

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The Administrative Law Court

The Honorable S. Phillip Lenski, Administrative Law Judge

Case No. 2018-ALJ-21-0201

Appellate Case No. 2019-000389

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SC Court of Appeals

ALIEO GARGA-RICHARDSON APPELLANT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES RESPONDENT

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

- 1. Did the Respondent Properly Assess A Missed Inspection Point Against the Appellant?**

STANDARD OF REVIEW

In his brief the Appellant requests the Court apply a de novo standard of review. The correct standard of review is stated by S.C. Code § 1-23-610(B):

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (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.

STATEMENT OF THE CASE

The Appellant started participating in the South Carolina Ignition Interlock Device Program (the Program) on May 22, 2015. He was required to drive a vehicle equipped with a Breath Alcohol Ignition Interlock Device (Device). According to records received from the South Carolina Department of Motor Vehicles (DMV) by the Department of Probation, Parole and Pardon Services (the Department or the Respondent), he was required to participate in the Program for a minimum of two years.

On May 22, 2017 the Department sent the Appellant a letter requesting that he take the vehicle in which the Device was installed to have a final inspection. This inspection was necessary before the Department could consider him to have successfully completed the Program. Nonetheless, the Appellant did not have the final inspection performed, so the Program continued to actively monitor him pending reception of a final inspection report. The Program requires every active driver to obey the Program's rules, which include the requirement to have the vehicle equipped with the Device inspected at least once every sixty days. Failure to do so causes a one-point assessment.¹

After the Program sent the request for the final inspection, the Appellant proceeded to skip four inspections in a row earning one point for each skipped inspection. For each skipped inspection, the Program mailed the Appellant a point assessment notice. The fourth notice, dated January 4, 2018, informed the Appellant of his suspension for an accumulation of four or more points.²

¹ S.C. Code Ann. § 56-5-2941(H)(1).

² S.C. Code Ann. § 56-5-2941(E)(3).

The Appellant requested a hearing at the Office of Motor Vehicle Hearings to contest this suspension. The hearing was held on April 3, 2018 before Hearing Officer Phillip T. Addington. The subject of the hearing was whether or not the Program had properly assessed the single point detailed in the January 4, 2018 suspension notice, and whether four total points had been assessed against the Appellant by the Program. On April 9, 2018 Hearing Officer Addington issued a final order and decision finding that the point assessment recorded by the January 4, 2018 notice had been properly assessed, that four total points had been assessed against the Appellant, and that his suspension should be sustained.

The Appellant filed an appeal of the final order in the Administrative Law Court. On January 10, 2019 Administrative Law Judge S. Phillip Lenski issued an order affirming the final order. The Appellant filed a motion for reconsideration, which was denied. This appeal followed.

ARGUMENT

A. THE DEPARTMENT HAS THE AUTHORITY TO REQUIRE A FINAL INSPECTION BEFORE A DRIVER'S PROGRAM TERM IS COMPLETED.

The Appellant's essential complaint is about the administrative structure of the Ignition Interlock Device Program (the Program). In his brief he lists three matters in his statement of the issues on appeal, but emphasizes that he wants this Court to decide the third: "Did the Department of Probation, Parole and Pardon Services have the right to assess[] IID Points against me after my program completion date?" Appellant's Initial Brief, p. 1. This statement is based on the assumption that the Appellant had completed his term in the Program when the Respondent assessed points against him. However, the Respondent's position has been that the Appellant had not completed his term in the Program when the

points were assessed. Administrative Law Judge Lenski agreed with the Respondent. R *, p. 5. Whether or not this was the correct conclusion, and thus whether points were properly assessed against the Appellant, will require a discussion of the Program's procedures for when drivers enroll in and subsequently complete their terms in the Program.

Please note that consistent with Rule 208(B), SCACR, this brief will not address any arguments, statements or statutory provisions discussed in the Appellant's brief that do not appear to be related to the third item in the Appellant's statement of issues on appeal.

1) The Program Requires a Final Inspection at the End of Program Terms.

