THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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Appellate Case No. 2018-002137

South Carolina Department of Motor Vehicles and
Berkeley County Sheriff's Office ..... Appellant,

v.

Erika R. Willey ..... Respondent.

Of Which South Carolina Department of Motor Vehicles is the Appellant

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FINAL BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

This matter comes before the South Carolina Court of Appeals pursuant to the appeal of the South Carolina Department of Motor Vehicles (hereinafter, "SCDMV"), which seeks review of the Office of Motor Vehicle Hearings' (hereinafter, "OMVH") *Order Denying Petitioner's Motion to Dismiss* dated December 13, 2017, *Order of Dismissal* dated February 7, 2018, and *Order Denying Petitioner SCDMV's Motion for Reconsideration* dated March 1, 2018 and the Administrative Law Court's (hereinafter, "ALC") *Order* filed November 6, 2018 and *Order Denying Appellant's Motion for Reconsideration* filed November 28, 2018, which together acted to rescind Respondent's implied consent suspension (R. pp. 1-9, 71-76, and 104-107). In the instant appeal, SCDMV seeks to have these orders reversed and the Respondent's implied consent suspension sustained.

The Respondent was arrested on July 1, 2017 for driving under the influence and was asked to submit to a breath, blood, or urine test pursuant to S.C. Code §56-5-2950. (R. p. 117). Respondent refused to submit to the requested test and was issued an MV-65 Notice of Suspension by Deputy Chad Johnson of the Berkeley County Sheriff's Office on July 1, 2017. *Id.* Respondent received a copy of this MV-65 Notice of Suspension on July 1, 2017 as evidenced by her signature on the MV-65 Notice of Suspension and as evidenced by the fact that Respondent's request for a contested case hearing before the

OMVH was made using this MV-65 Notice of Suspension. *Id.* The MV-65 Notice of Suspension issued to Respondent by Deputy Johnson explicitly informed Respondent that if she wanted to challenge the implied consent suspension she was required to file a request for contested case hearing with the OMVH within thirty days of issuance of the MV-65 Notice of Suspension. *Id.* Respondent did not file her request for a contested case hearing for this violation until November 9, 2017. *Id.*

Because S.C. Code §56-5-2951 and OMVH Rule 4(B) both provide that a request for a contested case hearing for an implied consent case must be filed and served within thirty days of the notice of suspension being issued to the driver and Respondent did not file her request for a contested case hearing until November 9, 2017, which was 101 days beyond the mandated thirty dead deadline set forth in S.C. Code §56-5-2951, the SCDMV filed a *Motion to Dismiss* the OMVH contested case on November 17, 2017 (R. pp. 109-113). Respondent responded to SCDMV's *Motion to Dismiss* with an e-mail sent to the OMVH and parties on November 22, 2017 (R. p. 108). On December 13, 2017, the OMVH issued *Order Denying Petitioner's Motion to Dismiss* (R. pp. 104-107). This order denied SCDMV's *Motion to Dismiss* because the hearing officer concluded "the suspension notice was not issued to Respondent until the [SCDMV] issued its notice of suspension on or after October 10, 2017." (R. p. 105). On January 30, 2018, the OMVH held the hearing in this case and the Berkeley County Sheriff's Office did not appear (R. pp. 55-57). As a result, an *Order of Dismissal* rescinding Respondent's implied consent suspension was issued on February 7, 2018 (R. p. 71-73).

On February 12, 2018, the SCDMV filed a *Motion for Reconsideration* with the OMVH (R. pp. 77-103). That motion was denied on March 1, 2018 (R. p. 74-76). SCDMV then timely appealed to the ALC (R. pp. 59-70).

On April 27, 2018, SCDMV filed *Brief of Appellant* with the ALC (R. pp. 32-47). Around the end of July 2018, the ALC and SCDMV learned that Respondent had changed residences. As a result, SCDMV's *Brief of Appellant* served on Respondent on April 27, 2018 was never received by Respondent. On July 31, 2018, the ALC issued *Order to Serve Appellant's Brief and Scheduling Order*, which required SCDMV to serve a copy of SCDMV's *Brief of Appellant* on Respondent at her new address (R. pp. 10-12). SCDMV served this second copy of SCDMV's *Brief of Appellant* on Respondent, at her new address, on August 2, 2018 (R. pp. 48-50).

