THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Hon. Deborah Brooks Durden, Administrative Law Judge

SC Court of Appeals Case No. 2018-001788

Toyota of Greer..... Appellant,

v.

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

APPELLANT'S FINAL REPLY BRIEF

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INTRODUCTION

This case is a perfect example of the danger posed to South Carolina citizens by the "...leviathan known as administrative agency rule-making—the so-called Fourth Branch of government—and illustrates the danger it poses to the once sacrosanct constitutional principle of separation of powers."[1] .

It is clear that when DE-002 was prepared, the concept of due process was foremost in the Department's mind. It was clear that it should be applied uniformly, and not haphazardly as any assistant manager may want to apply it. It required a willful failure to deliver title within 45 days of the date of sale. All witnesses agreed that if the standard of DE-002 was applied, none of the points should have been charged. (R. 243, l. 17- R. 244, l. 14; R. 290, ll. 3-15). Therefore, it is absolutely unfair for the Department to attempt to suspend the Dealer's business at the cost of $2.1 million when it didn't even follow its own procedures.

The Dealer came to court prepared to defend against the 12-point suspension which requires willfulness, but the Respondent sought an order claiming that the Dealer's actions were arbitrary, and that the 12-point system did not apply. This is a gross violation of the Dealer's constitutional rights of due process. It is now time to keep the Department, which explicitly condoned selling cars before the title was in hand and claimed suspension based on DE-002, from unilaterally changing the rules, and attempting to put the Dealership out of business at the cost of $2.1 million and deny wages to 86 South Carolinians.

This appeal is a direct attempt to keep this from happening. The Department, through the unilateral acts of an assistant manager, is attempting to change the way business has been done for

[1] *Joseph v. S.C. Dep't of Labor*, 417 S.C. 436, 454-56, 763 S.E.2d (2016)(Kittredge concurring).

years in the State of South Carolina with no notice. Most dealerships sell cars without having the title in hand, as allowed by South Carolina law. They expect that title will be provided within the time allotted by law. In fact, Appellant had over 25,000 transactions in which there was no problem over the three-year period. It was only three sales that accumulated that form the basis for shutting down a business at great cost to the Dealer and its employees. The Department's field agent and assistant manager, who came up with their own interpretation of the point system, should not be given this power. There is no substantial evidence in the Record that the sales were done in a manner to damage Dealer's customers.

ARGUMENT

I. IT IS NOT ARBITRARY TO SELL A CAR IN SOUTH CAROLINA WHEN THE TITLE IS EXPECTED

A. The Department Explicitly Allowed Such Sales

The Dealer's Vice President, Bob Hogan, made it clear that (uncontradicted by the Department) the Respondent absolutely and unequivocally approved of the sale of a pre-owned car prior to having the title in hand:

> Q. [DMV] And did you say - - or tell me if it's true that according to your procedure, you will sell a car if you don't have a title for it yet, right?
> A. [Hogan] If we don't have the title physically in possession, yes, we will.
> Q. Okay.
> A. And I'm not aware of any law that prohibits such at all. In fact, to the contrary, I was informed by the DMV, Mr. Paden, that that was not a law in South Carolina.
>
> R. 364, ll. 11-21.

In fact, the law explicitly allows such a sale.[2] Now, the Department is attempting to shut the Dealer down after condoning the procedure for selling a car, now claiming this procedure was arbitrary, in bad faith, unconscionable, and fraudulent. Respondent incorrectly states that it informs dealers not to sell cars without the title in hand when the Auditing Unit Team Leader stated only that they suggest dealers hold vehicles until they get the title. (R. 303, ll. 2-7) This is the exact kind of hubris that the law seeks to protect the public from by requiring that an agency follow it procedures and not make them up as they go along. This action requires reversal.

B. Titles Were Delivered by Dealer Over 25,000 Times Without a Problem

If a customer trades in a car, that car can be available for sale even before the title is transferred by the previous owner.[3] This gives the public access to a large range of pre-owned cars- 99% of the time the title is transferred within the 45-day period (R. 366, ll. 3-7). In fact, the Dealer sold in the relevant three year period 25,182 cars (R. 348, l. 20). This confirms that the Dealer's system works; and it cannot be arbitrary, or in bad faith, or unconscionable or fraudulent to sell cars before the titles are in hand. This system benefits the customers, and no substantial evidence is in the Record that this system harms the customer.

C. This is How Business is Done in South Carolina

Not only does the Department condone the sale of pre-owned vehicles before the title is received, but this is how business has been done in South Carolina for years (R. 364, l. 11 – R. 365, l. 25). Customers expect to have access to a large inventory of cars. Now, the Department, *ex post facto,* through the unilateral acts of two employees, is trying to label this accepted and

[2] *See* S.C. Code §56-19-370
[3] *Id.*

condoned business procedure as arbitrary. S.C. Code §56-19-370 makes it clear that cars can be sold before the titles are in hand.

