. SALTER:** Jennifer K. Salter.

12 **HEARING OFFICER:** Your address?

13 **MS. SALTER:** 503 33rd Avenue North, Myrtle Beach,
14 South Carolina.

15 **HEARING OFFICER:** And you are the respondent?

16 **MS. SALTER:** Yes, sir.

17 **HEARING OFFICER:** If you'll raise your right hand,
18 please, ma'am. Do you solemnly swear that the
19 testimony you're about to give in this matter
20 will be the truth, the whole truth, and nothing
21 but the truth?

22 **MS. SALTER:** Yes, sir.

23 **HEARING OFFICER:** Okay. Arresting officer have
24 testimony he'd like to enter at this time.
25 Again, the only contested issues will be the



1 implied consent advisement and the refusal.

2 OFFICER DIXON: Yes, sir.

3 HEARING OFFICER: Okay.

4 DIRECT TESTIMONY BY OFFICER DIXON:

5 OFFICER DIXON: At the time of the subject's
6 arrest, she was read Miranda warnings. The
7 subject was then transported to HCDC, Horry
8 County Detention Center's BA room.

9 HEARING OFFICER: Okay.

10 OFFICER DIXON: Once inside the BA room, she was
11 advised of being video and audio recorded.

12 HEARING OFFICER: Okay.

13 OFFICER DIXON: The subject was issued a copy of
14 the implied consent right form and they were
15 also read to her.

16 HEARING OFFICER: Okay. Continue.

17 OFFICER DIXON: The subject refused to sign the
18 implied consent form.

19 HEARING OFFICER: Continue.

20 OFFICER DIXON: The subject's mouth was checked and
21 an earring or jewelry located in her lower lip
22 had to be removed.

23 HEARING OFFICER: Lower lip?

24 OFFICER DIXON: Yes, sir.

25 HEARING OFFICER: Continue.



1 **OFFICER DIXON:** The subject was then observed for
2 20 minutes.

3 **HEARING OFFICER:** Okay.

4 **OFFICER DIXON:** During the 20 minute observation
5 period, the subject stated she would not give
6 a breath sample.

7 **HEARING OFFICER:** Continue.

8 **OFFICER DIXON:** I continued to observe the subject
9 for the entire 20 minute observation period.

10 **HEARING OFFICER:** Continue.

11 **OFFICER DIXON:** When it was time for the subject to
12 provide a breath sample in the BA machine, she
13 refused to provide a sample.

14 **HEARING OFFICER:** How? How did she refuse?

15 **OFFICER DIXON:** By not placing the instrument
16 inside of her mouth and providing the sample.
17 It was -- she was given every opportunity.

18 **HEARING OFFICER:** Okay. Continue.

19 **OFFICER DIXON:** The subject signed and was issued a
20 South Carolina Department of Motor Vehicles
21 notice of suspension form and she was advised
22 that her South Carolina driver's license would
23 be seized and suspended. The subject was
24 charged with DUI, first offense.

25 **HEARING OFFICER:** Any further evidence or testimony



1 you wish to enter into the record?

2 **OFFICER DIXON:** Yes, sir. A copy of my South
3 Carolina DMT certification.

4 **HEARING OFFICER:** If you'll show that to Attorney
5 even though that is not an issue in this case.

6 **MR. O'SULLIVAN:** That's fine.

7 **HEARING OFFICER:** Any further evidence or
8 testimony?

9 **OFFICER DIXON:** No, sir.

10 **HEARING OFFICER:** Cross?

11 **MR. O'SULLIVAN:** Thank you.

12 **OFFICER DIXON - CROSS-EXAMINATION BY MR. O'SULLIVAN:**

13 Q: Now, in order to -- you just submitted into
14 evidence a record of training, so you've been
15 trained on how to perform breath tests, is that
16 correct?

17 A: Yes, sir.

18 Q: And you've received training on the SLED
19 procedures required for advisement of implied
20 consent rights, is that correct?

21 A: Yes, sir.

22 Q: And in that training, did you become familiar
23 with the advisement of implied consent rights
24 form issued by SLED?