Respondent never filed a brief with the ALC. Due to this failure, on October 2, 2018, SCDMV filed *Notice of Motion and Motion to Resolve Appeal Adversely to Respondent and in Appellant's Favor* with the ALC (R. pp. 29-31). On November 6, 2018, the ALC issued its final *Order* in this matter, which denied SCDMV's motion to resolve the appeal adversely Respondent and held that SCDMV "failed to meet its burden of convincingly proving that the hearing officer's order was without evidentiary support, is arbitrary, capricious, or erroneous as a matter of law." (R. pp. 3-9).

On November 16, 2018, SCDMV filed its *Notice of Motion and Motion for Reconsideration* with the ALC (R. pp. 13-28). The ALC declined to reconsider its final *Order* (R. pp. 1-2). Thereafter, this appeal was timely filed on December 3, 2018.

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 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....
>
> (5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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

1) DID THE OFFICE OF MOTOR VEHICLE HEARINGS HAVE JURISDICTION OVER A CONTESTED CASE HEARING FOR AN IMPLIED CONSENT VIOLATION THAT OCCURRED ON JULY 1, 2017 AND THE NOTICE OF SUSPENSION WAS SERVED ON RESPONDENT ON JULY 1, 2017, BUT THE REQUEST FOR THE CONTESTED CASE HEARING WAS NOT FILED UNTIL NOVEMBER 9, 2017?

The ALC held "there is substantial evidence in the record to support the OMVH hearing officer's factual finding that under the circumstances of this case, notice of suspension was not given until the Department issued its 'Official Notice' of October 10, 2017, advising Respondent of the same." (R. p. 6). The ALC further held that the OMVH "hearing officer clearly placed more weight on Respondent's declarations, and it is not within the discretion of this Court to substitute its judgment for that of the hearing officer." (R. p. 7). In making these rulings it appears the ALC was referring to the

OMVH's *Order Denying Petitioner's Motion to Dismiss*. The OMVH *Order Denying Petitioner's Motion to Dismiss* contained, essentially, the following:

1. A finding that this matter was before the OMVH due to Respondent's request for a contested case hearing (R. p. 104).
2. A finding that that SCDMV filed a *Motion to Dismiss* asserting that the OMVH lacked jurisdiction to consider this matter. *Id.*
3. A citation to S.C. Code §56-5-2951(B)(2), which requires a request for an administrative hearing to be filed within thirty days after issuance of the notice of suspension (a.k.a. the MV-65 Notice of Suspension). *Id.*
4. A citation to Rule 4(B), OMVH Rules, which requires a request for an administrative hearing to be filed within thirty days after notice of the SCDMV's determination (a.k.a. the MV-65 Notice of Suspension). *Id.*
5. Summarization of the arguments of both parties. The OMVH did not state whether it put any particular weight or belief in the arguments presented by either party. *Id.*
6. A finding that SCDMV did not receive the MV-65 Notice of Suspension for Respondent's implied consent violation until October 10, 2017, at which time SCDMV posted the implied consent suspension to Respondent's driving record (R. pp. 104-105).
7. Finally, with no factual findings, conclusions of law, or other explanations regarding how it came to its determination, a holding that "Based on the circumstances in this case, I conclude the suspension notice was not issued

to Respondent until the Department issue its notice of suspension on or after October 10, 2017." (R. p. 105).

The problem is that in making its ruling as set forth in item 7, above, the OMVH hearing officer completely ignored the fact that Deputy Johnson issued the MV-65 Notice of Suspension directly to Respondent on July 1, 2017. Significantly, the OMVH and the ALC both failed to discuss this fact and its legal impact on their analysis in this case. Further, it appears that on reconsideration the OMVH hearing officer failed to examine the contents of the July 1, 2017 MV-65 Notice of Suspension and SCDMV's October 10, 2017 letter to Respondent to determine which one, if any, constituted a Notice of Suspension under S.C. Code §56-5-2951. Importantly, the OMVH's ruling that a suspension notice was not issued to Respondent until the "Department issued its notice of suspension on or after October 10, 2017" is not supported with any factual or legal justification within the *Order Denying Petitioner's Motion to Dismiss* or any other order issued by the OMVH (R. pp. 104-105).

The OMVH refers to the October 10, 2017 letter issued by SCDMV to Respondent as a "notice of suspension." *Id.* The October 10, 2017 letter issued by SCDMV to Respondent is not, nor ever has been, a notice of suspension (R. p. 96). The letter itself specifically states it is an "Official Notice." *Id.* This letter does not state that it is a Notice of Suspension. *Id.* Significantly, the MV-65 Notice of Suspension issued to Respondent on July 1, 2017, and used by Respondent to request this contested case hearing, did specifically state it is a "Notice of Suspension" (R. p. 117). While titles of documents are not dispositive of what the document actually is, such titles can provide

guidance to courts regarding what the document is. *Spalt v. South Carolina Dep't. of Motor Vehicles*, 423 S.C. 576, 584, 816 S.E.2d 579, 583 (2018).

