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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable H. W. Funderburk, Jr., Administrative Law Judge

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Case No. 2020-000980

Shante Michele Eugene . . . . . Respondent,

v.

South Carolina Department of Motor Vehicles . . . . . Appellant.

FINAL BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

This matter comes before the Court of Appeals pursuant to the appeal of the South Carolina Department of Motor Vehicles (hereinafter, "SCDMV" or "DMV"), which seeks review of the February 6, 2020, Final Order and June 19, 2020, Amended Final Order from the Administrative Law Court (hereinafter, "ALC"). SCDMV seeks to have the Orders of the Administrative Law Judge (hereinafter, "ALJ") overturned and the Office of Motor Vehicle Hearings' (hereinafter, "OMVH") Final Order and Decision issued May 28, 2019, reinstated in full.

Respondent was arrested for driving under suspension (hereinafter, "DUS") on May 31, 2013, and convicted of this offense on August 20, 2013, (UTT# 78917GC). R. p. 181, 264, 265, and 268. SCDMV received notice of this conviction on September 3, 2013, and posted this violation to Respondent's driving record on September 9, 2013. R. p. 268. On June 1, 2013, the Respondent was arrested for DUS and convicted of this offense on February 4, 2014 (UTT# G281787). R. p. 181, 262-263, 265, and 268. SCDMV received notice of this conviction on February 19, 2014, and posted this violation to Respondent's driving record on February 21, 2014. R. p. 263 and 268. SCDMV mailed Appellant a letter dated February 21, 2014, notifying her that she had accumulated two major and three minor driving violations and was at risk of being declared a habitual offender and undergoing a five year suspension of her driver's license

and driving privileges.[1] R. p. 181 and 266. Finally, Respondent was arrested for DUS on April 7, 2015, and was convicted of that offense on January 13, 2016 (UTT# 57873GO). R. p. 181, 261, and 267. SCDMV received notice of this conviction on January 18, 2018, and posted this violation to Respondent's driving record on January 24, 2018. R. p. 208 and 267. Thus, Appellant was charged and convicted of three (3) separate and distinct major traffic violations within a three (3) year period. The OMVH Hearing Officer and the ALJ both concluded that the Respondent's driver's record as maintained by SCDMV meets the criteria of a Habitual Offender as defined by S.C. Code Ann. § 56-1-1020 (2006) and § 56-1-1030 (Suppl. 2012). R. p. 185, 19, and 6. Further, Respondent has never contested the fact that she incurred the requisite convictions to trigger this habitual offender suspension.

Appellant timely requested a hearing before the OMVH. R. p. 273-276. That hearing was held on April 6, 2018. R. p. 100-168. After reviewing the record and considering all the evidence, the OMVH Hearing Officer sustained the suspension of the Appellant's driving license or driving privileges. R. p. 180-188.

At the OMVH hearing and on appeal to the ALC, Appellant argued that she should not have to serve her habitual offender suspension due to the two year delay between the date of conviction for UTT# 57873GO and when that conviction was communicated to SCDMV.[2] R. p. 100-168 and 71-82. Further, at the OMVH hearing

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[1] This is a process Respondent was familiar with due to her prior declaration and suspension for habitual offender. R. p. 182 and 268.

[2] The ALC *Brief of Appellant* argued that there was no evidence to support the OMVH Hearing Officer's finding that SCDMV was not at fault in creating the delay in this case. ALC *Brief of Appellant*. This argument is baseless and goes against the evidence presented in this case. The evidence in this case clearly showed that this conviction was not communicated to SCDMV until January 18, 2018, and that SCDMV then promptly

Respondent attempted to present evidence of prejudice or hardship for her having to serve her habitual offender suspension shortly after the date SCDMV received notification of the triggering conviction (January 2018) versus shortly after the date the triggering conviction took place (January 2016). *Id.* The OMVH Hearing Officer ultimately ruled that Appellant did not present evidence of prejudice or hardship that was different from applying the habitual offender suspension in January 2018 versus January 2016. R. p. 180-188. To explain her ruling the OMVH Hearing Officer made the following findings:

1) "Respondent resides on Seabrook Island in Beaufort County and commutes approximately 1 ½ hours to and from her place of employment at a mail processing center for the U.S. Postal Service in North Charleston, South Carolina, where she has been employed since May 2016."[3] R. p. 183.

2) "Respondent has two children, ages 2 and 3, and they both attend daycare while Respondent works." *Id.*

3) "Respondent has been in the National Guard since November 2013. Respondent testified that she has to report to Hopkins, South Carolina, for drill once a month and that the commute is approximately two hours from her home. Respondent has been in the same National Guard unit since November 2013. Respondent testified that there are National Guard units throughout the state and placement in a particular unit is based upon interest and availability." *Id.*

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placed the conviction on Appellant's driving record on January 24, 2018. R. p. 229 and 267. Furthermore, despite numerous communications with the Clerk of Court, Appellant was not able to produce any evidence to support the allegation that this conviction was transmitted to SCDMV any sooner than the January 18, 2018, communication from the Beaufort County Sheriff's Office. R. p. 232 ("Unfortunately we have no record of when the yellow copy was sent to SCDMV. The clerk who does the DL-76 report on Fridays did not keep copies of the transmittals at that time.").