25 A: Yes, sir.



1 Q: Okay. And do you agree with me here that it
2 says provide subject with a written copy of the
3 following advisement and read the advisement to
4 the subject?

5 A: Yes, sir.

6 Q: Okay. And do you know -- are you familiar with
7 statute 56-5-2950 of the South Carolina Code
8 for implied consent?

9 A: Yes, sir.

10 Q: Okay. And do you agree with me that section
11 (b) of that statute says no test may be
12 administered or samples obtained unless upon
13 activating of the video recording equipment and
14 prior to the commencement of the testing
15 procedure the person has been given a written
16 copy of and verbally informed that, and then it
17 goes on to list the requirements for implied
18 consent?

19 A: Yes, sir.

20 Q: You agree with that? And your testimony is
21 that prior to beginning any testing procedure
22 and upon activation of the video equipment, you
23 provided a written copy of the implied consent
24 rights to Ms. Salter?

25 A: It was done after the video when audio was



1 activated.

2 Q: Okay.

3 **HEARING OFFICER:** Okay. You read it to her at what
4 point?

5 A: Upon the activation of the video -- of the
6 video equipment.

7 **HEARING OFFICER:** Okay. Continue.

8 Q: And prior to reading it to her, your testimony
9 is you gave her a written copy of it?

10 A: Once I read the implied consents form, that's
11 when she was provided a copy of it.

12 Q: Okay. Now, so what you're saying is you did
13 not provide her a copy of the form prior to
14 reading her those implied consent rights?

15 A: No, sir.

16 Q: Okay. In fact, it was 20 minutes after you
17 advised her of her implied consent rights that
18 you finally handed her the form?

19 A: I'm not sure.

20 **MR. O'SULLIVAN:** Well, Your Honor, I have brought
21 the video with me today and I can play it on my
22 computer.

23 **HEARING OFFICER:** I don't play videos at the
24 hearing. I will take a copy of that video and
25 I will look at it when I get back to the



1 office.

2 **MR. O'SULLIVAN:** Okay.

3 **HEARING OFFICER:** But I will not watch it here.
4 Time does not allow us to do that. But as I
5 said, I will be more than glad today to take a
6 copy of it when I leave here or if you --

7 **MR. O'SULLIVAN:** I know the exact spot, I can cue
8 it up, you don't have to watch the entire
9 video. It won't take but a couple minutes.
10 This is -- this is crucial to our case because
11 this is -- this is where the failure to provide
12 implied consent occurred. She was never
13 provided with a written copy of the implied
14 consent rights, which it clearly states by
15 statute you can't do any tests unless you
16 provide her with a copy and then read her the
17 rights.

18 **HEARING OFFICER:** Are you saying she was never at
19 all provided a written copy?

20 **MR. O'SULLIVAN:** Once -- once the -- once it was
21 concluded --

22 **HEARING OFFICER:** All right. No, the question was
23 are you saying she was never provided with a
24 written copy?

25 **MR. O'SULLIVAN:** She was provided with a written



1 copy after she had refused and that is not
2 allowable by statute. The statute clearly says
3 you can't even begin a test until --

4 **HEARING OFFICER:** Okay. Where's -- where's your
5 machine to --

6 **MR. O'SULLIVAN:** Right here. All right. I've got
7 it set here to the very -- this is when he
8 informs her that -- well, you'll hear it, but
9 this is where he gives her the advice and
10 informs her she's being videotaped.

11 **(Video is played.)**

12 **HEARING OFFICER:** What did she say, that's not
13 going to happen?

14 **MR. O'SULLIVAN:** (Inaudible) And, Your Honor, you
15 can see this is 5:16 (inaudible), he's advising
16 her (inaudible). And, as you can see, Your
17 Honor, he has not provided her with the written
18 form.

19 **HEARING OFFICER:** He's doing good to read it to
20 her. I don't want to rule on this right now,
21 but do you want me to really watch the rest of
22 that because I mean, I mean, I prefer right now
23 for you to get to the point where you're
24 talking about because from what I'm seeing, he
25 is doing the best he can to read it to her.