Drivers who are subject to an ignition interlock requirement and who want to participate in the Program must first have a Breath Alcohol Ignition Interlock Device (Device) installed in any vehicle they intend to drive. S.C. Code Ann. § 56-5-2941(A). The South Carolina Department of Motor Vehicles (DMV) will not issue such drivers an ignition interlock restricted license (IIR license) until the driver has confirmed that a Device has been installed. S.C. Code Ann. § 56-1-400(A). Participation in the Program begins when DMV issues the IIR license. Drivers issued this license "must be subject to an Ignition Interlock Device Point System managed by the Department of Probation, Parole and Pardon Services." S.C. Code Ann. § 56-5-2941(E). The General Assembly established penalties for point assessments under this system, which can include extensions of time served in Program and the suspension of the driver's IIR license. *Id.* Drivers who have been issued a IIR license must have the vehicle in which the Device is installed inspected at least once every sixty days, and are subject to penalty if they refuse to do so:

The person *shall have the device inspected every sixty days* to verify that the device is affixed to the motor vehicle and properly operating, *and to allow for the preparation*

of an ignition interlock device inspection report by the service provider indicating the person's alcohol content at each attempt to start and running retest during each sixty-day period. Failure of the person to have the interlock device inspected every sixty days must result in one ignition interlock device point.

S.C. Code Ann. § 56-5-2941(H)(1) (emphasis added).

The ignition interlock device inspection report (the Inspection Report) contains the data recorded by the Device while the driver has been operating the vehicle. This data is downloaded at the inspections and reported to the Department. The Inspection Report is what allows the Program to monitor the driver's conduct and subject them to the Ignition Interlock Device Point System (Point System). Therefore, in order to carry out its legislative mandate, the Department must have access to the Inspection Reports, and the drivers must have their vehicles inspected to allow their preparation. For those drivers who are subject to the interlock requirement, the General Assembly has specified the minimum length of time they must participate in the Program and thus be subject to the Department's supervision under the Point System. S.C. Code §§ 56-5-2945(C)(2); 56-5-2947(D)(2); 56-5-2951(I); 56-5-2990(A). Therefore, the Department must also have access to Inspection Reports that cover the entirety of the drivers' required Program terms.

The Department's responsibility to monitor drivers' *entire* Program term poses a problem at the end of a driver's mandatory term, because the Program cannot access data recorded by the Device until it has been inspected. On the day a driver's term ends, there will inevitably be data recorded by the Device that the Program has not been able to review. The data might show that the driver should be subject to penalties under the Point System that will extend his term in the Program or cause his suspension. Therefore the Department established a procedure to ensure that it monitors the entire term for which drivers must participate in the Program. At the hearing of the contested case, Mrs. Ruth Ann Cartwright, Administrator of the Program, testified about

this procedure. She stated that when drivers reach the end of their Program term they must take their vehicles in for a final inspection so that an Inspection Report of the data recorded by the Device may be prepared for review by the Program. The Program first sends a letter to the drivers requesting that they take their vehicles in for an inspection. T-7, ll. 9-14. This is consistent with Section 56-5-2941(H)(1) as set forth above, which requires drivers to undergo inspections “to allow for the preparation of an ignition interlock device inspection report”. Mrs. Cartwright further stated:

We cannot close out their case without the information from that final inspection. We rely on that to make sure that up until the point that the driver was to satisfy the period of time on [the Program], that they are free and clear of violations. If for some reason there are violations assessed during that final inspection period, it may result in extensions. So was have to look at that final download before the driver could be program complete.

T-7, ll. 15-24.

Ms. Cartwright emphasized that merely having the final inspection performed does not complete the driver’s Program term: “. . . you have to have a final inspection and then based upon the results of that final inspection, then it’s determined whether or not they’ve completed the Program. They’re not program complete at the final inspection.” T-13, ll. 12-20; T-39, ll. 15-20. If the inspection report from the final inspection contains no penalties that cause a suspension or extension of time in the Program, then the Program will send a letter to the driver informing him that his term in the Program is complete.³ T-13, ll. 16-18; T-32, ll. 14-20.

³ On enrolling in the Program Drivers are sent an information packet detailing this procedure, which is also published online at <https://www.dppps.sc.gov/ignition-interlock/Program-Procedures>.