II. THE RESPONDENT IS REQUIRED TO FOLLOW ITS POINT SYSTEM

A. The South Carolina Supreme Court's Opinion in *Joseph* Checks the Actions of the "Administrative State"

The Respondent appears to assert that DE-002 should have no bearing and it is free to abandon its established point system whenever it wants. Respondent clearly informed Appellant in its Official Notice of Suspension that the reason was the accumulation of points ". . . under DMV Policy DE-002 pertaining to Dealer Sanctions." (R. 30-32, Official Notice of Dealer License Suspension). Respondent argues that policy statements are outside the definition of a "regulation" and therefore, they are not required to follow Procedure DE-002. The question of whether Respondent can arbitrarily deviate from its established mandatory procedure is not answered only by an evaluation of whether the procedure has to be promulgated as a regulation. Even a general policy statement cannot be arbitrarily ignored by an agency.[4]

In *Joseph v. S.C. Dep't of Labor*, 417 S.C. 436, 790 S.E.2d 763 (2016), the Supreme Court found that the South Carolina Board of Physical Therapy created a binding norm that it was required to follow in the 2011 Position Statement and, therefore, the Position Statement had the effect of a regulation under the APA.[5] Like *Joseph,* DE-002 was not promulgated as a regulation; but this does not mean it does not have to be followed.[6]

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[4] *See INS v. Yang,* 519 U.S. 26 (1996).

[5] It further found that the Board violated the APA by adopting the 2011 Position Statement without promulgating it as a regulation.

[6] The ALC erred in holding the only limitations on the DMV's discretion regarding sanctions are contained in S.C. Code Ann. § 56-15-350 when DE-002 was a binding norm established by the DMV.

The South Carolina Supreme Court's test to determine if an agency has created the equivalent of a regulation is:

> Whether a particular agency creates a regulation or simply announces a general policy statement depends on whether the agency action establishes a "binding norm." *Home Health Serv., Inc. v. S.C. Tax Com'n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994).
>
> The "key inquiry" is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm. [*Sloan v. S.C. Bd. Of Phys. Therapy Ex'mnrs.*, 370 S.C. 452, 491, 636 S.E. 2d 598 (2006) (Toal, C.J., dissenting)] *(quoting Ryder Truck Lines, Inc. v. United States* , 716 F.2d 1369, 1377 (11th Cir. 1983))...
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> *Joseph,* 417 S.C. at 454, 790 S.E. 2d at 772.

The Supreme Court found the Position Statement was a binding norm because it gave the Board no discretion in applying the policy. Likewise, the Department was required to follow DE-002, and had no discretion to rewrite it and apply sanctions as two employees saw fit.[7] The Department, through the point system, intended to establish how a dealer's license can be suspended; it then made it public in the Dealer Manual, published on its website. By disregarding portions of DE-002, the Department deprived Appellant of due process and equal protection.

The Department recognizes that the Position Statement in *Joseph* "...was to protect PTs and PT Groups and specifically ... was intended to have the force of law." (Respondent's Brief, p. 24). It then denies that Procedure DE-002 was to have the "force of law, filling in the gaps in

[7] In fact, the Department promises in the Dealer Manual that any "[c]hanges in law or policy may require periodic updates" and those updates " ...will be placed on the DMV's website." (R. 409, Pet. Ex. 2, p. 2) The Department presented no evidence of a policy change for the removal of the willfulness requirement, nor for allowing for the reduction in points for damage to any party on its website. The procedure gave the Department discretion to charge 6 points up to revocation for damage to the public, but not 4 points.

the law, or even *interpreting* any law." *Id.* The Department intentionally overlooks the explicit language in the Dealer Manual:

> Changes in law or policy may require periodic updates to the Dealer Manual. The manual will be placed on DMV's website. Sections of the law appearing in this manual may be paraphrased for simplicity **or to reflect DMV's interpretation**. (emphasis added)[8]
> (R. 409, Pet. Ex. 2, p. 2).

Therefore, the Department cannot now claim that the Sanctions Chart in the Dealer Manual was not their interpretation of the law meant to bind the dealers.

Further, the *Joseph* Court did not justify reversal by finding an equal protection violation alone. The majority opinion was a plurality opinion, with the deciding vote being Justice Kittredge. He clearly stated in his concurrence that he would not support reversing based on constitutional grounds. Instead, he wanted to check the power of the fourth branch of government that "presents a threat to our civil society" by applying statutory grounds alone.

The Department's reliance upon *Home Health Service, Inc. v. S.C. Tax Com'n*, 312 S.C. 324, 440 S.E. 2d 375 (1993) is unavailing. There, the Supreme Court held a Question and Answer Internal Memorandum, that was never approved by the Commission nor circulated to the bingo establishment, was not required to be a regulation. Nevertheless, the procedure was followed.[9] Here, DE-002, was approved by the DMV Director (the Chief Executive authority of the

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[8] Respondent wrongfully alleges in its Brief that Appellant is attempting to make the Dealer Manual binding. Appellant's argument is that DE-002 is binding on Respondent. The Dealer Manual is relevant because it publishes to dealers the sanctions points from DE-002.

[9] The Department wrongfully claims in its Brief that the procedure was not followed. (Respondent's Brief, p. 25). In fact, the answer on the questionnaire was that runners could not fill in for players and that is what the Commission enforced. *Home Health Service, supra*, 440 S.E.2d at 378.

Department)[10] and the point system was externally published to all dealers in the Dealer Manual, put on the website, but not followed.