The October 10, 2017 letter from SCDMV merely provided confirmation of the Respondent's suspension start and end dates; in this case, a start date of July 1, 2017 and an end date of January 1, 2018 (R. p. 96). The letter then advises the Respondent of special driving privileges that may be available to her during her suspension period and the requirements that she must complete to regain her regular driving privileges in South Carolina. *Id.* SCDMV must send drivers a letter confirming their implied consent suspension start and end dates, just like the October 10, 2017 letter issued to the Respondent in this case, because the start and end dates of such suspensions vary based on each driver's driving record. See S.C. Code §56-5-2951(C) and (I). For example, if a driver is under suspension for an implied consent violation on the date they are issued a second implied consent MV-65 Notice of Suspension by law enforcement, then that driver's first implied consent suspension must end before their second implied consent suspension can begin. S.C. Code §56-5-2951(C). Additionally, in such an example, the driver's second implied consent suspension would be for a 9 month period of time, rather than a 6 month period of time. S.C. Code §56-5-2951(I)(2)(a). Thus, the letter issued by SCDMV to Respondent on October 10, 2017 was not the Notice of Suspension for this implied consent violation, it was merely the letter confirming the suspension dates for this violation (R. p. 96).

Additional evidence that the October 10, 2017 letter does not constitute the Notice of Suspension is found in S.C. Code §56-5-2951(E). S.C. Code §56-5-2951(E) requires a

notice of suspension issued to a driver under S.C. Code §56-5-2951 to advise the person of the following:

1. The person's right to obtain a temporary alcohol license and to request a contested case hearing before the OMVH;
2. That if the person does not request a contested case hearing within 30 days of the issuance of the notice of suspension (MV-65) that the person will have waived their right to the contested case hearing and the suspension must continue for the period provided for in S.C. Code §56-5-2951(I); and
3. That if the suspension is upheld at the contested case hearing or the person does not request a contested case hearing, the person shall enroll in ADSAP.

Because the October 10, 2017 letter from SCDMV is not the Notice of Suspension, it does not notify the Respondent of any of these items (R. p. 96). Instead, the MV-65 Notice of Suspension issued to Respondent by Deputy Johnson on July 1, 2017 notifies Respondent of each of the items required by S.C. Code §56-5-2951(E) (R. p. 117).

Additionally, S.C. Code §56-5-2951(A) requires the arresting officer to issue the MV-65 Notice of Suspension for an implied consent violation to the driver immediately because, unless the driver has a conflicting suspension that delays the start date of the implied consent suspension, the implied consent suspension begins on the date of the violation of S.C. Code §§56-5-2930, 56-5-2933, or 56-5-2945. S.C. Code §56-5-2951(C). The October 10, 2017 letter was issued to Respondent by the SCDMV, not the arresting officer, and was issued over three months after this suspension began (not on

the same date of Respondent's arrest under S.C. Code §56-5-2930) (R. p. 96). The July 1, 2017 MV-65 Notice of Suspension, however, was issued by Deputy Johnson to Respondent on the date of Respondent's arrest under S.C. Code. §56-5-2930 (R. p. 117).

Because the October 10, 2017 letter issued by SCDMV to Respondent merely confirmed the start and end dates of Respondent's implied consent suspension, did not contain the elements required by S.C. Code §56-5-2951(E), was not issued by the arresting officer to the Respondent, and even stated it was only an "Official Notice," it was an error of law for the OMVH hearing officer to treat the October 10, 2017 letter as the Notice of Suspension in this case, particularly without some legal or factual justification within the OMVH's *Order Denying Petitioner's Motion to Dismiss*.

