THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2018-001868

South Carolina Department of Health and
Environmental Control, ... Appellant-Respondent,

v.

James W. Davenport, ... Respondent-Appellant.

FINAL BRIEF OF RESPONDENT-APPELLANT ON PRIMARY APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

(1) Did the Administrative Law Judge properly determine that the underlying contested case is a "civil action" for purposes of S.C. Code Ann. § 15-77-300?

(2) Did the Administrative Law Judge correctly conclude that DHEC's "enforcement action" against Respondent-Appellant's paramedic "certification" was not a "disciplinary action by a state licensing board"?

(3) Was the Administrative Law Judge's factual finding that DHEC acted "without substantial justification" in pressing its claims against Respondent-Appellant supported by substantial evidence in the record of the contested case hearing over which the same Administrative Law Judge presided?

(4) Was the Administrative Law Judge's factual finding that no special circumstances exist to make an award of attorney's fees unjust supported by substantial evidence?

STATEMENT OF THE CASE

Respondent-Appellant (hereinafter "Mr. Davenport") hereby incorporates the Statement of the Case from his Initial Brief on his Cross-Appeal. It is important to note at the outset that Appellant-Respondent, South Carolina Department of Health and Environmental Control (hereinafter "DHEC"), did not appeal the Administrative Law Judge's Order on the merits of the case, which contains factual findings and conclusions of law that cannot be challenged in this appeal.

In a thorough and deliberate opinion, and after affording both sides an opportunity to present and debate their arguments in person at a full hearing, Administrative Law Judge Robinson rejected every argument presented by DHEC against awarding attorney's fees in this case.

STANDARD OF REVIEW

This appeal is governed by a very narrow standard of review. Significantly, DHEC did not take an appeal from the underlying order vacating DHEC's agency decision to revoke Mr. Davenport's paramedic certification. Thus, Administrative Law Judge Robinson's findings of fact and conclusions of law in her underlying Order are the law of the case. ZAN, LLC v. Ripley Cove, LLC, 406 S.C. 404, 411 n.3, 751 S.E.2d 664, 668 n.3 (Ct. App. 2013) (citing Carolina Chloride, Inc. v. Richland Cnty., 394 S.C. 154, 172, 714 S.E.2d 869, 878 (2011) (noting "an unchallenged ruling, right or wrong, becomes the law of the case")).

Appeals from the ALC are otherwise governed by the Administrative Procedures Act, which provides that the court of appeals "may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-610(B). The court of appeals may reverse or modify the decision of the ALC only

> if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
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> (a) in violation of constitutional or statutory provision;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (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.

Id. In other words, "The decision of the Administrative Law Court should not be overturned unless

it is unsupported by substantial evidence or controlled by some error of law." Original Blue Ribbon Taxi Corp. v. South Carolina Dep't of Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). It is well established under South Carolina law that "[t]he decision to award or deny attorneys' fees and costs will not be disturbed on appeal absent an abuse of discretion." Maybank v. BB&T Corp., 416 S.C. 541, 579–80, 787 S.E.2d 498, 518 (2016). The South Carolina Supreme Court in Maybank recognized that "'An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.'" Id. at 580, 787 S.E.2d at 518 (quoting Kiriakides v. School Dist. of Greenville Cty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009)). Where the Court's decision on attorney's fees or costs depends on the interpretation of a statute, that becomes a question of law reviewed on appeal under a de novo standard. Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

FACTS

In its Initial Brief, DHEC improperly attempts to portray the underlying facts very differently than as found by Administrative Judge Robinson in her March 20, 2018 Final Decision and Order in the contested case, from which DHEC did not appeal. The underlying propriety of Mr. Davenport's care he provided to the stabbing patient (and to the other two patients from the initial report) is not at issue in this appeal. Mr. Davenport called two well-credentialed witnesses at trial who testified that his patient care was appropriate, that the patient was stable throughout the entire encounter, and that the patient did not need any ALS-level care prior to arriving at the hospital, where the patient underwent successful surgery to have the knife removed from his abdomen. Importantly, none of the three patient encounters that were initially sent down to DHEC from the Anderson County EMS Department involved any adverse patient outcome.

The only factual findings of Judge Robinson's that are at issue in this case are those she made specifically relating to the attorney's fee petition. Judge Robinson, who also presided over the trial of the underlying contested case, was clearly in the best position to weigh the record evidence and to determine the credibility of witnesses on the issues relevant to the fee petition. As Judge Robinson specifically noted in her Order granting attorney's fees, "In evaluating DHEC's justification in pressing its claim, the Court has the benefit of considering the outcome of the contested case." (R. p. 75).