1 MR. O'SULLIVAN: Your Honor, I understand your --

2 HEARING OFFICER: Okay. So what is the point right
3 here?

4 MR. O'SULLIVAN: The point --

5 HEARING OFFICER: He's reading. So what do you
6 want me to see on this tape?

7 MR. O'SULLIVAN: What I would like to see, Your
8 Honor, the point is that --

9 HEARING OFFICER: I know what the statute says.

10 MR. O'SULLIVAN: Okay.

11 HEARING OFFICER: So what do you want me to see on
12 the tape?

13 MR. O'SULLIVAN: He has failed to comply with the
14 statute. He does not --

15 HEARING OFFICER: In what respect? You are arguing
16 right now that at that point, she has not
17 received the implied consent advisement, is
18 that correct?

19 MR. O'SULLIVAN: In writing, which it says -- the
20 first line of his instructions --

21 HEARING OFFICER: I understand what it says. You
22 -- I mean, I don't need to be educated on that.

23 MR. O'SULLIVAN: I'm just trying to put it on the
24 record.

25 HEARING OFFICER: I need -- yeah, oh -- and that's



1 no problem. But where did you want to show me
2 that the implied consent was given to the
3 respondent?

4 **MR. O'SULLIVAN:** Okay. That's -- Okay. So after
5 this at 5:18, the observation begins.

6 **HEARING OFFICER:** Right.

7 **MR. O'SULLIVAN:** At 5 -- and this is crucial too.
8 At 5:31, see, there's another area out here.
9 At 5:31, another young lady is brought in and
10 she is advised by a different officer of her
11 implied consent rights, where he actually
12 follows the procedure outlined in the statute
13 where he hands her a copy --

14 **HEARING OFFICER:** I don't -- I'm not -- I'm not
15 worried about that. I just want to know about
16 this case.

17 **MR. O'SULLIVAN:** I know, but I'm -- if you'll just
18 give me a little latitude, Your Honor, he --

19 **HEARING OFFICER:** Okay. What I need -- we're
20 sticking strictly to the issues. I see where
21 it was read. Your issue is that it wasn't
22 given to her as soon as it was read. I want to
23 see where it was given or not given to her.

24 **MR. O'SULLIVAN:** Okay. But what triggers this
25 officer to -- to finally give it to her is he



1 observes the other officer follow the procedure
2 and provide it to the young lady at the time
3 she's being advised. This is -- Okay. At
4 5:33. Sorry.

5 **HEARING OFFICER:** Not a problem. Okay. So it was
6 read -- what time was that that we had on the
7 --

8 **MR. O'SULLIVAN:** It was 5:16 when he advised her --

9 **HEARING OFFICER:** Yeah, okay, read it at 5.

10 **MR. O'SULLIVAN:** And then he began the testing
11 procedure by beginning the 20 minute waiting
12 period.

13 **HEARING OFFICER:** Uh-huh (affirmative response).

14 **MR. O'SULLIVAN:** So the procedure has now been
15 started without ever providing her with a
16 written copy of her advisement rights.

17 **HEARING OFFICER:** And if neither party has an
18 objection if -- is there a breath alcohol
19 analysis test report that I can look at this
20 again when I get back to the office? Do you
21 have that so I can get the code?

22 **MR. O'SULLIVAN:** Oh, yes, Your Honor, this is --

23 **HEARING OFFICER:** Yeah.

24 **MR. O'SULLIVAN:** -- on the bottom of that.

25 **HEARING OFFICER:** Are you going to enter this? Is



1 this mine or do you have a copy I can take?

2 **MR. O'SULLIVAN:** I believe I have a copy of that
3 one.

4 **HEARING OFFICER:** Okay. So you're going to enter
5 this, is that right, so I can look at this
6 video, is that correct?

7 **MR. O'SULLIVAN:** Yes, Your Honor, unless you want
8 to just take the information and --

9 **HEARING OFFICER:** No, I'd rather be able to look at
10 it. I'll have the password and the subject ID.

11 **MR. O'SULLIVAN:** Now, we're closing in on 5:33, but
12 you can see the other lady's coming in. He's
13 about to hand her the form and correctly advise
14 her of her rights. And it's at this point that
15 we believe Officer Dixon realizes okay, I have
16 failed to provide her with a written copy, so
17 now I will try to go ahead and do that.