2) The Department Has the Authority to Establish the Final Inspection Procedure.

The General Assembly has granted the Department broad authority to administer the State's Ignition Interlock Device Program. See generally S.C. Code Ann. § 56-5-2941. The final inspection procedure is compelled by the General Assembly's intent that drivers participating in the Program "*must* be subject to an Ignition Interlock Device Point System managed by the Department of Probation, Parole and Pardon Services." S.C. Code Ann. § 56-5-2941(E)(emphasis added). Further, the Department must assess points against drivers for their violations of the Program's rules:

A person accumulating a total of:

- (1) two points or more, but less than three points, *must* have the length of time that the device is required *extended by two months*;
- (2) three points or more, but less than four points, *must* have the length of time that the device is required *extended by four months*, shall submit to a substance abuse assessment pursuant to Section 56-5-2990, and shall successfully complete the plan of education and treatment, or both, as recommended by the certified substance abuse program. [] .
- (3) four points or more *must* have the person's ignition interlock restricted license suspended for a period of six months [] .

S.C. Code Ann. § 56-5-2941(E)(emphasis added).

Further, drivers must have the Device installed in their vehicles inspected to provide the Department with the data it needs to monitor the drivers under the Point System:

The person shall have the device inspected every sixty days to verify that the device is affixed to the motor vehicle and properly operating, and to allow for the preparation of an ignition interlock device inspection report by the service provider indicating the person's alcohol content at each attempt to start and running retest during each sixty-day period. Failure of the person to have the interlock device inspected every sixty days must result in one ignition interlock device point.

S.C. Code Ann. § 56-5-2941(H)(1) (emphasis added).

Finally, the General Assembly has established the minimum time the Department must monitor drivers while they are subject to the Point System. S.C. Code Ann. §§ 56-5-2945(C)(2); 56-5-2947(D)(2); 56-5-2951(I); 56-5-2990(A).

The General Assembly clearly intended that the Department monitor drivers enrolled in the Program, that the drivers should be subject to the Point System to penalize them for various infractions of the Program's rules, and that the drivers should be monitored for defined lengths of time. However, the General Assembly did not set forth how the Department should manage the end of the drivers' Program terms. Therefore the Department established the final inspection procedure to do so while carrying out the intent of the law. It is within the Department's discretion to establish this procedure:

While the Legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board "to fill up the details" by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.

McNickel's Inc. v. S.C. Dep't of Revenue, 331 S.C. 629, 634, 503 S.E.2d 723 (1998) (Citing Heyward v. South Carolina Tax Comm'n, 240 S.C. 347, 126 S.E.2d 15 (1962) (internal quotes in original)).

Where an agency is tasked with enforcing a law, and the statute is silent or ambiguous with regards to a specific issue, a court must give deference to the agency's interpretation of the statute. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 33, 766 S.E.2d 707 (2014)(Citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). In South Carolina, courts defer to an administrative agency's interpretation of the statutes it is tasked with enforcing unless there is a compelling reason to differ with the agency's interpretation:

[T]he deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute.

Id. at 34-35.

Further, “[i]n South Carolina, operating a motor vehicle is a privilege of the State, not a right of the individual.” Taylor v. S.C. Dep't of Motor Vehicles, 368 S.C. 33, 36, 627 S.E.2d 751 (Ct. App. 2006). This privilege is subject to reasonable regulation under the State’s police power to further public safety and welfare. See e.g. Chisolm v. S.C. Dep't of Motor Vehicles, 402 S.C. 593, 597, 741 S.E.2d 42 (Ct. App. 2013); Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 595, 654 S.E.2d 284 (Ct.App.2007); State v. Collins, 253 S.C. 358, 361, 170 S.E.2d 667 (1969).

The Department has interpreted the statutory scheme set forth in S.C. Code Ann. § 56-5-2941 and its related statutes⁴ to require that drivers participating in the Program must be monitored for the entire duration of their statutorily defined Program terms. The Department developed the final inspection procedure to carry this out. It is not arbitrary, because it is designed to provide the Department with the final Inspection Report it needs to implement the General Assembly’s mandate. It is not capricious for the same reason, but also because it is structured to obtain the final Inspection Report with as little inconvenience as possible to the drivers. Further, possession of a IIR license is a privilege the State has granted to eligible drivers, and thus is subject to the State’s reasonable regulation. Finally, in all instances, participation in the Program is voluntary, and its terms, conditions and procedures available for public review.