The underlying contested case seeking to revoke Mr. Davenport's paramedic certification was initiated after the Anderson County EMS Director, Scott Stoller, contacted his (Stoller's) former partner at the Greenville County EMS Department, Arnold Alier, now DHEC's Director of the EMS Division, about three separate patient incidents involving Mr. Davenport's paramedic care. Stoller's first contact with Alier occurred late in the day, at 5:19 p.m. on Friday, March 25, 2016, after the Anderson County Medical Control Physician, Dr. Thomas Kickham, had reinstated Mr. Davenport's authority to continue working as a paramedic in Anderson County earlier that same day. (R. p. 1316, ll. 11-17). Significantly, Anderson County's review of the three incidents involving Mr. Davenport was not handled as part of the established QA/QI (quality assurance/quality improvement) procedures of the Anderson County EMS Department. Instead, Stoller hired another one of his close friends and former partners from the Greenville County EMS Department, Keith Eudy, to prepare a report critical of Mr. Davenport's care, unbeknownst to Dr. Kickham. DHEC called Mr. Eudy as a witness during the trial, despite the fact that no one at DHEC ever communicated with Mr. Eudy during the investigation of Mr. Davenport. (R. p. 373, ll. 1-16).

During the contested case trial, Judge Robinson strictly limited Mr. Davenport's factual

presentation about Stoller's ulterior motive in seeking to have Mr. Davenport's paramedic credentials revoked. Namely, Mr. Davenport had recently complained that Stoller had misappropriated funds and property of the Anderson County EMS Department for his personal use, among other allegations of mismanagement and malfeasance by Stoller within the Department. Stoller's deposition testimony, which was offered into evidence when Stoller was unable to testify live at trial, confirmed that he was aware of Mr. Davenport's complaints about him at the time the he (Stoller) first contacted DHEC about Mr. Davenport. (R. p. 1230, l. 6 to p. 1233, l. 25). Judge Robinson prevented Mr. Davenport from introducing much evidence of the underlying retaliatory motivation of Stoller in attempting to discredit Mr. Davenport and terminate his employment with the Anderson County EMS Department.

Alier conceded at trial that the underlying complaint against Mr. Davenport was not handled in accordance with DHEC's regulations for initiating or accepting complaints against paramedics and EMTs. (R. p. 1332, l. 13 to p. 1333, l. 25). Alier actually admitted that his receipt of the body-worn camera video of one of the underlying incidents involving Mr. Davenport was likely a violation of the patient's HIPAA rights, when Stoller transmitted the video to Alier's personal email address without any type of encryption. (R. p. 1308, l. 22 to 1315, l.16; p. 1340, ll. 4-18).

Alier opened an investigative file about Mr. Davenport and assigned the case to DHEC investigator Rich Naugler. Tellingly, DHEC did not even call Naugler as a witness in its case in chief. Mr. Davenport called Naugler as an adverse witness as part of the defense case. Naugler testified that he conducted literally no investigation into the matter, other than reviewing the body-worn camera video of the incident. According to Naugler, "My investigation came from the video. . . . That's all I needed." (R. p. 1264, l. 2, 5). Naugler conceded that he never attempted to

speak to any critical witnesses to the incident or obtain any documents or records relating to the incident. (R. pp. 1263-1268).

DHEC's Bureau Chief for the Bureau of EMS and Trauma, Rob Wronski, testified that after he and some other DHEC employees, including State Medical Control Director, Dr. Edgar Deschamps, viewed the body-worn camera footage, they decided to call Mr. Davenport in for an investigatory interview under false pretenses. They misrepresented their involvement in the three cases as being part of a routine QA/QI review and told Mr. Davenport that they needed a statement from him to close out their file, because they already had a written statement from Mr. Davenport's partner on the self-inflicted stabbing call, and they thought that Anderson County handled the matter appropriately. (R. p. 1005, l. 25 to 1006, l. 3). They did not tell Mr. Davenport that he was the subject of an investigation, much less one that could lead DHEC to revoke his paramedic credentials or that he had a right to bring counsel to the meeting. (R. p. 1017, l.21 to p. 1018, l.3). Wronski testified that he and his investigator at DHEC, Naugler, devised a "strategy" going into the meeting with Mr. Davenport to obtain an "ultimate objective"–apparently to intimidate Mr. Davenport into signing a consent order voluntarily surrendering his paramedic credentials. At the beginning of the interview, they deliberately asked Mr. Davenport gentle, open questions "to put [him] at ease and establish a little bit of rapport with him." (R. p. 1009, l.19 to p. 1010, l.4). As the interview went on, they began to ask Mr. Davenport pointed and leading questions about the stabbing patient incident that they already knew the answer to based on their prior review of the body-worn camera video. (R. p. 1016, ll. 7-24). As the interview appeared to be wrapping up, they sprang the video footage of the incident on Mr. Davenport and began to ask him very hostile, cross examining questions. Wronski said that his investigative technique of ambushing Mr. Davenport was not part

of any training through DHEC, but probably came from "watching too much TV." (R. p. 1023, l.23 to p. 1024, l.5). Wronski also misled Mr. Davenport into believing that DHEC investigators had spoken with the patient and that the patient allegedly complained about how Mr. Davenport regularly treated him. In reality, DHEC never spoke to the patient or to the patient's family as part of the investigation. (R. p. 1022, l.17 to p. 1023, l.22).