[3] Seabrook Island, located in Charleston County, and Seabrook, located in Beaufort County, are two different locations. Appellant testified that she resides in "Seabrook" in "Beaufort County." R. p. 130, lines 4-9. Additionally, Appellant's driving record lists her residence address in Seabrook, Beaufort County. R. p. 205.

4) "I find the facts of this case distinguishable from those in both Wilson and Davis. In finding that Davis would suffer prejudice based upon the imposition of the habitual offender suspension after a six-year delay, in Davis the court found significant that the delay exceeded the total time of the five-year habitual offender suspension. In Respondent's case, the delay was two years and clearly did not exceed the total time of the suspension. Additionally, in Davis, his license had been reinstated for a total of twenty months after he fulfilled the requirements to have it reinstated before the SC DMV sought to impose the habitual offender suspension. In this case, Respondent's license had only been reinstated for approximately one month after she fulfilled the requirements to have it reinstated in December 2017 – just after her previous habitual offender suspension ended." *Id.* p. 8.

5) "Furthermore, unlike in Wilson, Respondent has not had a significant change in personal or professional circumstances in the two years between her conviction and the imposition of the suspension. In finding that Wilson demonstrated she would be prejudiced by a suspension after five years, the Court looked at the fact that it had taken Wilson two years to find employment after losing her job after her driving under the influence arrest and that travel for her company was a requirement of her new employment. Wilson also presented evidence she would suffer from severe economic hardship if she lost her job. Unlike in Wilson, Respondent has maintained employment in the same position with the U.S. Postal Service in North Charleston since May 2016, and she has been a member of the same National Guard unit since November 2013. Additionally, despite her commute and the suspension of her driving privileges since at least 2012 for a prior habitual offender suspension and other violations, Respondent has maintained that employment and remained in the National Guard since that time. While Respondent testified that she will lose her job if unable to get back and forth to work, which would undoubtedly result in some economic hardship, Respondent also did not present specific evidence to show that she would suffer a severe economic hardship, as in Wilson as a result. Therefore, based upon the evidence presented, I conclude that the imposition of the habitual offender suspensions after the two-year delay would not be fundamentally unfair or constitute a violation of due process." *Id.* p. 8-9.

Thus, the OMVH Hearing Officer weighed the evidence presented at this hearing to determine whether Respondent had presented sufficient evidence of prejudice as a result of the two year delay between her conviction and when that conviction was posted to Respondent's driving record (triggering the habitual offender suspension). Significantly,

the OMVH Hearing Officer found numerous factual differences between this case and the cases *Wilson v. S.C. Dept. of Motor Vehicles*, 419 S.C. 203, 786 S.E.2d 541 (Ct. App. 2017), *Davis v. S.C. Dept. of Motor Vehicles*, 420 S.C. 98, 800 S.E.2d 493 (Ct. App. 2017), and *Hipp v. S.C. Dept. of Motor Vehicles*, 381 S.C. 323, 673 S.E.2d 416 (2009). As a result of those factual differences, the OMVH Hearing Officer weighed the evidence as she deemed appropriate in evaluating whether Respondent presented sufficient evidence of prejudice during the two year delay between when the DUS conviction took place and when SCDMV first attempted to impose this habitual offender suspension.

Respondent appealed the OMVH Hearing Officer's Final Order and Decision to the ALC. R. p. 169-203. Despite the OMVH's factual findings, the ALJ erroneously engaged in a reweighing of the evidence in the case, discounting evidence that the OMVH Hearing Officer found significant and granting more significance to evidence that the OMVH Hearing Officer found irrelevant or of little significance. R. p. 1-27. As stated in S.C. Code §1-23-380(A) the reweighing of evidence by an appellate court is not permitted. Originally, the ALJ attempted to counteract reweighing the evidence in this case by sustaining the habitual offender suspension and ordering the SCDMV to take several illegal actions to soften the blow of having the habitual offender suspension sustained.[4] R. p. 25-26. In a motion for reconsideration, the SCDMV explained how the

[4] The ALC ordered the SCDMV to:

1) backdate Respondent's habitual offender suspension to start as if SCDMV had timely received the conviction at issue in this case;
2) to issue a judicially created route restricted driver's license to Respondent for the remainder of her habitual offender suspension period;
3) to grant Respondent permission to drive places on the judicially created route restricted license for which no route restricted license in this State allows driving;
4) to waive the statutorily mandated fee associated with the issuance of the route restricted licenses; and

actions ordered by the ALJ were not legal and asked the ALJ to reconsider those parts of the ALC Final Order dated February 6, 2020. R. p. 32-39. The ALJ responded to SCDMV's motion for reconsideration by reversing its prior holding sustaining the habitual offender suspension and alleging that rather than simply asking to enforce the law as written the SCDMV was "unwilling to follow the [ALJ's] previous Order." R. p. 2.

The SCDMV filed this appeal on July 13, 2020.

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code §1-23-380(A)(5).

> (A) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....
>
> (5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (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

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5) to waive the statutorily mandated fees associated with reissuing Respondent's driver's license at the end of Respondent's backdated habitual offender suspension.