DE-002 was explicitly written to enforce specific statutes dealing with dealerships. It made explicit reference to S.C. Code §56-15-350 and listed "Required Action" on the part of all Department employees. (R. 502, Pet. Ex. 5, p. 1). Respondent clearly had the intent to interpret the law, and make it a binding norm on its employees and on all dealers alike in sanctioning South Carolina car dealers. If it presents a close question, Respondent should treat DE-002 as a binding norm.[11]

B. DE-002 Creates a Binding Norm as the Official Procedure

Respondent's official procedure has been adopted since November 2009.[12] DE-002 is "Approved By" and signed by the DMV Director.[13] (R. 502, Pet. Ex. 5, p. 1) The purpose of Procedure DE-002 is "[t]o establish uniform guidelines for the application and administration of sanctions. . ." (R. 505, Pet. Ex. 5, p. 4) and "[t]o ensure uniformed [sic], fair, impartial, and thorough . . . assessment of sanctions. . . ." (R. 507, Pet. Ex. 5, p. 6) Uniform fairness is essential

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[10] S.C. Code §56-1-5(E) provides for the executive director to appoint assistants, and prescribe their duties, powers, and functions. DE-002 was approved by the DMV Director, who presumably was rightfully exercising the delegated duties and powers from the Executive Director. There is no evidence presented by the Department that this was not a proper delegation of authority.

[11] The Supreme Court advised in *Home Health Service*:

> We caution Respondent that when there is a close question whether a pronouncement is a policy statement or regulation, the commission should promulgate the ruling as a regulation in compliance with the APA.

Id. 312 S.C. at ___, 440 S.E.2d at 378.

[12] "Procedure Establishment Date: 11/02/09" (R. 502, Pet. Ex. 5, p. 1)

[13] Respondent claims in its Brief that DE-002 was not signed by the Director (Respondent's Brief, p. 33) but his illegible signature appears directly above the signature line entitled "DMV Director" in the section entitled "APPROVED BY" (R. 502, Pet. Ex. 5, p. 1). Further, there was no evidence presented at the hearing to support this claim.

as the Respondent's assistant manager testified, "[w]e try as much as possible to treat all dealers the same." (R. 237, ll. 12-13). Respondent's counsel confirmed this in his opening statement:

> According to our procedure, if we're going to follow our own rules, that is the least we can do under the circumstances we find ourselves. (R. 185, ll. 22-25).

The Department has made clear in the Dealer Manual (placed on the Department's website), what the point system is and the amount of points for each violation: 6 points to revocation for engaging in any action which caused damage to any party; 4 points for willful failure to deliver title within 45 days of sale. There is nothing "internal" about the point system, and it comes directly from the Department's Procedure DE-002. (R. 515).

What is inescapable is that the Department did follow DE-002 up to a point. The Department:

1) conducted administrative investigations under Section III C. 1;
2) completed the results of its investigation under Section III C. 3;
3) required Dealer to submit written statements as required by Section III C. 2 explaining how the problems in all three instances were caused by a prior seller or lienholder; and
4) substantiated in all three cases that the problem was with a third party.

Therefore, no points should have been assessed in all three cases. Instead of following the intended consequences of III C. 2, and the published and required DE-002A Dealer Performance Violation Sanction Table, it now claims it was forbearing in reducing the charge for damage to the public from 6 points to revocation to 4 points. It also claims Dealer's actions were arbitrary, in bad faith, unfair, and fraudulent even when the Department substantiated, under Section III C. 2, that the actions were not willful.

Finally, the assistant manager did not "forward anything through her" designated chain of command to the DLAU in Blythewood for review, approval and sanction assessment, as required

by Section III C. 4. (R. 507, Pet. Ex, 5, p. 6). She did not because she knew her immediate supervisor previously instructed her not to sanction when the fault fell at the feet of a third party. (R. 233, ll. 14-21). Finally, she completely ignored Headquarters review and sanctions approval as required by Section III D. (R. 507, Pet. Ex. 5, p. 6). The assistant manager was both judge and jury, assuring no review by her supervisors.

C. DE-002 is Written in Mandatory Terms

In the present case, DE-002 does not give the Respondent discretion as to whether it must be followed:

REQUIRED ACTION:

- Managers are required to have employees read this procedure and complete the electronic Policy/Procedure Acknowledgment on the Intranet if it applies to the employee's job duties. Supervisors/managers must maintain Policy/Procedure Acknowledgment reports for their areas.
- Employees are responsible for reading, electronically acknowledging and following this procedure if it applies to your job duties.

(R. 502, Pet. Ex. 5, p. 1)

It is not a "guidance" or "advisory" document as Respondent contends. (Respondent's Brief pp. 28-29). DE-002 uses the term "required" and not "may." See *State v. Hill*, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994). DE-002 is clearly meant to apply to dealers and not just agency personnel. Leaks, Assistant Manager of the Department, agreed that DE-002 is the mandatory official procedure regarding the issuance of dealer sanctions (R. 261, l. 20 – R. 262, l. 6; R. 502, Pet. Ex. 5, p. 1). This is not an advisory document. Ms. Leaks even admitted she did not have the power to change it:

Q: Okay. So that also requires a willful[14] failure, does it not?
A: Correct.
Q: And just because you don't put it in a letter, you can't change what your rules are, can you?
A: Correct.

(R. 262, ll. 1-6)

So did Jason Benjamin, the Dealer Agent for the Department:

Q: Let me read it one more time, maybe I - - maybe I confused you and I'm sorry. The failure to deliver title violation is not considered willful if the dealer can provide a written statement which is substantiated by the dealer licensing and audit unit agent identifying a prior seller or lien holder who has failed to deliver the title as required by law.
A: Yes, that says ---
Q: Did I read that correctly?
A: Yes.
Q: Are you bound by that definition or not?
A: Yes.