Significantly, the OMVH hearing officer never issued <u>any</u> finding that Respondent was <u>not</u> issued the MV-65 Notice of Suspension on July 1, 2017. Further, none of the orders in this case, from the OMVH or the ALC, ever addressed the fact that when Respondent requested this contested case hearing she did so using <u>only</u> the MV-65 Notice of Suspension issued to her on July 1, 2017 by Deputy Johnson (R. p. 117). In fact, the only reason the October 10, 2017 letter is even in the ALC *Record on Appeal* in this case is because SCDMV submitted a copy of that letter with its *Motion for Reconsideration* filed with the OMVH on February 9, 2018 (R. p. 96). At the time of issuance of the *Order Denying Petitioner's Motion to Dismiss*, the OMVH did not have a copy of the October 10, 2017 letter before it for review and consideration. Thus, the OMVH's ruling that Respondent's request for a contested case hearing was timely under S.C. Code §56-5-2951 was inconsistent with the evidence that was before the OMVH

hearing officer at the time the *Order Denying Petitioner's Motion to Dismiss* was issued.[1] In other words, because the OMVH failed to rule that Respondent was not issued the MV-65 Notice of Suspension on July 1, 2017, a ruling that because Respondent was issued the MV-65 Notice of Suspension on July 1, 2017 and, therefore, was required to file her request for a contested case hearing by no later than July 31, 2017, is simply in keeping with the requirements of S.C. Code §56-5-2951.

Per the requirements of S.C. Code §56-5-2951, the only things that are factually relevant for determining the timeliness of a person's request for a contested case hearing in an implied consent case are: 1) the date the MV-65 Notice of Suspension is issued to the driver; and 2) the date the driver files their request for a contested case hearing.[2] As discussed above, in this case the MV-65 Notice of Suspension was issued to Respondent on July 1, 2017 and the OMVH Hearing Officer never issued any ruling to the contrary (R. p. 117). Further, the OMVH hearing officer specifically ruled that Respondent did not file her request for a contested case hearing until November 9, 2017 (R. p. 104). For these reasons, the OMVH hearing officer's ruling was an error of law and contained

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[1] Notably, Respondent has never asserted that she did not receive the MV-65 Notice of Suspension on July 1, 2017 from Deputy Johnson.

[2] Implied consent and BAC violations always have a delay between the date the MV-65 Notice of Suspension is actually issued to the driver and when that suspension is entered in SCDMV's Phoenix system. This is because implied consent and BAC violations are not transmitted to SCDMV electronically. Rather, the law enforcement officers must mail the MV-65 Notice of Suspension to SCDMV and, once SCDMV receives the MV-65 Notice of Suspension, the violation/suspension is entered in SCDMV's Phoenix system manually by SCDMV staff. Despite this delay, pursuant to S.C. Code §56-1-2951(A), the suspension is in effect as soon as the law enforcement officer issues the MV-65 Notice of Suspension to the driver ("The arresting officer shall issue a notice of suspension which is effective beginning on the date of the alleged violation of Section 56-5-2930, 56-5-2933, or 56-5-2945.").

clearly erroneous findings in view of the reliable, probative, and substantial evidence in the record at the time of the ruling.

Further, the OMVH hearing officer ruled that Respondent still had a temporary alcohol license until August 9, 2017 (R. p. 104-105). This is an incorrect statement of law. As a matter of law, under S.C. Code §56-5-2951(A), the MV-65 Notice of Suspension is "effective beginning on the date of the alleged violation of Section 56-5-2930, 56-5-2933, or 56-5-2945" as soon as the notice of suspension is issued to the driver. Thus, the moment Deputy Johnson issued the MV-65 Notice of Suspension to Respondent, her TAL was suspended, no matter what the SCDMV Phoenix system showed the status of Respondent's license to be.

Respondent complained that she could not be issued a temporary alcohol license between July 1, 2017 and October 10, 2017 (R. p. 108). First, this is not accurate. Respondent could not be issued a temporary alcohol license between July 1, 2017 and November 9, 2017. This is because S.C. Code §56-5-2951(B)(2) specifically requires a driver to request a contested case hearing before the OMVH within thirty days of issuance of the MV-65 Notice of Suspension before that driver can be issued a temporary alcohol license. See S.C. Code §56-5-2951(B)(1). In Respondent's case, SCDMV could not issue Respondent a temporary alcohol license between July 1, 2017 and November 9, 2017 because she had not yet requested a contested case hearing related to her July 1, 2017 implied consent violation (R. p. 117).