The Investigative Review Committee ("IRC") meeting that considered Mr. Davenport's case in June 2016 was not an independent, unbiased reviewing body. The IRC was led by Wronski and was chaired by Dr. Deschamps, DHEC's State Medical Director, who also served as one of DHEC's expert witnesses at trial. Dr. Deschamps was one of the original DHEC officials or employees who reviewed the video of the stabbing patient encounter shortly after it was sent by Stoller to Alier. At trial, the Administrative Law Judge properly sustained an objection when DHEC attempted to introduce into evidence the recommendations of the IRC. (R. p. 814, l.1 to p. 815, l.17). DHEC did not challenge that ruling, nor did DHEC attempt to proffer such evidence for the record on appeal.

Most of DHEC's case at trial was attempting to establish that Mr. Davenport's care of the stabbing patient allegedly violated various protocols of the Anderson County EMS Department and related rescue squads operating under Dr. Kickham's Medical Control. DHEC repeatedly attempted to create a false equivalency between violation of a protocol and violation of a physician order. One of the categories of "misconduct" for paramedics and EMTs is disregarding a physician's order. S.C. Code Ann. § 44-61-80(F)(6). DHEC's own expert witnesses, Dean Douglas, testified at length on cross examination that the terms "protocols" and "physician's orders" are very different things. (R. p. 718, l.4 to p. 725, l.11). Even Dr. Deschamps testified as follows: "So sometimes I think we make too much of is this a protocol or is this an order. There are times when it's very clear, give them

medicine, give x amount of medicine. That's clearly a standing order. But if you say take the stretcher to the bedside, that's an order but it falls within the protocol. So it's kind of wishy washy." (R. p. 826, l.24 to p. 827, l.7). Dr. Deschamps conceded on cross examination that one of the goals of educating paramedics is to teach them not to "blindly follow the protocols," but to recognize when they should step outside of the protocols based on their own training and experience. He also agreed that paramedics cannot step outside of the requirement of following physician orders. (R. p. 861, l.18 to p. 862, l.1).

One of the primary criticisms leveled at Mr. Davenport was his failure to place the stabbing patient on oxygen, to start an IV on the patient, and to place the patient on a cardiac monitor. (R. p. 386, l. 21 to p. 387, l.5). This was the essence of Mr. Eudy's written review that was done outside of the Anderson County EMS QA/QI process. (R. p. 377, ll. 7-11). Mr. Eudy acknowledge that he is a "close friend" to Stoller and was Stoller's partner on occasion when they both worked at Greenville County EMS years earlier. (R. p. 360, ll. 5-12). Dr. Kickham also testified that "any major trauma patient should have IV, oxygen, cardiac monitor." (R. p. 447, ll.19-20). Dr. Deschamps echoed that same phrase that he learned during his training as a paramedic in the 1970s. (R. p. 807, ll. 6-8). DHEC's investigator, Naugler, testified that he was also familiar with the old paramedics' mantra, "O2, IV, monitor," although he corrected Davenport's counsel that he learned it as "IV, O2, monitor." (R. p. 1241, ll. 6-9). DHEC's own expert witness, Dean Douglas, testified that the mantra "O2-IV monitor for paramedics" has been "outdated for a while." (R. p. 680, ll.14-19; p. 717, ll. 14-18). Mr. Douglas actually testified that, in his opinion, the stabbing patient did not need to be placed on a heart monitor, (R. p. 737, ll. 19-25), nor did the patient require supplemental oxygen. (R. p. 741, l.24 to p. 742, l.1). Similarly, Mr. Davenport's expert witness, Leo Deason,

testified that the phrase "O2, IV, monitor" has been obsolete since at least 2010 in the training of paramedics. (R. p. 1128, l.23 to p. 1129, l.3).