18 **HEARING OFFICER:** And what I will do for the
19 respondent is I will -- since I have this copy
20 that you have introduced, I will look at the
21 entire breath alcohol test. What time do you
22 have that the form is given to the respondent?

23 **MR. O'SULLIVAN:** It's coming up. It's at 5:33 and
24 40 seconds, so in about 14 seconds here. And,
25 again, now he sees the correct procedure so he



1 tries to give her the form. Doesn't tell her
2 anything about it, what it is or anything, just
3 hands her a form.

4 **HEARING OFFICER:** And that's at what time?

5 **MR. O'SULLIVAN:** That's at 5:33:40.

6 **HEARING OFFICER:** Okay. I will watch that again,
7 so I will make note of that in my order. Okay.
8 Continue with your cross.

9 Q: Okay. So, Officer, you will agree with me that
10 you did not follow the rules on this form which
11 states provide the subject with a written copy
12 of the following advisement and then read the
13 advisement to the subject?

14 A: It doesn't show where I could have also have
15 offered her and where she refused to accept the
16 copy, as well.

17 Q: Officer, I -- the question I've asked you is is
18 it your testimony that you -- we just watched
19 a video where she was not handed the form prior
20 to you reading her --

21 A: Okay. It cut off right after I read her the --
22 and it had skipped to where I did give it to
23 her. I don't know what happened after that.
24 Don't remember what happened after that.

25 Q: Right, but you know you didn't hand it to her



1 prior to reading the --

2 A: No, I -- no, I didn't.

3 Q: Okay. So you would agree that you did not
4 follow this rule noted on the advisement of
5 implied consent rights?

6 **HEARING OFFICER:** Let him look at the rule real
7 quick. I may --

8 Q: So you would not --

9 **HEARING OFFICER:** I see what you're talking about.

10 Q: You did not -- you acknowledge you did not
11 follow that rule?

12 A: Yes, sir.

13 Q: Okay. And as statute, South Carolina Code 56-
14 5-2950, states, you're not to begin the testing
15 procedure until you have provided her her
16 rights in writing, and you agree you did not
17 comply with that statute?

18 A: Yes, sir.

19 Q: Yes, sir, you did not comply?

20 A: No, I did not comply.

21 Q: Okay. And now I know in your -- in your
22 report, I'm going to certainly give this to you
23 to look at --

24 **HEARING OFFICER:** Okay. Are you also introducing
25 this?



1 MR. O'SULLIVAN: Yes, yes, sir.

2 HEARING OFFICER: Okay.

3 MR. O'SULLIVAN: Yes, sir. I would assume the
4 Court will take judicial notice of the code
5 section 56-5-2950.

6 HEARING OFFICER: I will.

7 Q: It says in your report the subject was issued
8 a copy of implied consent rights and they were
9 also read to her. Okay. But as we've
10 established, you read them to her without
11 providing them in writing, then began the
12 tests, and subsequently to that, you provided
13 her with --

14 A: What that means, that's what that means.

15 Q: Okay. So that's correct?

16 A: Yes, sir.

17 Q: Okay.

18 MR. O'SULLIVAN: If you'll just give me one second,
19 Your Honor. Okay. I believe that's going to
20 conclude our presentation, Your Honor.

21 HEARING OFFICER: Is the respondent offering any
22 testimony?

23 MR. O'SULLIVAN: No, sir, Your Honor.

24 HEARING OFFICER: At this time, we'll go to
25 closing. No new evidence or testimony will be



1 entered into the record. Attorney O'Sullivan,
2 do you have a closing?

3 **MR. O'SULLIVAN:** Your Honor, simply we -- we feel
4 we have clearly shown through the evidence and
5 documentation provided to the Court, as well as
6 through the officer's own testimony where he
7 honestly admitted that he failed to comply with
8 the SLED procedures and statute 56-5-2950.
9 Certainly if -- if a defendant is not correctly
10 advised of their implied consent rights in
11 accordance with the statute, they can't be
12 punished for any refusal. In fact, because the
13 statute says no test may be administered or
14 samples obtained until the requirements are
15 followed, and they were never followed. It was
16 never appropriate to begin this test when the
17 officer did. So, consequently, we would ask
18 that the motion -- or the suspension be
19 rescinded and this action be dismissed for
20 failure to comply with the statutory
21 requirements. I don't -- I believe we're all
22 in agreement. The officer's testified that he
23 didn't comply with these regulations and,
24 therefore, we believe it should be dismissed,
25 Your Honor.