⁴ Broadly enacted by 2014 South Carolina Laws Act 158 (S.B. 137), known as “Emma’s Law”.

Drivers who have enrolled in the Program cannot claim to be ignorant of what is required of participants.

The only alternative to the Program's final inspection procedure would be to allow the drivers to immediately remove the device from their vehicles at the final inspection. There are two principle problems with this. First, if the final inspection report indicates that points should be assessed, and the assessment causes an extension of time in the Program, then the driver would be required to go to the expense of having the Device reinstalled so that the extension in time could be served.⁵ Second, drivers issued the IIR license must drive a vehicle equipped with a working Device. S.C. Code Ann. § 56-5-2941(A). Drivers who fail to do so commit a misdemeanor; repeated failures may result in a felony. S.C. Code Ann. § 56-5-2941(K). Until the Department has determined that the driver has successfully completed the Program, DMV will not issue the driver an unrestricted driver's license. So long as the driver holds the IIR license, his vehicle must be equipped with a Device. Given the statutory scheme, the procedure the Department has implemented is the best available option for handling the end of drivers' Program terms while satisfying the General Assembly's intent that the Department monitor the entirety of drivers' terms. The Court should defer to the Department's interpretation of the statutory scheme implementing the Program and recognize that it has the authority to establish the final inspection procedure.

B. THE DEPARTMENT HAS THE AUTHORITY TO CONTINUE MONITORING A DRIVER WHO REFUSES TO UNDERGO A FINAL INSPECTION.

Drivers issued the IIR license "*must* be subject to an Ignition Interlock Device Point System managed by the Department of Probation, Parole and Pardon Services." S.C. Code §

⁵ Without question the Department will not simply "write off" the data recorded on the device without reviewing it for potential violations.

56-5-2941(E)(emphasis added). Drivers are subject to various penalties for violations of the Program's rules, which may include extensions of time a driver must participate in the Program. S.C. Code § 56-5-2941(E)(1, 2, 3). Therefore drivers in the Program must have their vehicles regularly inspected so that the Program can review the Inspection Report containing data recorded by the Device installed in driver's vehicles. S.C. Code § 56-5-2941(H)(1). As discussed in Subsection (A)(1) of this brief, the Department must have the Inspection Reports to carry out the General Assembly's mandate to monitor the drivers, and the Program must be able to review Inspection Reports that cover the entire term the driver is required to serve in the Program. As also discussed, the Department established a procedure at the end of the drivers' terms to request a final inspection of the Device be performed so that the Program can review the data recorded by the Device. Only after reviewing this final Inspection Report will the Program consider the driver to have completed the Program.

In general, having a driver's license of any kind is not a property right, but is only a privilege that is subject to reasonable regulation under the State's police power in the interest of the public safety and welfare. See e.g. Chisolm v. S.C. Dep't of Motor Vehicles, 402 S.C. 593, 597, 741 S.E.2d 42 (Ct. App. 2013); Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 595, 654 S.E.2d 284 (Ct.App.2007); State v. Collins, 253 S.C. 358, 361, 170 S.E.2d 667 (1969). The purpose of the Ignition Interlock Device Program is to protect the interest of public safety and welfare by requiring drivers who have violated State laws relating to drinking and driving to drive a vehicle equipped with a Device. While drivers are subject to the interlock restriction they must participate in the Program, *if they want to drive legally*. S.C. Code Ann. § 56-5-2941(A, K). However, they are not compelled to do so. It is their choice whether to have a Device installed in

their vehicle and to acquire the IIR license. Further, at any time, drivers enrolled in the Program may remove the Device from their vehicles and surrender the IIR license.