Mr. Davenport, who has been a certified paramedic since 1995 and received extensive medical training as a Special Forces Medic in the mid-2000s, quickly determined that the stabbing patient was stable and did not need supplemental oxygen, did not need an IV started, and did not need be connected to a heart monitor. Only BLS-level treatment was provided to the patient, which Mr. Davenport's EMT-Basic partner was perfectly capable of handling (and, in fact, did handle without incident throughout the ambulance trip to the emergency department at the hospital). Mr. Davenport carefully explained his thought processes in assessing the patient, treating the patient, stabilizing the impaled knife, and getting the patient to the ambulance as safely as possible. (R. p. 1415, l.4 to p. 1446, l.11). Mr. Deason convincingly testified that Mr. Davenport's treatment of the stabbing patient and the manner in which the patient was moved out of the house to the ambulance were appropriate. (R. p. 1152, ll. 17-21; p. 1154, l.23 to p. 1155, l.3; p. 1166, ll.19-25; and p. 1168, ll. 17-22).

Throughout the course of DHEC's processing and consideration of this matter, DHEC made several overtures to Mr. Davenport to enter into a consent order; however, all proposals would have required Mr. Davenport to completely relinquish his paramedic (and even EMT-level) credentials for at least one year. Mr. Davenport was steadfast and confident in his position that he rendered appropriate medical care to all three patients at issue in Stoller's initial transmittal to Alier at DHEC, although Mr. Davenport readily acknowledged that his language towards the stabbing patient was somewhat rude and terse. (R. p. 323, ll. 4-6; p.1450, ll. 6-14). By way of explanation and not excuse for his actions, Mr. Davenport explained at trial that he was at the tail end of working a 36-hour shift,

that he was in significant pain from his amputation, and that he was still grieving the loss of his good friend and fellow paramedic, who had committed suicide less than six weeks earlier–all mitigating factors that no one at DHEC ever attempted to ascertain or consider. (R. p. 1414, ll. 8-12; p. 1415, ll. 18-24; p. 1419, ll. 3-5; p. 1430, l.22 to p. 1431, l.1). Instead, DHEC persistently tried to entrap and intimidate Mr. Davenport into giving up his certification as a nationally registered paramedic. Unfortunately for DHEC, they tried to ambush the wrong Green Beret.

ARGUMENTS

1. THE ADMINISTRATIVE LAW JUDGE PROPERLY DETERMINED THAT THE UNDERLYING CONTESTED CASE IS A "CIVIL ACTION" FOR PURPOSES OF S.C. CODE ANN. § 15-77-300

DHEC first argues that Section 15-77-300(A) is not applicable here because, it contends, the underlying contested case is not a "civil action" as that phrase is used in the statute. With all due respect, DHEC's argument suggests an overly narrow reading of the statute. The term "civil action" is not defined by S.C. Code Ann. § 15-77-300; accordingly, as Judge Robinson aptly noted, the Court should "interpret the term in accord with its usual and customary meaning." State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999). Black's Law Dictionary defines the term "civil action" as follows: "An action brought to enforce, redress, or protect private rights. In general, all types of actions other than criminal proceedings." Black's Law Dictionary at 245 (6th ed. 1990).

The underlying contested case before the Administrative Law Court is clearly a "civil action," not a criminal or quasi-criminal action. The standard of proof in a contested case before the ALC is generally the civil standard, i.e., by a preponderance of the evidence, not the criminal standard of beyond a reasonable doubt. S.C. Code Ann. § 1-23-600(A)(5). Rule 68 of the South Carolina

Administrative Law Court Rules actually incorporates the South Carolina Rules of Civil Procedure (not Criminal Procedure) to contested cases, to the extent that questions are not specifically addressed by the ALC Rules. SCALC Rule 68. Rule 1 of the South Carolina Rules of Civil Procedure similarly provides, "These rules govern the procedure in all South Carolina courts in all suits of a civil nature . . . ." Rule 1, SCRCP (emphasis added); see also Rule 81, SCRCP ("These rules, or any of them, shall apply to every trial court of civil jurisdiction within this state . . . ."). Furthermore, Rule 2 of the South Carolina Rules of Civil Procedure provides, "There shall be one form of action to be known as 'civil action.'" Rule 2, SCRCP. This provision reflects the modern practice of merging actions at law with suits in equity and is not intended to exclude cases in the Administrative Law Courts. There can be no doubt that a contested case before the ALC is a "civil action" for purposes of S.C. Code Ann. § 15-77-300(A).