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981), our Supreme Court set out the standard of evidentiary review under the South Carolina Administrative Procedure Act:

> [Section 1-23-380(g)(5)] specifically states: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.
>
> We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of administrative agencies. As stated in *Dickinson-Tidewater, Inc. v. Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside.

The Court further noted that:

> The substantial evidence rule... means that we will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." (Citation omitted.)

See also *Schudel v. South Carolina Alcoholic Beverage Control Commission*, 276 S.C. 138, 276 S.E.2d 308 (1981); *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 281 S.E.2d 18 (1981).

An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990); *Lark v. Bi Lo, Inc.*, *supra*. In *Lark*, our Supreme Court quoted

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

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

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

A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion. *Dorman v. DHEC, supra*; *Hamm v. American Telephone & Telegraph Co., supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. *See Fowler v. Lewis*, 260 S.C. 54, 194 S.E.2d 191 (1973).

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary support or is arbitrary or capricious as a matter of law. *Hamm v. South Carolina Public*

Service Commission, 294 S.C. 320, 364 S.E.2d 455 (1988).

ARGUMENT

I) THE ALJ ERRONEOUSLY ENGAGED IN A REWEIGHING OF THE EVIDENCE IN THIS CASE IN VIOLATION OF S.C. CODE §1-23-380(A).

There are four cases that have analyzed the issue of a delay between the time a conviction took place and the time SCDMV (or its' predecessor agencies) took suspension action based on that conviction. Each of these cases demonstrates that the appellate courts have consistently analyzed whether the delay resulted in some increased prejudice or denial of fundamental fairness as a result of the delay itself. It is intuitive that any driver's license/driving privilege suspension causes hardship for the person who is not allowed to drive during the suspension period. These cases each looked to see if there was something about the delay that caused that hardship to be increased in any way. Each of these four cases are discussed in further detail below in the order in which they were decided.

The first case to address the delay issue was *State v. Chavis*, 261 S.C. 408, 200 S.E.2d 390 (1973). Mr. Chavis was arrested for driving under the influence (hereinafter, "DUI") on December 1, 1971. *Id.* at S.E.2d 391. Mr. Chavis refused to submit to a breathalyzer test. *Id.* Mr. Chavis was convicted of DUI on March 7, 1972. *Id.* For unknown reasons that DUI conviction and the notification that Mr. Chavis had refused to submit to a breathalyzer test were not sent to the SC Highway Department (one of SCDMV's predecessor agencies) until on or about February 1, 1973. *Id.* The SC Highway Department notified Mr. Chavis on February 8, 1973, that his driver's license would be suspended from February 8, 1973 through May 8, 1973 for the refusal to submit to a breathalyzer test. *Id.* The SC Highway Department further notified Mr. Chavis on

February 22, 1973, that his driver's license would be suspended from May 9, 1973 through November 8, 1973 as a result of his DUI conviction. *Id.* 200 S.E.2d at 391. Thus, there was approximately a fifteen month delay between the refusal to submit to a breathalyzer and when the SC Highway Department notified Mr. Chavis of his suspension for that violation. Additionally, there was approximately a one year delay between the DUI conviction and when the SC Highway Department notified Mr. Chavis of his suspension for that conviction. The Record on Appeal contained no additional facts and, as a result, the Court ruled on the case solely based upon the time delay and whether that time delay was unreasonable, violated basic fairness, and violated due process of law provisions of both State and Federal Constitutions. *Id.* In ruling on these matters, the Supreme Court made the following findings:

1) There was no contention or suggestion that there was any unreasonable delay on the part of the SC Highway Department once it was it was notified of the violation and conviction. *Id.*
2) There was no contention or suggestion that there was any improper conduct on the part of the SC Highway Department. *Id.*
3) The parties' responsible for the delays in sending the notices of the violation and conviction to the SC Highway Department were not parties to the case. *Id.*
4) The Record on Appeal contained no evidence as to the circumstances that caused the delay. *Id.*
5) The Record on Appeal contained no evidence of any prejudice to Mr. Chavis as a result of the delay. *Id.*

6) Mr. Chavis was "charged with knowledge of the law, and that therefore his license was required to be suspended." *Id.*

7) The Record on Appeal contained no evidence that Mr. Chavis sought, wished, or desired to have the suspensions promptly started. *Id.*

8) "For aught the record shows, [Mr. Chavis] simply kept quiet and continued to drive in the hope that his license suspension would somehow or other get overlooked and never be imposed." *Id.*

9) The only case (at that time) where a driver was afforded relief as a result of a delay was a case from Pennsylvania where the driver "made a strong showing of substantial prejudice from a very long delay" from the office whose duty it was to impose the suspension. *Id.* 200 S.E.2d at 392.

Thus, right from the beginning the SC Supreme Court set forth that a prejudice analysis must be performed in these cases and discussed some of the items that should be considered as part of that analysis: 1) the length of the delay, 2) the person/agency that caused the delay, 3) the reason for the delay [if known], 4) whether the SCDMV engaged in any unreasonable delay or improper conduct, 5) whether there has been a change the driver's circumstances that creates substantial prejudice as a result of the delay, and 6) whether the driver took any action to ensure the suspension was promptly started or whether the driver "simply kept quiet and continued to drive in the hope that his license suspension would somehow or other get overlook and never be imposed."