Any driver who has volunteered to participate in the Program has also consented to its rules and regulations. To begin participating in the Program at all, the driver must follow statutorily set procedure. S.C. Code § 56-1-400(A)(requiring drivers to have a Device installed in their vehicle before DMV will issue the IIR license). The driver's participation begins when he obtains the IIR License. Any driver who, while holding the IIR license, refuses to have a final inspection performed is preventing the Department from monitoring the entire period of the driver's Program term, and is thus thwarting the General Assembly's intent that the entire term be monitored. Without the final Inspection Report, the Department cannot consider the driver to have successfully completed the Program term. Under such circumstances, so long as the driver continues to possess the IIR license, then the Department has no choice but to continue to monitor the driver per its statutory mandate.

As discussed in section (A)(2) of this brief, here is another instance where the Department must "fill up the details by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." McNickel's Inc., 331 S.C. 629, 634 (1998). Where an agency is tasked with enforcing a law, and the statute is silent or ambiguous with regards to a specific issue, a court must give deference to the agency's interpretation of the statute. Kiawah Dev. Partners, II, 411 S.C. 16, 33, (2014). In South Carolina, courts defer to an administrative agency's interpretation of the statutes it is tasked with enforcing unless there is a compelling reason to differ with the agency's interpretation, and so long as it is not arbitrary, capricious, or manifestly contrary to the statute. Id. at 34-35.

Here, the General Assembly did not speak to a scenario where a driver enrolled in the Program refuses to have a final inspection performed, thereby preventing the Department's access to information it needs before the driver's term is complete, *and while the driver continues to possess the IIR license and to keep the device installed in his vehicle*. The Department's practice of continuing to monitor such drivers until it receives a final Inspection Report is consistent with the General Assembly's intention that the Department monitor the drivers until their terms are complete, even if the Department must continue monitoring them beyond what would have been the formal end date of the driver's term. This is not arbitrary because the Department is required to monitor the drivers until their terms are complete; it is not capricious for the same reason, but also because the driver in such a situation has consented to participate in the Program, and has by their own inaction prevented the Department from designating their Program term complete. Nor is this manifestly contrary to statute -- the Program has no idea what information the Device may have recorded that would require the Department to assess points against the driver; it would be contrary to statute for the Department to simply write this possibility off and designate the drivers as having completed the Program. Drivers should not be allowed to thwart the General Assembly's intent by refusing to comply with rules and procedures they consent to when they enroll in the Program, and the Court should defer to the Department's discretion to continue monitoring drivers in the above circumstances.

1) The Department Properly Continued to Monitor the Appellant After He Failed to Have a Final Inspection.

The Appellant's behavior is singular and unprecedented thus far among drivers who have enrolled in the Program, and deserves clear explanation for the Court's understanding of the circumstances. The Appellant had a Device installed in his vehicle, obtained the IIR license, and started participating in the Program for a two-year requirement on May 22, 2015. At the hearing,

Mrs. Cartwright testified that on May 22, 2017 the Department mailed the Appellant a letter requesting a final inspection. T-8, ll. 4-8. He admitted to receiving this letter. T-27, ll. 16-21; T-32, ll. 4-5. However, he did not take his vehicle in for an inspection. As Ms. Cartwright explained, without the final Inspection Report the Program could not consider the Appellant to have completed the Program. T-7, ll. 15-24; T-13, ll. 12-20. He continued to possess the IIR license and the Device remained in his vehicle. Therefore the Program continued to actively monitor him pending the reception of the final Inspection Report. Drivers who are actively monitored by the Program are subject to the Program's terms and conditions. Therefore the Appellant continued to be subject to the Program's rules, including the requirement to have the device inspected regularly. T-32, ll. 21-14. Failure to do so at least once every sixty days will cause a one-point penalty assessment. S.C. Code Ann. § 56-5-2941(H)(1).

Prior to May 22, 2017 the Appellant's previous inspection had occurred on May 2, 2017. T-9, ll. 12-14. He failed to have an inspection within sixty days of that date, causing a point to be assessed against him pursuant to Section § 56-5-2941(H)(1). The Program mailed him a letter advising him of the assessment. He acknowledged receiving this letter. T-16, ll. 12-17. He did not appeal this point assessment or contact the Program. T-16, ll. 24-25. Mrs. Cartwright noted that prior to May 22, 2017 the Appellant had filed with the Department at least one successful appeal of a point assessment, so he should have been familiar with the procedure.⁶ T-10, ll. 20-23; T-39, ll. 1-8.