1 HEARING OFFICER: The State have closing?

2 OFFICER DIXON: Due to the fact that -- also, if
3 you could take into consideration, the subject
4 did resist that arrest.

5 MR. O'SULLIVAN: Your Honor, this is new evidence.

6 HEARING OFFICER: Okay. No new evidence or
7 testimony, I might hear it though, will not be
8 entered into the record. But anything else you
9 want to say in closing?

10 OFFICER DIXON: No, sir.

11 HEARING OFFICER: This hearing is now concluded.

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

14

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CERTIFICATE

This is to certify the transcript of the DVM v. JENNIFER SALTER consists of Twenty One (21) pages. This transcript was prepared by me without the benefit of my being present during the hearing. Additionally, this transcript was prepared from a audio recording provided to me.

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 this October 1, 2013.

Carenn N. Moore
Carenn N. Moore
Notary Public for South Carolina
My Commission Expires: 3/24/2019

Frances Inabinet

From: Frances Inabinet
Sent: Wednesday, July 31, 2013 11:02 AM
To: 'hpu@scdmv.net'; Conway Police Department (ttyler@cityofconway.com); Conway Police Department (rhill@cityofconway.com); mosullivanlaw@gmail.com
Cc: 'Johnson, Brenda A'
Subject: Jennifer Salter FOD 2242
Attachments: 7-16-13 jennifer salter.pdf; 7-31 Cert. of Serv..pdf

Frances L. Inabinet
Scheduling Assistant to Hearing Officers
Phil Hayes
Robert Harley
Phil Addington
SC Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton St. Ste.325
Columbia SC 29201
803-734-3209
803-734-3200 (fax)

EXHIBITS

Hearing: Conway Police Department, vs. Jennifer K. Salter,
and
South Carolina Department of Motor Vehicles, Petitioners, Respondent.
Petitioners,

Docket No.: 13-OMVH-01-2242-CC

Date of Hearing: July 16, 2013 Location: Horry County Historical Court House

Hearing Officer: H. Philip Hayes, Jr.

() I hereby certify that neither party offered exhibits into the record.

(X) I hereby certify that exhibit(s) were offered into the record and are indicated below.

PETITIONER:

RESPONDENT:

() Notice of Suspension

() Notice of Suspension

() Advisement of Implied Consent Rights

(X) Advisement of Implied Consent Rights

() SLED Breath Alcohol Analysis Test Report

(X) SLED Breath Alcohol Analysis Test Report

() In-car CD-R

() In-car CD-R

() DataMaster site CD-R

(X) DataMaster site CD-R

(X) DataMaster Test certification card

() DataMaster Test certification card

() Other: _____

() Other: _____

() I hereby certify that no exhibits were attached to this form and it was delivered to the OMVH Office by either _____ hand delivery or _____ e-mail.

(X) I hereby certify that the listed exhibits were attached to this form and delivered to the OMVH Office by either _____ hand delivery or XXX e-mail.

Date placed in e-mail July 30, 2013 or Date hand delivered _____

Signature H. Philip Hayes, Jr.

State of South Carolina

SC Criminal Justice Academy

State Law Enforcement Division



DMT: 005162

PERMIT TO PERFORM BREATH ALCOHOL TEST

APPLICATION HAVING BEEN MADE, a permit is hereby granted, or a renewal of same, to:

Kendall Dixon

to perform chemical analyses of the breath to determine blood alcohol level.

Evidence of qualifications has been examined, and it has been determined that the applicant herein has met the standards prescribed by law and regulations.

This permit is limited to the performance of chemical analyses of the breath under the authority of Sections 56-5-2950, 50-21-114, 55-1-100, and 56-1-286, of the South Carolina Code of Laws, 1976, as amended; and policies of the South Carolina Law Enforcement Division, utilizing any of the various models of the DataMaster DMT.