(R. 287, l. 24 –R. 288, l. 11)

D. DE-002 is Binding on the Dealers

Respondent raised for the first time to the ALC that DE-002 is only an internal procedure, similar to its procedure regarding employee phone use. It is quite clear that Respondent meant for Appellant to be aware of and to follow the Sanction Table derived from DE-002. Respondent

[14] The Department makes the bold statement in its Brief that the term "willful" does not apply to the transactions in question. This totally contradicts the testimony of the Department employees Leaks and Benjamin, and DE-002 itself:

> The "failure to deliver title violation" is not considered willful if the dealer can provide a written statement, which is substantiated by the Dealer Licensing and Audit Unit agent identifying a prior seller or lienholder who has failed to deliver the title as required by law.
> (R. 507, Pet. Ex. 5, p. 6)

(Leaks, R. 243, ll. 17-24; Benjamin, R. 287, l. 24- R. 288, l. 11) Benjamin testified that the Dealer provided, in all three instances, written statements that he substantiated. (R. 295, l. 22 – R. 296, l. 16)

requires dealers to answer affirmatively that they have the Dealer Manual when applying for and renewing their dealer license. (R. 398, Pet. Ex. 1, p. 2). Respondent explicitly asserted it was suspending Appellant's license based on DE-002. (R. 30, Official Notice).

Respondent makes much of the fact that only the 2007 version of the Manual was introduced in front of the hearing officer. The 2007 Manual was introduced by the Respondent at the hearing only for the proposition that Appellant was aware at the time that it began operating that title was to be provided to customers within 45 days of sale. (R. 214, l. 15- R. 215, l. 21).

Respondent argued for the first time before the ALC that Appellant was not prejudiced by DE-002 because it was not familiar with the Sanctions Procedure. (R. 103, DMV's Response to Appellant's Appeal to the ALC, p. 19). Respondent makes this argument even though it informed Appellant that it suspended under DE-002 in its Official Notice of Suspension. (R. 30). Appellant addressed this erroneous statement before the ALC, where it was raised for the first time, and referenced the current Manual available to the public on the Respondent's website. (R. 114, Appellant's Reply to the ALC, p. 2).

The stated purpose and scope of the Manual is "...to provide new and existing dealers with up-to-date information" regarding "... requirements mandated by state and federal law, and DMV's policy." (R. 409, Pet. Ex. 2, p. 2) In fact, the Department has placed the entire Manual on its website. (R. 409). Any changes in policy interpretation were promised to be placed on the website.

Page 5 – 3 of the Dealer Manual (available online) clearly states:

> The Department of Motor Vehicles (DMV) has established uniform guidelines for the application and administration of sanctions for dealers... that violate rules, regulations, policy, or law. . . . DMV will suspend, for a period of 7 days, the license of any dealer... that accumulates 12 points.

Page 5 – 4 of the Dealer Manual (available online) then lists the Dealer Performance Violations; the ones relevant for this case are:

> Engaging in any action which causes damage to any party: 6 points to Revocation
>
> Willful failure to deliver title to buyer or department within 45 days of sale: 4 points.

This Table is a summary of the DE-002 Sanction Table.

Now the Respondent asserts that the 2007 Manual is the only relevant version and seems to suggest that the sanctions in DE-002 were not even in place at the time of assessment. (Respondent's Brief, pp. 31-32) These statements by Respondent are disingenuous.

The current version of the Dealer's Manual makes it clear that the new points system was implemented beginning August 1, 2009. DMV's Zenda Leaks testified that the point system was in effect before she became the assistant manager in May of 2011. (R. 219, ll. 14-18). The 2007 version of the Manual cannot have been introduced by the Respondent for the proposition that it represents Appellant's knowledge of DE-002, which was not yet in effect in 2007. Surely the Respondent is not suggesting that it intentionally misled the Hearing Officer, the ALC, or this Court by arguing that the 2007 version of the Manual establishes whether Appellant had knowledge of the point system. Rather, the Record shows that the DMV updated the Dealer's Manual as needed to reflect changes in its interpretation and posted that information on its website. Respondent is attempting to prevent this Court from reviewing the very document it prepared that refutes statements it made after the hearing and which it has made public on its website.

Administrative Procedure Act S.C. Code §1–23–10(4) clearly defines a regulation that fits the facts of this case:

> "Regulation" means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency... but does not include descriptions of agency procedures applicable only to agency personnel...

It is clear that the Sanction Point System contained in DE-002 is a "statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." It was not applicable only to agency personnel, but to all South Carolina car dealers. The Policy is external, for it is for all South Carolina dealers, and not just an internal policy for the DMV. [15] Respondent expressly references DE-002 in its Suspension letter. (R. 30, Official Notice). Therefore, it is mandatory.

Respondent claims in its Brief that the Dealer benefited from its 'forbearance" in only charging 4 points for the violation of "Engaging in any action which causes damage to any party or to the public. (Failure to deliver title within 45 days of date of sale)" (Respondent's Brief p. 28). However, DE-002 and the Sanctions Chart published in the Dealer's Manual gave the Respondent the discretion to charge 6, 7, 8 or points "up to revocation" for this violation. It did not give it discretion to charge less. DE-002, the Dealer's Manual Chart, and the Department's Sanction letter (Failure to deliver title within 45 days), accompanied by the 4-point sanction, made clear to the Dealer what violation was being charged.