The second case to address the delay issue was *Hipp v. S.C. Dept. of Motor Vehicles*, 381 S.C. 323, 673 S.E.2d 416 (2009). The *Hipp* case had substantially different facts that the *Chavis* case. Mr. Hipp was convicted of DUI in Georgia in 1993. *Hipp*,

381 S.C. at 324. SCDMV was not notified of that Georgia DUI conviction until 2005. *Id.* Thus, the delay in the *Hipp* case was twelve years long. The SC Supreme Court found it significant that Title 56 of the South Carolina Code is replete with ten-year limitations for purposes of sentence enhancement and keeping record of convictions. *Id.* at 325-326. The SC Supreme Court concluded by stating that "under the unique circumstances of this case, the attempted suspension of [Mr. Hipp's] driver's license twelve years after conviction constitutes a denial of fundamental fairness." *Id.* at 326. Some of the unique circumstances of the *Hipp* case that were considered by the lower court were:

1) At the time of his arrest for DUI in Georgia, Mr. Hipp was a South Carolina resident attending college in South Carolina. 2006 WL 6105588 (S.C.Com.Pl.) ("In 1993, when he pled guilty, [Mr. Hipp] was a college student, ready, willing and able to endure the suspension period.")
2) After his guilty plea to the Georgia DUI, Mr. Hipp finished his college degree, returned to Charleston, and began working. *Id.*
3) Mr. Hipp continued to be gainfully employed and continued to lawfully drive a motor vehicle during this time. *Id.*
4) At the time SCDMV sought to impose the suspension against Mr. Hipp he was employed in a sales position requiring the use of a vehicle in his daily duties. *Id.*

Thus, Mr. Hipp showed "extreme prejudice" due to the delay in his case as a result of his change in situation from being a "college student, ready, willing and able to endure the

suspension period" to being a person "employed in a sale position requiring the use of a vehicle in his daily duties." *Id.*

The third case to address the delay issue was *Wilson v. S.C. Dept. of Motor Vehicles*, 419 S.C. 203, 796 S.E.2d 541 (Ct. App. 2017). The *Wilson* case also had substantially different facts than the *Chavis* case. Ms. Wilson was arrested for DUI on November 22, 2008. *Wilson*, 419 S.C. at 205. Ms. Wilson pled guilty to this DUI offense on June 11, 2009. *Id.* Ms. Wilson enrolled in and completed the Alcohol and Drug Safety Program ("ADSAP"). *Id.* In August 2009, Ms. Wilson contacted a local branch of the SCDMV in an attempt to obtain a restricted driver's license. *Id.* At that time, the SCDMV informed Ms. Wilson that there was no record of a DUI conviction on her driving record. *Id.* Ms. Wilson then contacted the Clerk of Court who informed Ms. Wilson that her DUI conviction was sent to SCDMV on July 1, 2009. *Id.* Ms. Wilson then contacted her insurance agency in an effort to file form SR-22 with the SCDMV. *Id.* Ms. Wilson's insurance agent went to a different local branch of the SCDMV to inquire about filing form SR-22 on Ms. Wilson's behalf and was similarly told that there was not a DUI conviction on Mr. Wilson's driving record.[5] *Id.* Although Ms. Wilson's DUI ticket was adjudicated on June 11, 2009, both the 2010 and 2011 ticket audit reports submitted by the arresting agency stated the ticket was still "in court" (meaning unadjudicated). *Id.* The 2013 ticket audit report submitted by the arresting agency stated

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[5] Significantly, the evidence in this case demonstrates that despite her extensive experience with DUS and habitual offender suspensions, the Respondent took no action to follow up on her January 2016 DUS conviction that should have triggered a DUS and a habitual offender suspension shortly after Respondent's January 2016 conviction. Thus, in this way Respondent's case is also very dissimilar to Ms. Wilson's case and more closely aligned to Mr. Chavis's case in that Respondent "simply kept quiet and continued to drive in the hope that his license suspension would somehow or other get overlooked and never be imposed." *Chavis*, 200 S.E.2d at 391.

the ticket had been sent to the SCDMV. *Id.* Since SCDMV did not have a record of receiving the ticket in 2013, SCDMV requested the arresting agency send SCDMV a certified copy of the ticket. *Id.* SCDMV received the certified copy of Ms. Wilson's ticket on May 20, 2014, nearly five years after Ms. Wilson's conviction for DUI. *Id.* The Court of Appeals cited several reasons why the delay in Ms. Wilson's case was prejudicial as a result of the delay, including:

1) Ms. Wilson testified that she "lost her job after her DUI arrest, and it took her two years to find new employment as an office manager… that as part of her new job, she is required to travel on behalf of the company, and a suspension of her driver's license may cause her to lose her current job;"
2) Losing her current job would cause "severe economic hardship because [Ms. Wilson] has two mortgage payments and would not have a steady stream of income to make these payments;"
3) The Record on Appeal demonstrated that Ms. Wilson took several steps to ensure SCDMV was notified about her DUI conviction (including reporting the conviction to a local branch of the SCDMV, contacting the Clerk of Court to ensure the conviction had been sent to SCDMV, and having her insurance agency report the conviction to a local branch of the SCDMV); and
4) The Record on Appeal demonstrated that Ms. Wilson enrolled in and completed ADSAP even though SCDMV had no record of her DUI conviction.[6] *Id.* at 208.