Judge Robinson properly cited to the case of McDowell v. South Carolina Department of Social Services, 304 S.C. 539, 405 S.E.2d 830 (1991), to reject DHEC's now-abandoned argument that this contested case is not a "civil action" because it was not commenced by the filing of a summons and complaint. As Judge Robinson correctly noted, the McDowell Court squarely rejected that precise argument: "DSS contends . . . this is not a 'civil action' since it is not commenced by service of a summons and complaint, *see* Rule 2 and 3(a), SCRCP, and § 15-77-300 by its terms applies only to 'civil action.' We reject DSS's argument." McDowell, 304 S.C. 539 at 405 S.E.2d at 833. Indeed, the McDowell case was commenced by the appellant under the previous version of the APA, S.C. Code Ann. § 1-23-380, contesting the agency's decision to deny food stamps, not by filing a summons and complaint; yet, the SC Supreme Court concluded that the case was a civil action for purposes of the attorney's fees statute. Id. at 540, 405 S.E.2d at 832. Judge Robinson

correctly drew an analogy between DSS's administrative determination in McDowell and DHEC's administrative determination here and properly limited Respondent's attorney fee request only from the time the contested case was actually placed before the Administrative Law Court.

The fact that the ALC is situated in the executive branch and not the judicial branch of South Carolina government in not relevant on this appeal. The 2004 amendment to Section 1-23-500 of the South Carolina Code expressly describes the SCALC as "a court of record." S.C. Code Ann. § 1-23-500.

DHEC also asserts that an unsuccessful attempt in 1997 to amend Section 15-77-300 in an effort expressly to incorporate administrative proceedings into the statute suggests that the Section 15-77-300(A) was originally intended to exclude matters before the ALC. This argument is simply unavailing. Proposed legislation that was never enacted, especially a proposed bill that was rejected over twenty years ago, has absolutely no bearing on the interpretation of any statute. DHEC's quotation from the case of Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964), is simply misplaced. Unlike the amendment to the statute at issue in Vernon, the proposed bill from 1997 referenced by DHEC was not adopted by the General Assembly.

The Vernon case actually contains language that is strongly supportive of Mr. Davenport's position, not that of DHEC. The South Carolina Supreme Court in Vernon stated, "Where the terms of statutes are positive and unambiguous, exceptions not made by the Legislature cannot be read into the Act by implication. Where there is an express exception in a statute, all other exceptions which are not expressly set forth are excluded. The inclusion of one exception amounts to an affirmation of the applicability of the statute's provision to all other cases which are not excepted." Id.

Perhaps the strongest argument that the underlying contested case before the Administrative

Law Court is a "civil action" within the contemplation of Section 15-77-300 is the exception in subsection (C) for "disciplinary actions by state licensing boards." S.C. Code Ann. § 15-77-300(C). Under Section 40-1-160 of the South Carolina Code, any "person aggrieved by a final action of a [professional or occupational licensing] board may appeal the decision to the Administrative Law Court in accordance with the rules of the Administrative Law Court." S.C. Code Ann. § 40-1-160. The exception in Section 15-77-300(C) would be completely unnecessary if actions in the Administrative Law Court were not considered "civil actions" for purposes of Section 15-77-300(A). Furthermore, Section 40-1-210 of the South Carolina Code, which is actually titled "Civil proceedings before Administrative Law Court," allows the Department of Labor, Licensing & Regulation to "institute a civil action through the Administrative Law Court, in the name of the State, for injunctive relief against a person violating this article, a regulation promulgated under this article, or an order of the board." S.C. Code Ann. § 40-1-210.

Judge Robinson was absolutely correct in her rejection of DHEC's arguments: "I find minimal difficulty in concluding that the underlying proceeding meets the customary definition of civil action." (R. p. 73) (emphasis added).

2. THE ADMINISTRATIVE LAW JUDGE CORRECTLY CONCLUDED THAT DHEC'S "ENFORCEMENT ACTION" AGAINST RESPONDENT-APPELLANT'S PARAMEDIC "CERTIFICATION" WAS NOT A "DISCIPLINARY ACTION BY A STATE LICENCING BOARD."

DHEC next asserts that the case against Mr. Davenport is analogous to one of the listed exceptions in Section 15-77-300(C), which excludes "disciplinary actions by state licensing boards." S.C. Code Ann. § 15-77-300(C). According to DHEC, the Court should have considered DHEC's Bureau of EMS to be the equivalent of a "state licensing board" because its regulation of EMTs and

paramedics is "substantially the same" as the function performed by the various Professional and Occupational Licensing Boards administered by the South Carolina Department of Labor, Licensing and Regulation ("LLR"). The terms "disciplinary action" and "state licensing boards" are not expressly defined by Section 15-77-300. It is clear that the General Assembly intended the phrase "state licensing boards" to refer to the Professional Licensing Boards administered by LLR. DHEC is a completely separate governmental agency from LLR within the executive branch of government. S.C. Code Ann. §§ 1-30-10(A); 1-30-45 (DHEC); and 1-30-65 (LLR).