[15] The DMV's examples presented to the ALC of two of their internal procedures that should not be binding only emphasize how DE-002 is quite different. The first, an internal policy regarding how personal calls are handled by DMV employees, is nothing like DE-002 with its Sanctions Table published and distributed to the dealers with the danger of taking their licenses away. This is also true with the Department's use of its "Phoenix System." Nothing in DE-002 has to do with the internal procedures of how employees are supposed to act in the performance of their general duties. Rather, it is a specific, direct procedure as to how it should sanction dealers in order to take away their property rights, as published in the Dealer Manual.

E. Internal Guidelines can Bind an Agency

Respondent argues that because South Carolina's Administrative Procedures Act differs from the Federal Act, it is free to ignore its mandatory procedures. It is clear that an agency does not have to promulgate a regulation in order for its policies to be binding. Neither of the cases cited by Appellant turn on whether the policy was a "rule" under the Federal APA; in fact both cases refer to the policies as internal procedures. The Eastern District of New York found the INS abused its discretion in denying an alien's application for stay of deportation because the agency failed to follow internal guidelines. *Piper v. Crosland*, 519 F.Supp. 962 (E.D.N.Y.1981). The Third Circuit found that although the INS has discretion in deportation matters, it must follow its internal Operations Instruction.[16] The INS was found to have abused its discretion in denying the petition because it did not articulate a determination, as required in the internal Operations Instruction, that the petition was "frivolous" or that there were "substantial adverse factors" which "would probably lead" to the denial of extended voluntary departure. Likewise, in *Moret v. Karn*, 746 F.2d 989 (3d Cir.1984), the Third Circuit found that the Attorney General abused his discretion when he failed to follow his Status Review Plan. In the present case, the DMV abused its discretion by not following its adopted procedures.

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[16] INS's internal Operations Instruction 242.1(a)(25) provided in pertinent part:

> Pending final adjudication of a petition which has been filed, the district director will not deport, or institute proceedings against, the beneficiary of the petition if approval of the petition would make the beneficiary immediately eligible for adjustment of status under section 245 of the Act or for voluntary departure under the Service policy set forth in Operations Instruction 242.10(a)(6)(i). The district director may, however, seek to deport or institute proceedings against the beneficiary when it is determined that the petition is frivolous or there are substantial adverse factors which, based on the district director's opinion, would probably lead to the denial of adjustment of status or extended voluntary departure in the exercise of discretion.

III. THE CHARGE ALLEGED ONE THING, THE ORDER CONCLUDED ANOTHER

The Department is attempting to make new law by turning this case into a bad faith, unconscionable, and arbitrary decision, when in fact the only reason the Dealer faced suspension was because it failed to provide titles within 45 days. The actual Official Notice of Suspension made that clear: the reason given was not that the dealership was arbitrary, but only that it had accumulated separate sanctions of 4 points based on DE-002.

> The Department of Motor Vehicles (DMV) has determined that you have violated registration, dealer licensing and titling provisions of Title 56 and have accumulated 12 or more points listed below under DMV Policy DE-002 pertaining to Dealer Sanctions. (R. 30, Official Notice).

Dealer was aware that the 4-point violations were only for willful failure to deliver the title and not for damage to the public. Damage to the public required 6 points to revocation; which even the Hearing Officer acknowledged:[17]

> I find that the assessment of 4 point violations were made pursuant to a finding by Petitioner of a "willful failure to deliver title to buyer or department within 45 days of date of sale." Having made these findings, Petitioner is required to show that the failures to deliver title were "willful" as defined in its Procedure DE-002. (R. 6, Order p. 6).

The Hearing Officer's Order then ignores his finding of fact and impermissibly allows the Respondent to disregard DE-002:

> Official Notice of License Suspension listed each complaint as "[e]ngaging in any action which causes damage to any party or to the public" with a parenthetical "(failure to deliver within 45 days of date of purchase)." . . . . DE-002 contains no

[17] Appellant raised the issue of the mandatory nature of the Procedure and the DMV's duty to follow it at the hearing. (R. 370, l. 18 – R. 373, l. 2). The Hearing Officer also ruled that a Sanction Report was required if the DMV found a violation (R. 6, Order, p. 6) and then erroneously ruled that that the Department's suspension should be upheld.

provision that asserts the Department is limited to any particular category. An action which causes damage to any party or to the public is a separate violation on the grid. It provides for sanction points up to 6 for each repetition.

(R. 13, Order p. 13)

The law clearly requires the Dealer to be put on notice of the charge. 4 points could only mean a willful failure, and it is unfair to now find it was arbitrary, in bad faith, unfair, and fraudulent.

IV. IT ONLY TAKES ONE TRANSACTION TO REDUCE THE POINTS TO AVOID SUSPENSION

It only takes one of the three violations to fall off in order for the suspension to be reversed. The Department undeniably admitted it during the testimony of its witness, Zenda Leaks, the assistant manager, who made this clear:

Q: [Martin] So if this one falls off, the twelve points goes to eight points, right?
A: [Leaks] Well, its hasn't fallen completely off, though.
Q: If it's not willful, it falls off, right?
A: Correct.
Q: So twelve minus four equals eight, correct?
A: Correct.

(R. 244, ll. 10-16)

In the case of Quality Auto, a fellow car dealer, (and experienced purchaser) knew from the start that the title did not accompany the car. Quality Auto purchased the car at the Auction.[18] Therefore, Quality Auto agreed to the procedures of the Auction.