Sixty more days passed without an inspection. The Appellant continued to possess the IIR license and the Device remained in his vehicle. This caused a second one-point assessment.

⁶ All the Department's assessment notices include instructions on how to appeal the assessment.

The Program sent him a letter dated September 6, 2018 advising him of the assessment and a two-month term extension pursuant to S.C. Code Ann. § 56-5-2941(E)(1). The Appellant admitted to receiving this letter also. T-17, ll. 5-12. He did not appeal this point assessment. Id. A two-point assessment notice not only advises the driver of the term extension, it states the new projected Program end date. The Appellant noted that the September 6 letter stated “your adjusted program completion date is July 21st, 2017.” T-17; ll. 10-12. This date was calculated from what might have been the end date, May 22, 2017.⁷

Sixty more days passed during which the Appellant failed to have the vehicle inspected. The Appellant continued to possess the IIR license and the Device remained in his vehicle. The Program mailed the Appellant a one-point assessment dated November 6, 2017. Pursuant to S.C. Code Ann. § 56-5-2941(E)(2), the third point caused a four-month Program extension and required the Appellant to contact the Department of Alcohol and Other Drug Abuse Services (DAODAS) for a mandatory substance abuse assessment. If a driver fails set up the substance abuse assessment, DMV will suspend the driver’s license. S.C. Code § 56-5-2941(E)(2). The Appellant did not appeal the third point assessment, nor did he contact DAODAS to set up a substance abuse assessment. At the hearing the Appellant claimed he did not receive the third point assessment letter, though he did receive DMV’s notice that he would be suspended for failing to set up the substance abuse assessment.⁸ T-18, ll. 6-9. The Program mailed all notices to the Appellant’s record of address as maintained by DMV; at the hearing the Appellant confirmed that his address had not changed. T-22, ll. 19-24.

⁷ The Appellant got credit against this term extension, and for the subsequent four-month extension, from the extended time he was active in the Program. By the time he received notice of the extensions, he had already satisfied them.

⁸When the Department issues a suspension notice, DMV mails the driver a notice advising the driver of the nature of the suspension, when it will start, and when it will end.

Sixty days after the third point assessment, the Appellant had failed to have his vehicle inspected. The Appellant continued to possess the IIR license and the Device remained in his vehicle. The Program issued a fourth skipped inspection point. Dated January 4, 2018, this notice advised the Appellant that his license would be suspended for accumulating four points. R-*. It appears that before he received the January 4 notice, the Appellant attempted to file an appeal of the third point assessment with the Office of Motor Vehicle Hearings. R-*, *; T-18, ll. 10-11. Thereafter he received the January 4 notice, which he forwarded to OMVH, who converted his attempted appeal of the third point assessment into the appeal of the fourth point assessment.⁹ R-*, T-18, ll. 12-23.

On January 26, 2018, the Appellant's II Restricted license was suspended because he had failed to contact DAODAS as required as a consequence of the third point assessment.¹⁰ On February 13, 2018 he contacted the Program for the first time since it had mailed the May 22, 2017 request for a final inspection. T-32, ll. 1-12. He wanted to discuss the three-point assessment letter; he also stated that he had received the final inspection letter, but could not get his vehicle in for the inspection. Id. At this time he requested a removal letter so he could have the device removed from his vehicle. Id. This letter authorizes the installer to remove the Device. The letter was provided, and the Device was removed on February 19, 2018.¹¹ T-20, ll. 17-20. The installer attempted to download what data may have been recorded by the Device but Ms. Cartwright testified that it contained no data. T-30, ll. 22-25; T-31, ll. 1-4.

⁹While a driver's total points are under four, they must file appeals with the Department. S.C. Code § 56-5-19414(H)(6); see also SCDPPPS v. Brewer, 2015 WL 6410107 (S.C.Admin.Law.Judge.Div.)(2015).

¹⁰Note that this suspension started after the Department assessed the fourth point. Had it started before, it would have paused his active status on the Program until the suspension cleared.