[6] The ALC Final Order and ALC Amended Final Order both held that the OMVH hearing officer erred in discussing the concept of "severe economic hardship" because "that is not the standard applied in any of the cases discussed by the hearing officer." R. p. 23-24

Thus, like Mr. Hipp, Ms. Wilson had a substantial change in her circumstances that made imposition of her DUI suspension five years after the conviction took place prejudicial to Ms. Wilson in a way that did not exist at the time of her conviction. Furthermore, Ms. Wilson had taken repeated steps to attempt to correct the fact that this conviction had not been timely sent to the SCDMV by the court.

The last case to address the delay issue was *Davis v. S.C. Dept. of Motor Vehicles*, 420 S.C. 98, 800 S.E.2d 493 (Ct. App. 2017). Again, the *Davis* case had substantially different facts than the *Chavis* case. Mr. Davis was convicted of DUS on October 20, 2006, (his third DUS conviction within three years). *Id.* 420 S.C. at 100. From October 20, 2006 through April 26, 2010 Mr. Davis's driver's license and driving privileges remained suspended for various violations. *Id.* On April 26, 2010, Mr. Davis regained his driver's license. *Id.* On September 22, 2011, SCDMV received notice of Mr. Davis's DUS conviction from October 20, 2006. *Id.* SCDMV did not immediately post this ticket to Mr. Davis's driving record because it had only received one side of the ticket and was unable to determine what offense Mr. Davis had been convicted of committing. *Id.* On April 20, 2012, SCDMV requested additional information from the sheriff's office regarding this DUS ticket. *Id.* On October 25, 2012, SCDMV received the additional information needed to process and post this ticket to Mr. Davis's driving record. *Id.* SCDMV posted the DUS conviction to Mr. Davis's driving record on

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and 10-11. This is inaccurate. As cited in this sentence, the *Wilson* court discussed whether losing her job would cause "severe economic hardship" to Ms. Wilson and specifically cited Ms. Wilson's inability to pay her two mortgage payments if she lost her job. Therefore, the *Wilson* court did consider a severe economic hardship measurement for weighing the prejudice and/or hardship caused by a delay such as this. Furthermore, despite repeated statements otherwise, the ALC Final Order and ALC Amended Final Order both stated "Based on Wilson's statement that losing her job would cause *severe* economic hardship..." (emphasis added) R. p. 23 and 10.

December 5, 2012, which triggered a five year habitual offender suspension. *Id.* The Court of Appeals held that Mr. Davis would suffer prejudice and injury if he was suspended after the six year delay between his conviction for DUS and when that conviction was posted to his driving record because:

1) The six year delay exceeded the total time that Mr. Davis's suspension would have run if his habitual offender suspension had been timely imposed. *Id.* at 107.
2) Mr. Davis had already paid reinstatement fees, met the SCDMV's requirements for reinstatement of his driver's license, and had his driver's license reinstated for twenty months when SCDMV sought to impose the habitual offender suspension against him. *Id.*

Thus, like Mr. Hipp and Ms. Wilson, Mr. Davis had substantial changes in his circumstances that made the imposition of his habitual offender suspension six years after the triggering conviction occurred prejudicial to Mr. Davis in a way that did not exist at the time of his conviction.

Contrary to Mr. Hipp, Ms. Wilson, and Mr. Davis, Appellant's circumstances at the time SCDMV sought to impose this habitual offender suspension (January 2018) were nearly identical to those that existed at the time of Appellant's triggering conviction (January 2016). These circumstances were recognized by the OMVH Hearing Officer, but the ALJ reweighed the evidence in this case, placed different weight on certain pieces of evidence considered with regard to the prejudice analysis, and, in some cases, considered "facts" not in evidence.

State law defines a habitual offender as any person whose record as maintained by the Department of Motor Vehicles shows that he or she has accumulated the convictions for three or more separate and distinct major offenses or ten or more separate and distinct minor offenses committed within a three year period. S. C. Code Ann. § 56-1-1020 (2006). There is no question or challenge in this case about whether Respondent incurred convictions for three separate and distinct major offenses that were committed within a three year period. R. p. 185 and 71-82.

Rather than conducting a facial challenge to the habitual offender suspension, Respondent argued that she should not have to serve her habitual offender suspension due to the two year delay between the date of conviction for UTT# 57873GO and when that conviction was communicated to SCDMV. R. p. 100-168. In support of this argument, Respondent presented evidence of alleged prejudice or hardship for her having to serve her habitual offender suspension. This evidence covered three basic areas: impacts to Respondent's employment with the U.S. Postal Service and with the National Guard, impacts to Respondent's ability to care for her children, and the fact that Respondent had already taken steps to have her driver's license reinstated following her prior habitual offender suspension. The evidence presented by Respondent regarding these three areas, however, did not demonstrate that there was any difference in the prejudice or hardship between the two time periods. In short, the case law, as discussed above, requires the driver to demonstrate that they have been somehow hurt (prejudiced) or denied fundamental fairness by the delay between when the conviction occurs and when SCDMV first attempts to impose the suspension. Respondent's failure to demonstrate any increased prejudice or hardship due to the delay is why the OMVH Hearing Officer

sustained Respondent's habitual offender suspension. On appeal, however, the ALJ improperly substituted his judgment for the OMVH Hearing Officer's judgment on the facts in this case for each of these areas as discussed in further detail below.