[18] The Department falsely claims in its Brief that the car was sold to Quality Auto with ... "signed documentation that [the] there were no undisclosed liens." (Respondent's Brief, p. 7). The only documentation was actually signed by Quality Auto, the Buyer, stating that it did not have a lien "in the buyer's name." (R. 531, Pet. Ex. 7, p. 7).

The Auction made it clear that the title did not accompany the car when purchased.[19] Its rules provide that if the title is not produced within 30 days, Quality Auto could return the car back to the Auction. Or, at the dealer's choice, it could keep the car and wait for the title. This is exactly what happened.

Quality Auto decided to keep the car and wait for the title. It then actually sold the car to another person before it had the title, illustrating that this was an acceptable dealer practice in South Carolina. (R. 532, Pet. Ex. 7, p. 8). Then it filed its complaint. Obviously, its remedy was to return the car to the Auction if it did not want to wait for the title. Quality did not do this and therefore the Dealership should not be responsible for Quality's choice. This sanction should then fall off, making suspension impossible.

Finally, the problem with the title was caused by a prior lienholder, Carolina Title Loans. The Dealer paid off the lien before Quality Auto purchased from the Auction, so the Dealer knew there was no lien. Carolina Title cashed Appellant's check well within the 45 days. (R. 387, Resp. Ex. 8). DE-002 makes it clear that this cannot be willful (let alone arbitrary) if the written explanation is substantiated by the Respondent (which it was). Assistant manager Leaks' "immediate supervisor" clearly understood that DE-002 required a willful failure in his decision not to sanction the Dealer "around this time last year" (October 2016) when the "customer contributed to the problem [of] getting the title." (R. 233, ll. 14-21). Instead of applying the Procedure as her immediate supervisor required, Leaks charged forward with suspension,

[19] The Department refers to S.C. Code §36-2-312 regarding warranties by the seller. §36-2-312(a) makes it clear that the warranty will be excluded "...by circumstances which give the buyer reason to know that the person selling does not claim title in himself" or ... "that he is purporting to sell only such right or title as he or a third person may have." Quality Auto was an experienced dealer that understood that buying a car at auction with "title attached" meant that the title was not present. Quality Auto therefore had reason to know that the person selling did not claim title in himself. It further knew it could return the car within 30 days if the title did not come in from the third person.

intentionally ignoring the requirements of forwarding the documentation up the chain of command and obtaining "Headquarters Review and Sanctions Approval." (R. 507, Pet. Ex. 5, p. 6).

In essence, it became a suspension based on the Leaks' Rules, and not the Respondent's Procedural Rules. Clearly, this is an added burden upon Dealer, who had approval for selling cars before the title was in hand, and protection from sanction if the problem was caused by a prior seller or lienholder.

V. DEALER'S ACTIONS CANNOT BE FOUND TO BE ARBITRARY, IN BAD FAITH, UNFAIR OR DECEPTIVE, OR FRAUDULENT

A. The Respondent's Assessment of Points was not Based on a Finding that Appellant Generally Violated the Dealers Act

Respondent's argument that Appellant acted in "bad faith" cannot be an additional sustaining ground because Respondent stated in its Official Notice that its suspension was based on reaching 12 points under DE-002. The concept of an "additional sustaining ground" is the epitome of capriciousness from which the Respondent is prohibited. An agency acts arbitrarily or capriciously when it disregards its established policy without adequate explanation. *See WMI Liquidating Trust v. F.D.I.C.*, 110 F. Supp. 3d 44, 53 (D.D.C. 2015) citing *Yang, supra. See also Shepherd v. Merit Systems Protection Bd.*, 652 F.2d 1040 (D.C.Cir.1981) (finding an agency abuses its discretion if it fails to follow its own regulations and procedures).

In each case only a 4 point violation was assessed. In the two cases for which a Sanction Report was presented the violation is listed as "Failure to deliver title within 45 days of date of sale." As the Third Circuit recognized in *Moret v. Karn*, 746 F.2d 989 (3rd Cir. 1984):

> Even if the evidence in the record, combined with the reviewing court's understanding of the law, is enough to support the order, the court may not uphold the order unless it is sustainable on the agency's findings and for the reasons stated by the agency.

Id. at 992, citing K. Davis, Administrative Law Treatise Sec. 14:29 (1980). This is true whether the agency's findings are based on a regulation, rule, or binding norm.

Respondent's Official Notice indicated it was limiting itself to a single 4-point violation for each complaint. (R. 30-32). Because the violation "Engaging in any action which causes damage to any party or to the pubic" does not carry 4 points, it cannot be the violation with which Toyota of Greer was charged. As set forth previously, the 4 point violations charged by Respondent must be based on Respondent's own definition of "willful." *INS v. Yang,* 519 U.S. 26, 32 (1996). The Respondent admits this definition was not met.

B. The Record does not Support a Finding of Bad Faith

Even if the general ground of violation of the Dealers Act could be considered, there is no evidence that Appellant acted in bad faith.

1. Bad faith cannot be mere neglect

The Respondent's own point system indicates that "bad faith" cannot be mere neglect or the failure to fulfill a duty. Such a broad definition of "bad faith" would constitute an equal protection violation. Additionally, the Respondent's argument for an expansive definition is not supported by the DE-002 or South Carolina case law.