Professional licensing boards are governed by an extensive statutory scheme found in Title 40 of the South Carolina Code, as well as by regulations promulgated by the respective governing boards of each of the over three dozen specific regulated professions under LLR's jurisdiction. Section 40-1-20(3) defines the term "board" to mean "the group of individuals charged by law with the responsibility of licensing or otherwise regulating an occupation or profession within the State." S.C. Code Ann. § 40-1-20(3). The phrase "disciplinary action proceedings" is also a defined term under S.C. Code Ann. §§ 40-1-90 and -120. Section 40-1-90 contains extensive provisions for licensees to receive due process before disciplinary action can be taken against their licenses by the relevant board or a hearing officer or hearing panel designated by the board. S.C. Code Ann. § 40-1-90. Appeals of decisions by the LLR boards are subject to the Administrative Procedures Act, S.C. Code Ann. § 1-23-380, with review confined to the record created at the licensing board hearing. S.C. Code Ann. 1-23-380(4); see Osman v. South Carolina Dep't of Labor, Licensing & Regulation, 382 S.C. 244, 248, 676 S.E.2d 672, 675 (2009).

Paramedics and EMTs are not governed by Title 40. Instead, they are governed by the Emergency Medical Services Act of South Carolina, S.C. Code Ann. § 44-61-10 et seq., which is

administered by DHEC, not by LLR. If the General Assembly had intended for DHEC matters to be included within the exception to Section 15-77-300(C), it would have done so expressly. See Vernon, 244 S.C. at 157, 135 S.E.2d at 844 ("Where there is an express exception in a statute, all other exceptions which are not expressly set forth are excluded."). Mr. Davenport did not receive any type of hearing before the final agency action was taken by DHEC's staff members revoking his paramedic certification. The DHEC Board actually refused Mr. Davenport's request for a final hearing before that body, allowing the staff decision to become the final agency decision. Thus, Mr. Davenport's only opportunity for a hearing came at the contested case trial before the Administrative Law Court, pursuant to S.C. Code Ann. § 1-23-320.

The terms "license" and "certificate/credentials" are separate and distinct terms of art that the General Assembly used in the statutes governing EMTs and paramedics, as are the terms "disciplinary action" and "enforcement action." Mr. Wronski, the EMS and Trauma Bureau Chief, carefully distinguished between the two pairs of statutory terms:

> Q. And I think this is important because you keep using the term licensor.
>
> A. I'm sorry. Would you like me to clarify? It's another one of those interchangeable terms. EMT's and paramedics are not licensed. Only LLR licences. We issue credentials.
>
> * * * *
>
> Q. You do issue some licenses, but paramedics and EMT's receive certificates, right?
>
> A. Credential certificates. Yes, sir.
>
> Q. The only licenses you issue would be to somebody like Dr. Kickham, the Medical Control Physician, is that right?
>
> A. No, sir. We only issue licenses to the agencies.

Q. Okay.

A. So the agency is licensed.

Q. Okay. I'm sorry. So Dr. Kickham's Anderson County EMS gets the licenses, right?

A. Yes.

Q. Okay. So when you issue licenses it's to agencies, not to paramedics and EMT's?

A. Correct. Yes, sir.

(R. p. 984, l.4 to p. 985, l.1) (emphasis added).

Mr. Wronski was also careful to point out the difference between the terms "disciplinary action" and "enforcement action":

Q. So under subsection F of this statute [(S.C. Code Ann. § 44-61-80(F))], the Department may take enforcement action, okay, against the holder of a certificate at any time it is determined that the holder no longer meets the prescribed qualifications set forth by the Department or has failed to provide to patients emergency medical treatment of a quality deem[ed] acceptable by the Department or is guilty of misconduct. You see that?

A. Yes, sir.

Q. Okay. So this is the statutory authority for you to take enforcement action against Mr. Davenport, right?

A. Against any paramedic or EMT. Yes, sir.

Q. And it's not disciplinary action. It's enforcement action?

A. It's enforcement. Yes, sir. We don't like to use that word.

(R. p. 986, l. 8 to p. 987, l. 1) (emphasis added).

DHEC completely ignores Mr. Wronski's testimony in arguing that the terms "'[l]icensing' and 'certification' have the same meaning within the context of the [EMS] Act." (Appellant's Br.,

at 12). DHEC commits the same error in asserting that "[t]he [EMS] Act uses 'disciplinary action' and 'enforcement action' interchangeably." (Appellant's Br., at 12). DHEC's discussion about how certain terms are used by the National Registry of EMTs is completely irrelevant to the interpretation of S.C. Code Ann. § 15-77-300(C).

DHEC also argues that the underlying functions of LLR's POL Boards (for licenced professionals) and DHEC (for paramedics and EMTs) is analogous, so the Court should overlook the actual language used in the respective statutes. DHEC asserts that because both LLR and DHEC regulate professionals, the underlying policy of S.C. Code Ann. § 15-77-300(C) of not hindering or obstructing action against professionals by regulatory bodies is the same. Although this may be an argument DHEC should make in lobbying the General Assembly to suggest an amendment to Section 15-77-300(C), the plain language of the statute compels a different result.