A) Respondent's Employment with the National Guard

Respondent testified that she is a member of the South Carolina National Guard (hereinafter, "Guard") and has been a member since 2013. R. p. 131, lines 19-25. Respondent testified that part as part of her Guard duties she must report for duty once a month in Hopkins, South Carolina, which is "a little over 2 hours" from her home in Seabrook. R. p. 132, lines 10-22. Respondent further testified that she is in the 151 Aviation Unit within the Guard and has been in that unit since November 2013. R. p. 134, lines 11-16. On cross examination, Respondent admitted that the South Carolina Guard has units based in Beaufort and Charleston. R. p. 134, line 17 – p. 135, line 3. Since Respondent has been in the same Guard unit consistently since November 2013, there is no evidence that imposition of this habitual offender suspension in January 2016 versus January 2018 increased the hardship and/or prejudice against Respondent in any way. This evaluation of prejudice is backed up by the fact that despite her numerous suspensions Respondent was able to join the Guard and maintain her position in the Guard.[7]

In evaluating whether any prejudice existed with regard to Respondent's Guard employment, the OMVH Hearing Officer found the following:

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[7] If Respondent joined the Guard in 2013, she was already under suspension for her first habitual offender suspension at the time she joined the Guard. R. p. 268. The prior habitual offender suspension continued until Respondent met all of her reinstatement requirements for that suspension on October 31, 2017.

> "Respondent has been in the National Guard since November 2013. Respondent testified that she has to report to Hopkins, South Carolina, for drill once a month and that the commute is approximately two hours from her home. Respondent has been in the same National Guard unit since November 2013. Respondent testified that there are National Guard units throughout the state and placement in a particular unit is based upon interest and availability." R. p. 183.
>
> "Unlike in Wilson, Respondent... has been a member of the same National Guard unit since November 2013. Additionally, despite her commute and the suspension of her driving privileges since at least 2012 for a prior habitual offender suspension and other violations, Respondent has... remained in the National Guard since that time." R. p. 188.

Despite these findings, in the ALC Final Order the ALJ ruled that SCDMV must issue a special route restricted license to Respondent that would allow her to operate a motor vehicle to and from her residence to her monthly National Guard duty in Hopkins, South Carolina. R. p. 25. This matter was later addressed in SCDMV's motion for reconsideration, and the ALC Amended Final Order removed this ruling from its contents. In fact, the ALC Final Order and ALC Amended Final Order, although they both briefly discussed Respondent's Guard employment, made no findings of prejudice or lack of fundamental fairness with regard to this employment. Therefore, it appears that there is no question that there is no prejudice or lack of fundamental fairness to Respondent related to her Guard employment.

B) Respondent's Employment with the U.S. Postal Service

Respondent testified that she works for the U.S. Postal Service (USPS) in North Charleston and lives in Seabrook approximately one and a quarter to one and a half hours away. R. p. 129, line 24 – p. 130, line 15. Respondent testified that she began working for USPS in May 2016, a mere four months after receiving the conviction at issue in this case. R. p. 131, lines 15-18. On cross examination and redirect, Respondent admitted

that USPS has offices in Beaufort. She testified that she has previously applied for transfers to USPS offices located in Beaufort, but that she has not yet been selected for one of those transfers. R. p. 135, lines 4-6, and p. 140, lines 6-24. Significantly, although Respondent argues that the location of her job with USPS in comparison with where she lives constitutes a hardship and prejudice, the reality is that Respondent applied for and accepted the job with USPS while she was still under suspension for her prior habitual offender suspension, her June 1, 2013 DUS, and her May 31, 2013 DUS. R. p. 268. Further, Respondent's prior habitual offender suspension continued for approximately a year and half after Respondent started working for USPS. Respondent obviously worked out acceptable, reliable, and appropriate ways to get to her job at USPS despite those active suspensions. Even more significant, however, is the fact that Respondent applied for and accepted the USPS job knowing that she was actively under suspension for three different items and knowing that she should have two new suspensions starting at any time (her January 2016 DUS conviction would have triggered a DUS suspension and the habitual offender suspension at issue in this case). Thus, even if SCDMV had been timely notified of Respondent's DUS conviction in January 2016, Respondent still would have had to contend with the commute to her USPS job from Seabrook. The delay in this case has not changed that impact in any way. For this reason, Respondent's testimony about her USPS job did not demonstrate prejudice and/or hardship beyond that which would have been suffered had the DUS conviction been timely posted.