Appellant was assessed with a 4 point violation for failure to deliver title within 45 days. In order to assess a 4 point violation, the failure must be "willful." Willfulness is not shown merely by a failure to deliver title within 45 days. There is no willfulness if the failure to deliver title is due to a third party failing to deliver title to the dealer. An exception is carved out when a dealer is out of trust. In other words, if the dealer's own actions caused it not to receive the title, i.e. it has not paid for a vehicle or has not insured a lien was satisfied, the dealer's actions could be

willful. In the present case the only evidence is that all liens were paid before the cars were sold and third parties had a duty to release the titles.

2. Damage to the public exceeds the mere failure to fulfil a duty

A violation for "damage to the public," by virtue of the fact that it carries a heavier penalty of 6 points to revocation, clearly requires an act by the Dealer that exceeds the mere failure to fulfil the duty to deliver title within 45 days, which would not even constitute a 4 point violation. Therefore, by the Respondent's own procedures, the mere failure to fulfill a duty (deliver title within 45 days) is not enough to constitute bad faith.

3. Negligence cannot equal bad faith

If the Respondent's definition of bad faith is accepted, any negligent act by a dealer would constitute bad faith under the Dealers Act. In arguing that the mere failure to fulfill a duty constitutes "bad faith," the Respondent omits the fact that the courts have modified the clause of "neglect or refusal to fulfill some duty or some contractual obligation" with "not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *State v. Griffin*, 100 S.C. 331, 331, 84 S.E. 876, 877 (1915). Outside of the Dealers Act, the South Carolina Supreme Court has more generally found that fraud was synonymous with bad faith but distinguished from mistake or negligence. *Scarborough. v. Crosland*, ____ S.C. ____, 170 S.E. 453, 454 (1933). This is analogous to the Court's finding that a dealer's conduct under the Dealers Act need only have some reasonable basis to avoid being arbitrary. *Taylor v. Nix,* 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992). It was reasonable for Appellant to rely upon the former owner and lienholders to deliver title in a timely manner where it occurred timely over 25,000 times.

4. The facts do not support a Dealers Act violation

Bad faith is difficult to define and a review of cases involving the Dealers Act demonstrates that when the Court has addressed bad faith it has done so by a case-specific review of the facts. For example, in *Brown v. Dick Smith Nissan*, the South Carolina Supreme Court did not base its finding of bad faith on the fact that Dick Smith merely neglected to perform a duty it owed to Brown. Instead, Dick Smith knowingly applied for, and received, financing for a Nissan Altima and not the Mazda 6 the customer thought she purchased. Dick Smith showed Brown an approval letter from the bank based on incorrect information and correlating to a loan in a different amount, pertaining to a different car, and incorrectly listing Brown's income. Dick Smith did not inform Brown that it had received the payment from the bank. It refused to assist in correcting the alleged mistake when there was testimony that a telephone call would have corrected the problem. *Brown v. Dick Smith Nissan, Inc.*, 414 S.C. 101, 777 S.E.2d 208 (2015).

In the present case Appellant presented evidence that it consistently took steps to obtain the title to the vehicles. All liens had been satisfied and the ability to obtain the title was completely dependent upon the actions of third parties. When Appellant had it within its power to take action to procure the titles, it did so.

The Respondent misstates Appellant's argument regarding the Ford Explorer (Gilliam). The Derricks traded in a 2007 Ford Explorer on January 25, 2016 and certified there was no lien on the vehicle. (R. 380, Res. Ex. 3). This is not an audacious statement by Appellant. The assertion that there was no lien implied that the customer has physical possession of the title and would provide the title to the dealer. This was the same assertion made by Mr. Gorman as to the 2006 Mazda (McAllister).

Appellant took affirmative steps to run an inquiry through the DMV's electronic registration system which showed a lien from Ford Motor Credit (FMC) had not been satisfied. (R. 382, Res. Ex. 4; R. 307, l. 9 – R. 308, l. 20). The Clerk contacted FMC who confirmed that the loan had been paid four years earlier, but it neglected to file the lien release. (R. 309, l. 16). The Clerk was persistent in communicating with FMC until it provided the lien release. (R. 310, l. 24 – R. 312, l. 20). The fact that Appellant had a Power of Attorney does not imply that it could act prior to receiving the lien release. This step allowed Appellant to take the next step in procuring the title for Gilliam without further delay.

5. Respondent presented no evidence that remedial measures were not offered

Respondent presented no admissible evidence that remedial measures were not offered to the three customers.[20] Respondent did not present testimony by Gilliam or McCallister that they suffered any damages or that they even ceased driving the cars in question.[21] The record shows Quality Auto had the express right to return the Chrysler 300 to the auction if it did not have the title within 30 days. (R. 205, ll. 1-17; R. 379, Res. Ex. 2). Quality Auto decided not to return the vehicle but to sell the car without the title. (R. 207, l. 12 – R. 209, l. 7).

6. Appellant took action prior to the filing of complaints

There is also no evidence that Appellant failed to take action until complaints were made to the Respondent. The evidence is to the contrary. Appellant's title clerk, Toni Powell, testified that she made numerous calls to Carolina Title Credit, at the branch that processed the payoff,

[20] OMVH Rule 15(b) makes clear that the burden of proof is on the Department.