Judge Robinson's thorough and well-reasoned analysis of this issue should be affirmed.

3. THE ADMINISTRATIVE LAW JUDGE'S FACTUAL FINDING THAT DHEC ACTED "WITHOUT SUBSTANTIAL JUSTIFICATION" IS EASILY SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD OF THE CONTESTED CASE HEARING OVER WHICH SHE PRESIDED.

DHEC next attempts to attack Judge Robinson's specific finding that DHEC acted "without substantial justification" in pressing its case against Mr. Davenport as that phrase is used in Section 15-77-300(A)(1). Clearly, Judge Robinson applied the proper standards in her analysis of this issue.

The appropriate inquiry here is whether the state had a "'reasonable basis in law and fact'" for pressing its case against Mr. Davenport. McNaughton v. Charleston Charter School for Math & Sciences, Inc., 411 S.C. 249, 267, 768 S.E.2d 389, 399 (2015). Judge Robinson correctly observed that "DHEC's 'loss on the merits does not create a presumption that its position was not

substantially justified.'" (R. p. 75) (quoting Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 326 (2008)).

In analyzing the "without substantial justification" issue, Judge Robinson evaluated DHEC's aggressive litigation posture of pressing for the complete revocation of Mr. Davenport's paramedic certification. Judge Robinson carefully and deliberately went through each of the alleged bases for DHEC's assertions that Mr. Davenport's conduct justified its harshest possible enforcement action against a paramedic. (R. p. 74-77). Judge Robinson's specific factual findings on this factor should not be disturbed on appeal.

DHEC asserts that Judge Robinson's denial of Mr. Davenport's directed verdict motion at the close of DHEC's case in chief demonstrates that DHEC's case was legally and factually reasonable. With all due respect, Judge Robinson herself was in the best position to know why she denied the motion for directed verdict. In a non-jury trial such as the underlying contested case, it is perfectly reasonable for the judge, as the trier of fact, to wait for all evidence to be presented to her before making a ruling, in order to have a complete record for any possible appeal.

The fact that this matter allegedly went through what DHEC calls "several administrative filters" prior to reaching the ALC is also not significant, nor does it provided evidence of DHEC's reasonableness in pressing its claim against Mr. Davenport's credentials. None of the steps DHEC took prior to the final agency action had any degree of independent review: Deschamps, Wronski, and Alier all were intimately involved in all administrative steps at DHEC. Wronski actually testified that he crafted a "strategy" for interviewing Mr. Davenport immediately after viewing an unofficial copy of the body-worn camera video to achieve the "ultimate objective" of forcing Mr. Davenport to relinquish his paramedic credentials. In fact, at no time during this process was Mr.

Davenport ever presented with any proposed consent order that would have allowed him to retain his paramedic certification. No evaluation was made of any potential mitigating circumstances surrounding Mr. Davenport's comments, nor was any consideration given to the fact that no patient suffered any adverse outcome. Compared to other enforcement actions against paramedics and EMTs reported by DHEC within the past 10 years, the proposed actions against Mr. Davenport in this case were unusually harsh. See South Carolina Dep't of Health & Envt'l Control v. Stuart Platt, Docket No. 06-ALJ-07-0477-CC (Final Order and Decision, July 20, 2007), at p. 18 of 19 ("I find that revocation, the highest punishment, is not warranted in this case since this is Respondent's first violation.").

DHEC also argues that Judge Robinson "committed legal error by failing to recognize and apply the statutory presumption" in Section 15-7-300(A), which provides, "The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction." (Appellant's Br., at 17) (quoting S.C. Code Ann. § 15-77-300(A)). DHEC has not identified any statutory or constitutional "mandate" under which it was operating in this case.

DHEC's employees plainly testified that the complaint against Mr. Davenport was not initiated according to the procedures set forth in the statute and regulations; nor was any substantive investigation ever performed. DHEC's attempt to ambush Mr. Davenport by bringing him in under false pretenses, devising strategies to entrap him during the interview by asking loaded questions, springing the body-worn camera video on him to gauge his reaction, and then trying to intimidate him into relinquishing his credentials to avoid a potentially embarrassing public proceeding is not spelled out in any statutory or constitutional "mandate." DHEC's assertion that it "followed the

statutorily-prescribed process for investigating and pursuing this [enforcement action]" (Appellant's Br., at 17), is clearly belied by the record at trial. Judge Robinson painstakingly went through each and every one of the alleged statutory bases for DHEC's claims of misconduct by Mr. Davenport and found that none of them justified DHEC's actions here. (R. pp. 74-77).