This permit is not transferable, and is issued under authority of Sections 56-5-2950, 50-21-114, 55-1-100, and 56-1-286 of the South Carolina Code of Laws, 1976, as amended; and the rules, regulations, and policies of the South Carolina Law Enforcement Division.

Authority to perform tests under this permit shall expire: **November 25, 2013**

Hubert F. Harrell

Hubert F. Harrell - Director, SCCJA

November 25, 2011

DATE

Reginald I. Lloyd

Reginald I. Lloyd - Chief, SLED

5772 #1

ADVISEMENT OF IMPLIED CONSENT RIGHTS

Subject's Name (Print)

Jennifer Kay Satter

Date of Birth

3-30-1989

Driver's License Number

100461720

State Licensed

SC



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

Subject Copy

Subject's Signature

Firma del Sujeto (Recibió una copia)

Officer's Signature

Firma del Agente

date/time

fecha/hora

Kendall Quinn 4/11-2013 0535



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



SUBJECT BIOGRAPHICAL INFORMATION

SUBJECT NAME: JENNIFER K/SALTER
RACE: WHITE
SEX: F
DOB: 03/30/1989

DL NUMBER: 100461720
DRIVER'S LICENSE: SC
SUBJECT ADDRESS: 503 33RD AVENUE N
MYRTLE BEACH, SC

ARREST INFORMATION

OFFICER NAME: K/D/DIXON
TICKET NUMBER: 28802GG
ARREST DATE: 04/11/2013

AGENCY ORI: SC0260200
COUNTY OF ARREST: 26 - HORRY
ARREST TIME: 04:45

OPERATOR INFORMATION

TEST OPERATOR: K/D/DIXON
CERTIFICATION #: DMT005162
SOLUTION LOT #: 12802
BREATH TEST VIDEO RECORDED?
SUBJECT'S MOUTH CHECKED AND
ANY FOREIGN MATERIAL REMOVED?
SUBJECT ADVISED OF APPLICABLE RIGHTS?

YES
YES
YES

AGENCY ORI: SC0260200
EXPIRATION DATE: 02/21/2014
BOTTLE: 0807
SUBJECT INFORMED OF VIDEO RECORDING?
SUBJECT INFORMED OF TYPE SAMPLE REQUESTED?
SUBJECT OBSERVED FOR A MINIMUM OF (20)
TWENTY MINUTES?

YES
YES
YES

SUBJECT'S BREATH ALCOHOL TEST RESULTS

DATAMASTER DMT SERIAL #109607

TEST DATE:		04/11/2013
OBSERVATION START TIME:		05:18:02
BLANK TEST	0.00	05:39:00
INTERNAL STANDARD	VERIFIED	05:39:07
0.08% SIMULATOR TEMPERATURE	33.99°C	05:39:25
0.08% SIMULATOR VERIFICATION	0.078	05:39:25
BLANK TEST	0.00	05:40:14
SUBJECT SAMPLE	REFUSED	05:42:19
BLANK TEST	0.00	05:42:59
INTERNAL STANDARD	VERIFIED	05:43:05

Subject Copy

Subject's Signature

Kendall O26

Arresting Officer's Signature

4-11-2013 0545

(Received Copy) Date/Time

Kendall O26

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: 000732F4B6
SUBJECT PASSWORD: 0B9F8

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 Forensics Form # ICS 018, April 2010

Frances Inabinet

From: Frances Inabinet
Sent: Thursday, April 25, 2013 10:29 AM
To: 'hpu@scdmv.net'; Conway Police Department (ttyler@cityofconway.com); Conway Police Department (rhill@cityofconway.com); 'jksalter111@gmail.com'
Subject: Notice of Hearing, Jennifer Salter 7-16 dkt# 2242
Attachments: Notice of Hearing, Jennifer Salter 7-16 dkt# 2242.pdf

Called atty left v/m for email address, also emailed resp. at address she provided on the NOS