Respondent further testified that she believed that if she could not get to her work she would be fired. R. 131, lines 3-6. In this regard, it appears that Respondent was

attempting to liken her case to the *Wilson* case. In the *Wilson* case, however, Ms. Wilson had already been fired from her job, took two years to locate a new job, finally found a new job, and her new job required her to drive to maintain the job. Thus, Respondent's situation at USPS is not similar with Ms. Wilson's situation. First, Respondent accepted the job at USPS in May 2016, right when she should have been expecting to begin her DUS and habitual offender suspensions for her January 2016 DUS conviction and while already under suspension for a number of other items. Second, unlike Ms. Wilson, Respondent is not required to drive for her job at USPS. Respondent testified that she works in a mail processing center where batches of mail are sorted and then sent to branch offices of the USPS. R. p. 139, lines 9-20. Because Respondent accepted the USPS job while she was still actively under suspension for three things and while expecting another two suspensions to start at any time, these arguments do not demonstrate any change in Respondent's circumstances from January 2016 to January 2018.

Finally, Respondent testified that there is no one that can give her a ride back and forth to Charleston for work.[8] R. p. 131, lines 7-10. This testimony was vague and undeveloped. As stated earlier, Respondent was under active suspension for at least three things when she accepted the USPS job and at least one of those suspensions continued

[8] Respondent also testified that after she got her job at the USPS she "stayed" with her cousin in Charleston, but that her cousin does not live there anymore. R. p. 131, lines 10-13. Significantly, there was no indication in the record of when Respondent's cousin moved from the Charleston area, nor did Respondent testify about how frequently she "stayed" with her cousin, whether her cousin drove her to her job at USPS, or in what way her cousin's residency impacted Respondent's job at USPS. In fact, this testimony was vague enough that Respondent could have simply meant that she spent the night at her cousin's home two or three times over the year and a half period between when she started working at USPS and when she regained her driver's license.

for approximately a year and half after Respondent started working for USPS. Despite these suspensions, Respondent worked out a reliable, acceptable form of transportation from her home to her job at USPS. Respondent had only regained her driver's license for two months and five days when SCDMV was notified of Respondent's DUS conviction that triggered this habitual offender suspension. Yet, Respondent's testimony appears to vaguely indicate, without any explanation or detail, that in those two months she completely lost her reliable, acceptable transportation method that she had been using for approximately a year and half. Significantly, Respondent provided no information about what happened to her reliable, acceptable transportation method that she had been using for approximately a year and half. Under the relevant case law, it was Respondent's burden to present evidence of prejudice. As a result, it was Respondent's responsibility to fully develop the testimony regarding what she meant when she said she "stayed" with her cousin in Charleston and how that impacted her USPS employment, rather than expect the court to fill in the blanks and speculate about what Respondent meant. Without any explanation or details about what supposedly occurred during this two month period, this argument does not demonstrate any increase in prejudice or hardship for Respondent.

In evaluating Respondent's USPS employment, the OMVH Hearing Officer made the following findings:

1) "Respondent resides on Seabrook Island in Beaufort County and commutes approximately 1 ½ hours to and from her place of employment at a mall processing center for the U.S. Postal Service in North Charleston, South Carolina, where she has been employed since May 2016." R. p. 183.

2) "Respondent testified that she does not have anyone who could give her a ride to and from North Charleston, and that she will lose her job if unable

to get back and forth to work. Respondent testified that there are no processing centers in Beaufort but that there are branch offices. She also testified that there are certain locations in Beaufort that have positions for the same job she performs at the processing center in North Charleston but that she has so far been unsuccessful in getting transferred to one of those positions in Beaufort." *Id.*

3) "Unlike in Wilson, Respondent has maintained employment in the same position with the U.S. Postal Service in North Charleston since May 2016... Additionally, despite her commute and the suspension of her driving privileges since at least 2012 for a prior habitual offender suspension and other violations, Respondent has maintained that employment... While Respondent testified that she will lose her job if unable to get back and forth to work, which would undoubtedly result in some economic hardship, Respondent also did not present specific evidence to show that she would suffer a severe economic hardship, as in Wilson, as a result." *Id.* at 93.

Despite these factual findings, the ALJ reweighed the evidence in this case to make the following findings:

1) "During the contested case hearing, [Respondent] testified that, in May 2016, after her last DUS conviction in January 2016, she got a job with the U.S. Postal Service at a mail processing center in North Charleston, South Carolina. [Respondent] testified that when she got the job, she was living with a relative in North Charleston who was able to give her rides to and from work while her license was still under suspension from her previous habitual offender determination. At that time, [Respondent] anticipated having only about a year and a half left on her habitual offender suspension scheduled to end in October 2017 and believed she would be able to find transportation to work during the remaining ["for the remainder" in ALC Amended Final Order] suspension period because she lived close to work." R. p. 16 and similarly as noted in R. p. 4.

2) "However, [Respondent]'s circumstances changed when the relative moved and [Respondent] had to relocate to Beaufort County where she now resides. She has a significant daily commute of approximately 1.5 hours, each way, to get to and from her place of employment. [Respondent] testified that without her driving privileges, she has no other means of transportation to get to and from work and will lose the job she has held since May 2016. [Respondent] has submitted multiple requests to be transferred to a similar job in Beaufort County to eliminate the

commute, but her request has ["requests have" in ALC Amended Order] not been granted."[9] *Id.*

3) "Hearing Officer Autry correctly stated that the Court of Appeals considered that it took Wilson two years to find a job after her DUI arrest and that she was expected to travel on behalf of her employer in her position as an office manager. Distinguishing Appellant's case from *Wilson*, Hearing Officer Autry found that unlike Wilson [Respondent] had no 'significant change in personal or professional circumstances in the two years between her conviction and the imposition of the suspension.' (Final Order and Decision, p. 8). However, based upon Appellant's testimony and the Findings of Fact set forth in the Final Order and Decision, it is clear that [Respondent] did, in fact, have significant changes in both her personal and professional circumstances during the two-year delay.