The OMVH appeared to place significance on the fact that Respondent regained a regular driver's license from SCDMV on August 9, 2017 (R. p. 104). What the OMVH ignored, however, was the fact that Respondent was only able to fraudulently regain a

regular Class D driver's license on August 9, 2017 because SCDMV had not yet received the MV-65 Notice of Suspension for this implied consent from Deputy Johnson, the OMVH, or any other source, i.e. on August 9, 2017, SCDMV was not aware of Respondent's July 1, 2017 implied consent suspension.[3]

S.C. Code §56-5-2951(B) and Rule 4, OMVH Rules, requires a driver to file his/her request for a contested case hearing within thirty days after receiving the notice of suspension, and failure to do so divests the OMVH of jurisdiction. *USAA v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008) (citing *Canal Ins. Co. v. Caldwell,* 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct. App. 1999)); *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985) (Applied to implied consent cases through the case *Marshall D.L. Jones v. South*

[3] In approximately ½ of all implied consent and BAC hearings before the OMVH the first time SCDMV hears about the implied consent or BAC violation is when SCDMV receive the request for hearing from the OMVH to place that suspension in hearing request status. In such cases, SCDMV must first place the implied consent or BAC violation and suspension on the person's driving record and then must place the implied consent or BAC violation in "hearing request" status. Placing an implied consent or BAC violation in "hearing request" status is how SCDMV's computer system knows the driver may be able to obtain a temporary alcohol license. Some drivers obtain a temporary alcohol license and other drivers elect to not obtain a temporary alcohol license (meaning their implied consent or BAC suspension continues to run).

Additionally, Respondent committed perjury twice to obtain credentials from SCDMV that she was not entitled to. First, Respondent committed perjury when she applied for the duplicate of her TAL on July 3, 2017 she stated that her driver's license was not currently suspended (R. p. 99, question 5), that she had not recently surrendered her driver's license to a law enforcement officer (R. p. 99, question 6), and she signed an Affidavit for Lost/Surrendered Driver's License where she swore under penalty of perjury that her driving privileges were not suspended and that she had not surrendered her driver's license to a law enforcement officer because of an implied consent suspension (R. p. 100). The Application for Beginner's Permit, Driver's License, or Identification Card specifically states that all information and statements made in the application are given under penalty of perjury (R. pp. 99-100). Second, Respondent committed perjury again when she applied for her regular Class D driver's license on August 9, 2017. Respondent committed perjury the second time by stating that her driver's license was not currently suspended (R. p. 102, question 5) and that she had not recently surrendered her driver's license to a law enforcement officer (R. p. 102, question 6).

Carolina Dep't of Public Safety and South Carolina Dept. of Motor Vehicles, 2015 WL 1888824 (S.C. Admin. Law. Judge. Div.)). "The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004). In this case, the OMVH hearing officer did exactly what is prohibited by the *Elam* case. The OMVH hearing officer ignored the fact that Respondent was served with the MV-65 Notice of Suspension on July 1, 2017, that Respondent used that same exact MV-65 to request her contested case hearing on November 9, 2017, and issued a ruling that impermissibly extended the time for Respondent to request her contested case hearing before the OMVH. Given the reliable, probative, and substantial evidence in the record, the OMVH hearing officer's decision was clearly erroneous and a blatant error of law under S.C. Code §56-5-2951(B), Rule 4, OMVH Rules, and the *Elam* and *Mears* cases.

CONCLUSION

Given the errors of law discussed above and the clearly erroneous findings by the OMVH hearing officer in view of the reliable, probative and substantial evidence in the record at the time the OMVH's issued its *Order Denying Petitioner's Motion to Dismiss* (R. pp. 104-105), this case should have been dismissed by the OMVH and should not have progressed to a hearing on January 30, 2018. For the reasons stated above, SCDMV asks that the orders issued by the OMVH and ALC be overruled and the implied consent

suspension of Respondent be sustained due to the Respondent's failure to properly invoke the jurisdiction of the OMVH. [4]

Respectfully submitted,

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March 7, 2019
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[4] Because of Respondent's failure to timely request a contested case hearing for this implied consent violation, Respondent has already served all of her suspension time related to this suspension. Thus, if this suspension is sustained, the only reinstatement requirements that would be left for Respondent to fulfill are: 1) Enrollment in ADSAP (and completion of ADSAP within one year of the enrollment date); and 2) Payment of a $100 reinstatement fee to SCDMV. Please note the requirements described in this footnote pertain only to the implied consent violation at issue in this case and do not address any other suspension issues or unmet reinstatement requirements that may exist for any other of Respondent's suspensions.

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Of Which South Carolina Department of Motor Vehicles is the Appellant

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Appellant's Final Brief complies with South Carolina Supreme Court Order 2007-08-13-02 Amended by Order 2014-04-15-02, filed April 15, 2104.

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Blythewood, SC

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CERTIFICATE OF COUNSEL

The Undersigned Counsel certifies that the attached Final Brief is in compliance with SCACR 211(b).

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