[21] Appellant's counsel objected to the complaint forms as hearsay in an ongoing objection which was renewed for each Exhibit. The Hearing Officer agreed that hearsay statements contained within those exhibits would not be admitted or considered. (R. 269, l. 21- R. 271, l. 9; R. 278, ll. 23-24; R. 283, ll. 24-25).

regarding the vehicle purchased by Quality Auto. She started making the calls a few weeks after the loan was paid off and continued to pursue the release through a different branch when she did not receive a response. (R. 318, l. 20 – R. 319, l. 17).[22] Appellant's Michelle Taylor testified that she similarly made calls every two to three days to Mr. Gorman regarding the title for the vehicle purchased by McCallister. (R. 333, l. 20 – R. 334, l. 14). Appellant received the lien release letter from Chase bank weeks before (April 12th (R. 389, Resp. Ex. 10)). McCallister's complaint was filed (May 2nd (R. 563, Pet. Ex. 11, p. 1). Sheila Gilliam's complaint was not received by the Respondent until June 28th (R, 540, Pet. Ex. 8, p. 6), the same day that Ford Credit issued its release letter (R. 383, Resp. Ex. 5). Obviously, Appellant's effort to obtain that release predated the complaints.

The Hearing Officer could not properly infer from the comments in DMV Agent Benjamin's Investigation Report that Appellant acted in bad faith. Finally, even if the Hearing Officer properly considered the hearsay statement, which he did not, it demonstrates that Appellant had already taken corrective action to address any problems. The Respondent did not question Ms. Taylor about the statement even though she testified at the hearing. There is no support for Respondent's statement that "bad deals can also cause difficulty in acquiring titles." The comment references four separate dealerships with no reference with any particular problems Appellant had experienced and no evidence that a turnover in personnel caused the titles not to be provided within 45 days.

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[22] The Hearing Officer misstated the testimony of Appellant's Toni Powell regarding the sale to Quality Auto. Ms. Powell did know the branch where the title was held. She testified that she contacted the Greer branch and received the payoff information. (R. 316, ll. 1-13). She further testified that she sent the payoff check to the same branch and the check was cashed by Carolina Title Loan. (R. 316, ll. 13-17). It was not until after the Chrysler 300 was sold to Quality Auto (for $300) that it became known that the branch which had originally held the title had closed. (R. 317, l. 16 – R. 318, l. 25).

7. Respondent admits Appellant acted to correct any problems

Finally, how can Appellant's actions be found to be arbitrary, in bad faith, unfair or deceptive, or fraudulent when the Department's assistant manager herself testified after meeting with the Dealer:

> But you know, I did get the impression that they were going to try and do everything to correct the problems that they were having and not getting the problems that they were having and getting these titles delivered.
> (R. 235, ll. 21-25).

The meeting occurred in October of 2016 and the only sanction to follow the meeting was an April of 2017 complaint of a February purchase where the Dealer had the unusual circumstance of the seller, who represented there was no lien on his car, recently moving to South Carolina (and having a South Carolina address) but having his car still titled in North Carolina. The Dealership submitted a written statement that was substantiated by the Department that, once again, the problem arose when a prior seller failed to deliver the title as required by law.

VI. APPELLANT HAS PRESERVED THE ISSUES

Respondent is incorrect that certain issues raised by the Appellant have been waived because they were not ruled on by the Hearing Officer. The Hearing Officer wrongfully considered notes made by DLAU Agent Benjamin in the Dealer Comments section of the document entitled "Investigation of Complaint Regarding Dealer/Wholesaler." (R. 3, Order, p. 3). Toyota of Greer made a continuing objection to statements contained within the documents submitted by the DMV. (R. 269, l. 21 – R. 271, l. 9; R. 278, ll. 23-24; R. 283, ll. 24-25). These notes (R. 521, Pet. Ex. 6, p. 5) were hearsay and should not have been considered by the Hearing Officer. Appellant timely appealed this issue to the ALC. (R. 39). This is not a failure by the Hearing Officer to rule on an

issue that would require a motion to alter or amend in order to preserve the issue as required by *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

Appellant addresses each of its Issues on Appeal in its Brief. Respondent does not cite any authority for its erroneous argument that there must be a separate labeled section to correspond to each Issue on Appeal. A single section may address more than one issue. Each of Appellant's Issues on Appeal are addressed by arguments in the Brief that are supported by legal authority or citation specific documents or testimony; therefore, it has not abandoned any of its arguments. This is in contrast to cases in which a party is found to have abandoned an issue on appeal due to failure to cite any supporting authority and making only conclusory arguments. *See Pack v. S.C. Dep't of Transp.*, 381 S.C. 526, 532, 673 S.E.2d 461, 464 (Ct. App. 2009).

CONCLUSION

The DMV is required to follow its own binding norms even when those procedures are not promulgated into a regulation. The DMV created the mandatory procedure of DE-002 and informed all employees and dealers across South Carolina that any sanctions imposed would be subject to this procedure. The DMV's internal procedure regarding Appellant resulted in a finding of a 4-point violation and not the violation for "damage to any party or the public" that must start at 6 points. The DMV admitted that it was required to make a finding of willfulness in order to assess the 4 points and that its own definition of willfulness was not met.

No evidence was presented at the hearing that the DMV's investigation found the dealership's actions were arbitrary, unreasonable, capricious, nonrational, or fraudulent. Respondent is not free to arbitrarily abandon DE-002 and argue that its decision was justified based on other grounds. This case is the epitome of the danger imposed by rule making after the fact by

the Fourth Branch of government. For these reasons this Court should rescind the 7-day suspension of Appellant's license in order to avoid the consequences of an unchecked administrative state.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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