DHEC also baldly asserts that Judge Robinson "failed to place the burden of proving DHEC acted 'without substantial justification' on Mr. Davenport." This assertion is demonstrably incorrect. Judge Robinson cited Heath v. Aiken County, 295 S.C. 416, 420, 368 S.E.2d 904, 906 (1988), for the proposition that Section 15-77-300 has "the following three prerequisites to recovery: (1) the party seeking attorney's fees is the prevailing party; (2) the agency lacked substantial justification in pressing its claim against the contesting party; and (3) no special circumstances exist which would render an award of attorney's fees unjust." (R. p. 72) (emphasis added). There is no indication that Judge Robinson misallocated the burden of proof. Her use of the term "prerequisites" conveys factors that the moving party must establish to support his claim for attorney's fees. These were not even close issues according to Judge Robinson's factual findings, other than the legal question of whether the underlying action DHEC could be considered the equivalent of a "disciplinary action by a state licensing board."

DHEC spends the better part of 11 pages and 5 footnotes of its Initial Brief attempting to re-litigate the merits of the underlying claim in arguing that its litigation positions were substantially justified. (Appellant's Br., at 17-28). Importantly, DHEC did not appeal Judge Robinson's Order on the merits of the underlying claims. Judge Robinson was clearly in the best position to evaluate the evidence, weigh the credibility of the witnesses, and assess the expert opinion testimony of both sides' expert witnesses.

With all due respect, this underlying contested case against Mr. Davenport was not a "case of first impression," as asserted by DHEC. (Appellant's Br., at 22). As noted earlier, in the case of South Carolina Dep't of Health & Envt'l Control v. Stuart Platt, Docket No. 06-ALJ-07-0477-CC, the ALJ specifically found that "revocation, the highest punishment, is not warranted in this case since this is Respondent's first violation." Mr. Davenport's case may be the first occasion where DHEC has attempted to revoke a paramedic's certification for using rude language towards a patient where the actual medical care provided to that patient was appropriate, but that does not make this a "case of first impression."

4. THE ADMINISTRATIVE LAW JUDGE PROPERLY FOUND THAT NO SPECIAL CIRCUMSTANCES EXIST TO MAKE AN AWARD OF ATTORNEY'S FEES TO RESPONDENT-APPELLANT UNJUST.

Finally, Judge Robinson did not "confuse" the "special circumstances" prong with the "substantial evidence" prong of the attorney's fees test, as DHEC argues. Judge Robinson was responding to DHEC's argument that an award of attorney's fees would "chill future enforcement actions." Judge Robinson correctly noted that the language of the statute "without substantial justification" already ensures that legitimate enforcement efforts by the state will not trigger an award of attorney's fees and costs under the statute.

Actions taken against private citizens of modest means in an effort to deprive them of their ability to earn a livelihood in their chosen profession should be carefully scrutinized. DHEC must ensure that any enforcement action it takes against an EMT or paramedic has a reasonable basis in law and in fact before pressing such a serious claim. DHEC has not identified any "novel, but credible extensions and interpretations of the law" that would justify its Draconian actions and

prosecution against Mr. Davenport. Even though Judge Robinson strictly limited Mr. Davenport from introducing evidence reflecting possible collusion between Stoller and Alier in an effort to retaliate against Mr. Davenport, the Court still found that DHEC's actions were not taken in good faith, but were taken without a reasonable basis in fact and law.

Any admittedly improper or inappropriate language used by Mr. Davenport in interacting with the stabbing patient in the underlying incident should have been handled as a coaching or personnel matter at the local level, not as a potentially career-ending effort to revoke a dedicated and highly trained paramedic's ability to earn a livelihood in his chosen profession. DHEC did not try to make its case for revocation of Mr. Davenport's credentials based on his rude language alone; instead, DHEC attempted to impugn Mr. Davenport's patient care, which Mr. Davenport vigorously and successfully vindicated.

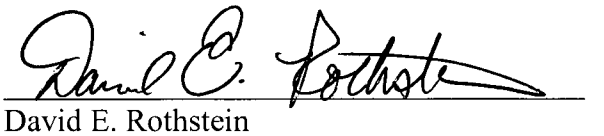
CONCLUSION

For all of the foregoing reasons, Respondent-Appellant respectfully requests that this Court affirm the Administrative Law Court's decision to award attorney's fees in this matter pursuant to S.C. Code Ann. § 15-77-300. As argued in Respondent-Appellant's cross appeal, those fees should be increased to include post-trial work and travel time reasonably and necessarily incurred in connection with this case, as well as recoverable court costs.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent-Appellant on Primary Appeal complies with Rule 211(b), SCACR.

March 29, 2019



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