Frances L. Inabinet
Scheduling Assistant to Hearing Officers
Phil Hayes
Robert Harley
Phil Addington
SC Administrative Law Court
Office of Motor Vehicle Hearings
1205 Pendleton St. Ste.325
Columbia SC 29201
803-734-3209
803-734-3200 (fax)

Frances Inabinet

From: Frances Inabinet
Sent: Friday, April 26, 2013 8:04 AM
To: 'mosullivanlaw@gmail.com'
Subject: FW: Notice of Hearing, Jennifer Salter 7-16 dkt# 2242
Attachments: Notice of Hearing, Jennifer Salter 7-16 dkt# 2242.pdf

Frances L. Inabinet
Scheduling Assistant to Hearing Officers
Phil Hayes
Robert Harley
Phil Addington
SC Administrative Law Court
Office of Motor Vehicle Hearings
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1205 Pendleton St. Ste.325
Columbia SC 29201
803-734-3209
803-734-3200 (fax)

Cash Receipt

Number: CR1304-0529
Till: OMVH Till
Posted: Yes

Dated: 04-24-2013
Total Paid \$200.00

Void Information

Void Method:

Voided:

No

Void Posted:

No

Void Explanation:

Generate

Cash Receipt

[Generate]

Invoices (1)				
Date	Number	Item Type	Customer	Paid
04-24-2013	NV1304-0525	Case Filing Fee - \$200	Salter, Jennifer K.	200.00

Payments (1)		
Payment Method	Reference	Paid
Check	CK 31842	200.00

2013-OMVH 1-2242



South Carolina Department of Motor Vehicles
NOTICE OF SUSPENSION

MV-65
(Rev. 8/12)

Driver's Name Jennita Kay Salter BP/DL State and Number 100461720 Date of Birth 3-30-1989
Address on Driver's License: Street address, Apt. No., City, State, Zip Code 503 33rd Avenue N Myrtle Beach S.C 29577

Special mailing address for notices (if different from driver's license address): Street address, Apt. No., City, State, Zip Code

Vehicle License Plate State and No. GUP 752 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*
Date of Test/Refusal

ANY AGE UNDER ARREST FOR DUI

- ☐ Registering an alcohol concentration of .15 or greater
☒ Refusing to submit to a breath, blood or urine test
Date of Test/Refusal 4-11-2013

*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 request a hearing to challenge the suspension. A request for a hearing must be filed with the SC Office of Motor Vehicle Hearings within thirty days of the issuance of the Notice of Suspension. There is a \$200.00 filing fee. (Personal checks are 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 obtain a temporary alcohol restricted license.

If you do not obtain a temporary alcohol restricted license, your suspension continues. You cannot either obtain a route-restricted license or 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 obtain 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 obtain a route-restricted license. If you do not obtain a route-restricted license or if you are under the age of twenty-one (21) 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 obtain 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 Department of Motor Vehicles office to have a license issued.

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 obtain a route-restricted license.

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

Signature of Driver

Date Signed

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

Date Signed 4-11-2013
Signature of Arresting Officer Kendall Dixon
Agency Name Corway Police Dept Agency Code 5C0260200
Date Signed 4-11-2013
Signature of DataMaster Operator Kendall Dixon
Agency Name Corway Police Dept Agency Code 5C0260200

Printed Name of Arresting Officer Kendall Dixon
Agency Telephone Number 843-248-1790
Printed Name of DataMaster Operator Kendall Dixon
Agency Telephone Number 843-248-1790

Blue Copy - Driver

Yellow Copy - DMV/Driver Records

Green Copy - Officer

White Copy - Officer's Agency

72

HEARING REQUEST:

I am requesting an administrative hearing. I understand that I must file my request with the SC Office of Motor Vehicle Hearings within thirty days of the issuance of the Notice of Suspension to have a hearing and to obtain a temporary alcohol restricted license.