¹¹This letter was issued due to his suspension by SCDMV, not because he had completed the Program. When drivers are suspended for any reason, they stop getting credit in the Program and are allowed to remove the Device rather than continue paying for it.

At the hearing the Appellant testified that he had contacted the Program around the time of the second point assessment to explain that his vehicle had broken down and he could not take it in for an inspection. T-17, ll. 16-18. However, Mrs. Cartwright testified that the Program's records showed that after it mailed the request for a final inspection in May 2017, the Appellant did not contact the Program until February 13, 2018. T-31, ll. 18-22. T-32, ll. 1-12; T-39, ll. 3-5. She stated it was possible he contacted the installer with this information, but that the Program would not necessarily learn of this.¹² T-32, ll. 14-15; T-39, ll. 1-8. Mrs. Cartwright testified that it is the driver's responsibility to get their vehicles in for inspections. T-39, ll. 12-18. This would be true whether the vehicle was broken down or not. She noted that had he simply had the final inspection performed, if there were no violations recorded by the Device, he would have completed the Program, but because he did not he remained active and the system continued to assess points against him for skipping inspections. T-32, ll. 16-24.

Here the Appellant volunteered to participate in the Program, and at what could have been the end of his Program term he simply refused to comply with the Program's rules. He would not have a final inspection performed, denying the Department the data it needed to designate him as Program complete. He did not contact the Program, but continued to possess the IIR license and to keep the Device installed in his vehicle. Under these circumstances the Program reasonably continued to monitor him, as required by the General Assembly until his term was complete, and reasonably continued to assess points against him for skipping inspections so long as he possessed an active, unsuspended IIR license. As argued above in Section B of this brief, the Department has the authority to do so. The Court should find that not

¹²Drivers rent the Devices from their manufacturers, who contract with local businesses (installers) to install and inspect the Devices. Drivers routinely contact the installers to set up inspection appointments, but the Department is not automatically privy to such communications.

only was it within the Department's discretion to continue monitoring the Appellant, it was required to do so under its mandate from the General Assembly to administer the Program.

C. THE POINT RECORDED IN THE SUSPENSION NOTICE WAS CORRECTLY ASSESSED.

The Department mailed the Appellant a suspension notice dated January 4, 2018. R-*. The notice stated that on December 29, 2017, one point had been assessed against him for a skipped inspection, and that because at least four points had been assessed against him he would be suspended. *Id.* Drivers must have their vehicles inspected at least once every sixty days or a point is assessed against them. S.C. Code Ann. § 56-5-2941(H)(1). Drivers in the Program must be suspended if they accrue four or more points. S.C. Code Ann. § 56-5-2941(E)(3). Therefore, at the hearing the Department was required to show that at least four points in total had been assessed against the Appellant. With regards to any point assessments that occurred prior to those detailed in the notice, the Department bore a burden of production that those points had been assessed. S.C. Dep't of Prob., Parole & Pardon Servs., Appellant, No. Docket No.: 15-ALJ-30-0061-AP, 2015 WL 6410107, at *7 (Oct. 13, 2015). With regards to the point assessment detailed in the suspension notice, the Department was required to prove by a preponderance of the evidence that the point was correctly assessed. *Id.*; see also S.C. Code Ann. § 1-23-600(A)(5); Rule 15(B), OMVHR.

At the hearing Mrs. Cartwright testified about a record of the Department she identified as the violations page, a screenshot from the Department's ignition interlock management system.¹³ She testified that it recorded any point assessments and the penalties caused by them.

¹³ Note that this document is misidentified by the Transcript on page 8, as Mrs. Cartwright's subsequent testimony makes clear. Further, though it was entered into evidence without objection (See T-12, ll. 10-17), it is absent from both the transcript and the Record on Appeal. It was a certified record of the Department prepared by Mrs. Cartwright, who is also the custodian of records for the Ignition Interlock Device Program.

T-9, ll. 1-11. She testified that four total missed inspection points were assessed against the Appellant. T-9, ll. 9-24; T-12, ll. 7-8. The Program's system automatically assesses skipped inspection points when sixty days have passed from the previous inspection, but the Program checks with the manufacturer to make sure that there had not in fact been an inspection before the Program will officially assess the point. T-11, ll. 9-18. She noted that the Appellant's last inspection had been on May 2, 2017. T-9, ll. 12-16. July 1st was sixty days later, the next day a point was assessed. August 30th was sixty days after July 1st; the next day a point was assessed. October 29th was sixty days from August 30th; the next day a point was assessed. Finally, December 28th was sixty days after October 29th; on December 29, 2017 the fourth skipped inspection point was assessed, and the suspension notice was mailed on January 4, 2018. *Id.*, ll. 17-24. After May 2017, the Appellant did not visit the device installer again until February 19, 2018. T-30, ll. 11-20.

Mrs. Cartwright's testimony established the Department's prima facie case that four points were assessed, and that the fourth was correctly assessed for skipping an inspection in violation of S.C. Code Ann. § 56-5-2941(H)(1). In South Carolina, "[o]nce a party establishes a prima facie case, the burden of proof shifts to the opposing party." Daisy Outdoor Advertising Co., Inc. v. South Carolina Dept. of Transp., 352 S.C. 113, 118, 572 S.E.2d 462(Ct. App. 2002). However, at the hearing the Appellant presented no evidence to rebut the fact that he had not taken his vehicle in for an inspection between October 29 and December 28, 2017. He did not even deny that he had not done so, or that he had not done so before the previous three points were assessed. Rather, he complained of the final inspection process the Program has established for drivers at the end of their Program terms. T-13; T-14, ll. 1-5.

The court may reverse or modify the decision if substantial rights of the

appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

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

S.C. Code Ann. § 1-23-380(5)

A decision is supported by substantial evidence when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910(2010). That the record, considered as a whole, may present the possibility of drawing two inconsistent conclusions from the evidence does not prevent an 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 (1996). When applying the substantial evidence rule, reviewing courts will not overturn an agency's finding of fact "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 603-04, 582 S.E.2d 413(2001) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304 (1981)). When applying this rule, the agency's factual findings are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 519, 466 S.E.2d 357 (1996). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. S.C. Coastal Council, 319 S.C 348, 353, 461 S.E.2d 388 (1995). Finally, 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.

Here the Appellant provided no evidence whatsoever that the point assessment detailed in the January 4, 2018 suspension notice was not supported by substantial evidence. He has not shown that the Department's decision was arbitrary, capricious, contrary to statutory provisions, in excess of the Department's authority or made upon unlawful procedure. The Court should therefore affirm the Administrative Law Court's order supporting the Respondent's suspension of the Appellant.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the Court affirm the order of the Administrative Law Court.

Respectfully submitted,

Thomas W. Nicholson, Esq.
Legal Counsel

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Attorney for the Respondent

Columbia, South Carolina
April 30, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Judge
Case No.: 18-ALJ-21-0201

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SC Court of Appeals

Appellant Case No. 2019-000389

ALIEO GARGA-RICHARDSON.....RESPONDENT

v.

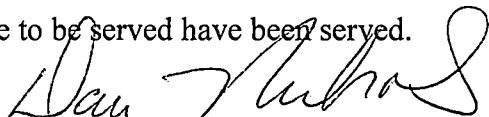
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES.....APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within Initial Brief and Designation of Matter dated May 1, 2019, on Appellant this 1st day of May, 2019, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Alieo Garga-Richardson, Pro Se
1435 Ebinport Road
Rock Hill, S.C. 29732

I further certify that all parties required by Rule to be served have been served.



Dawn Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
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State of South Carolina
Department of Probation, Parole and Pardon Services

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Governor



JERRY B. ADGER
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SC Court of Appeals

May 1, 2019

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: Alieo Garga-Richardson v. SCDPPPS

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated May 1, 2019, along with proof of service in the above referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Nicholson".

Thomas W. Nicholson
Legal Counsel

TWN:dn

Enclosures

cc: Alieo Garga-Richardson, Pro Se

State of South Carolina

Department of Probation, Parole, and Pardon Services

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SC Court of Appeals

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
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Columbia, South Carolina 29211



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