23 APR 13 Michael O'Sullivan - 503 33rd Ave N USS-9708 jsalter111@gmail.com
 Date Signature of Driver Driver's Mailing Address, Phone Number, and Email Address
Michael O'Sullivan (843) 957-9279
 Your Attorney's Name Attorney's Address, Phone Number, and Email Address

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, telephone number, and email address where you can be reached.
2. There is a \$200.00 filing fee for a hearing. (Personal checks are not accepted.)
3. Bring or mail your completed form, plus the filing fee, to the SC Office of Motor Vehicle Hearings, 1205 Pendleton St., Suite 325, Columbia, SC 29201. This completed form and the fee must be either hand-delivered or mailed on or before the thirtieth (30th) day of the date on this notice of suspension.

INSTRUCTIONS FOR REQUESTING A HEARING WHEN NOT USING THIS FORM

1. You may use the Official Notice letter you will receive from the DMV to request a hearing. However, the thirty (30) days to file begins at the time the original Notice of Suspension was issued to you. Be sure to include your mailing address, phone number, and email address, along with your attorney's mailing address, phone number, and email address.
2. There is a \$200.00 filing fee for a hearing. (Personal checks are not accepted.)
3. Without either form, you may submit a written request for a hearing. However, be aware the case will not be assigned and the request will not be forwarded to the DMV until the filing fee and either the Notice of Suspension or the Official Notice from the DMV have been received.
4. You must follow the time, delivery, and mailing instructions in the previous section.

INSTRUCTIONS FOR OBTAINING A TEMPORARY ALCOHOL RESTRICTED LICENSE

1. If you met 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 a temporary alcohol restricted license is \$100.00.
3. After you file your request for a hearing, the SC Department of Motor Vehicles will determine whether you are eligible for a temporary alcohol restricted license. If you are eligible, SC DMV will mail you a letter stating your eligibility.
4. IF YOU ARE SOUTH CAROLINA LICENSED DRIVER, you may take that letter to any SC DMV office in the state, pay the \$100.00 license fee, and have the temporary alcohol restricted license issued.
5. IF YOU ARE LICENSED DRIVER FROM ANOTHER STATE, you may take that letter and the \$100.00 license fee to SC DMV, Specialized Services, 1630 Shop Road, Columbia, SC (two miles North of I-77 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 www.scdmvonline.com), and the \$100.00 license fee to SC DMV, Driver Records, P.O. Box 1498, Blythewood, SC 29016-0028. That office will mail you the temporary alcohol restricted license.

INSTRUCTIONS FOR OBTAINING 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 drug 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 pre-pay the \$100.00 reinstatement 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-127). This application will be mailed to you with your suspension notice. It is also available on the Internet www.scdmvonline.com.
7. You are advised to complete the application and bring it, with the \$100.00 license fee (and the \$100.00 reinstatement fee if you are licensed in another state), to SC DMV, Specialized Services, 1630 Shop Road, Columbia, SC (two miles North of I-77 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 www.scdmvonline.com), the \$100.00 license fee (and the \$100.00 reinstatement fee if you are licensed in another state) to SC DMV, Driver Records, P.O. Box 1498, Blythewood, SC 29016-0028. Upon approval of the application and route, that office will mail you the route-restricted license.

ADSAP is an abbreviation for Alcohol and Drug Safety Action Program, which is operated under the direction of the SC Department of Alcohol and Other Drug Abuse Services (DAODAS). You must go to an ADSAP office to enroll. Numbers for ADSAP are in the County Government Section of most telephone directories. If you reside in another state, you can make arrangements to attend an equivalent program there.

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 9th day of October 2013

By: Yolande P. Hall

Title: Administrative Coordinator, OMVH

RECEIVED

AUG 22 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Appellate Case No: 2014-001025

AUG 22 2014

RECEIVED

SC Court of Appeals

Jennifer K. Salter,

Appellant,

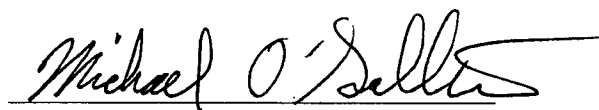
v.

South Carolina Department of Motor Vehicles
and Conway Police Department, Of whom South
Carolina Department of Motor Vehicles is the

Respondent.

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 materials.



Michael O'Sullivan
SC Bar No. 73768
Post Office Box 1785
Conway, SC 29528
Telephone: (843) 957 – 9279
Email: mosullivanlaw@gmail.com
Attorney for Appellant

August 19, 2014