   [Respondent] testified that she got her job with the U.S. Postal Service in North Charleston in May 2016, approximately four to five months after her conviction in January 2016. At the time she got the job, she was living with a relative in North Charleston and could rely on others to get to and from work locally while her license was suspended under the habitual offender designation that ended in October 2017. Since that time, [Respondent] has had to move to Beaufort County and now faces an approximately hour and a half commute to and from work each way. [Respondent] has tried to transfer to a similar job in Beaufort, but, thus far,[10] transfer has been unavailable." R. p. 22-23 and p. 9-10.

4) "The Court finds that... obtaining new employment, and moving to another county approximately 1.5 hours away from her place of employment do constitute significant changes in personal and professional circumstances. In the Final Order and Decision, all of these changes were acknowledged in the Findings of Fact but were later[11] ignored in the Hearing Officer's comparison of [Respondent]'s circumstances to the facts set forth in *Wilson*. Thus, despite the substantial evidence of significant changes in [Respondent]'s circumstances to show injury and prejudice caused by the two-year delay, the Hearing Officer concluded to the contrary and found that [Respondent] presented no evidence of specific injuries and prejudice." R. p. 23 and p. 10.

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[9] Notably, according to SCDMV's records, Appellant's address since September 2, 1999, has consistently been the same residence in Seabrook, South Carolina. R. p. 205 and 267.
[10] "thus far" contained only in the ALC Final Order.
[11] "later" contained only in the ALC Final Order.

5) "Like Wilson, [Respondent] testified her inability to make the commute to work as a result of the delayed suspension would cause her to lose the job she has held for approximately three years."[12] R. p. 24 and 11.

6) "Hearing Officer Autry was correct in her finding that the loss of [Respondent]'s job "would undoubtedly result in some economic hardship." (emphasis added). However, in concluding that [Respondent] failed to present specific evidence that she would suffer a 'severe' economic hardship, as in *Wilson*, the Hearing Officer required a heightened showing of injury and prejudice not established in any case law[13] addressing this issue." *Id.*

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[12] This sentence in particular highlights two significant issues that repeatedly arise in these types of cases. First, the case law in the area thus far has been clear that the evaluation of prejudice is only to cover the period of time between when the conviction occurred and when SCDMV first sought to impose the statutorily mandated suspension. See *Wilson, Hipp, Davis*, and *State v. Chavis*, 261 S.C. 408, 200 S.E.2d 390 (1973). Despite this clear guidance, the ALC and other courts have repeatedly continued to allow consideration of additional prejudice as the contested case hearing and appeals go forward, essentially allowing the further passage of time to compound the prejudice alleged. In this case, for example, although the delay between when the DUS conviction took place and when SCDMV first sought to impose the habitual offender suspension was only two years, the ALC has referred to Respondent possibly losing "the job she had held for approximately three years." This rolling consideration of prejudice should not be allowed for several reasons. Most significantly, rolling prejudice considerations should not be allowed because of the driver's potential to drag a case out or make other changes in their life for the sole purpose of creating prejudice where no prejudice existed prior to SCDMV's first attempt to impose the suspension. Secondly, there is no debate that a driver's license suspension is always disruptive to a person's life and can cause significant difficulties in the person's life. However, the fact that disruption and difficulties are caused by a driver's license suspension is not dispositive of prejudice by itself under the case law in this area. Rather the consideration is supposed to be whether the delay alone has created more prejudice (harm) to the driver. In other words, it is fairly common that a person would be at risk of losing their job if their driver's license is suspended and as a result they cannot report to work. In a delay case like this the question is whether something occurred <u>as a result of the delay</u> that will cause the person to lose his or her employment.

[13] "law" contained only in ALC Final Order.

C) Respondent's Ability to Care for her Children

Respondent testified that at the time of this contested case hearing she had two children, aged two and three, that attend daycare while she is at work.[14] R. p. 130, lines 19-25. The hearing took place in April 2018. If Respondent's children were two and three years old at the time of this hearing, then in January 2016 they would have been approximately an infant (somewhere less than one year old) and one year old. Thus, Respondent still had the same dependents to take care of in January 2016 as she did in January 2018. Furthermore, Respondent provided no other testimony regarding her children or their care beyond the children's ages, how many children she has, and what her children do when she is at work. So, while SCDMV understands that all driver's license and driving privileges suspensions cause hardship, given the ages of Respondent's children in January 2016 and January 2018 there is no evidence of any additional hardship or prejudice being created due to the delay in this case with regard to Respondent's children and the care they may need. This fact was recognized by the OMVH Hearing Officer by the extremely limited mention of Respondent's children in the OMVH Final Order and Decision. R. p. 183 and 187.

In opposition to the OMVH's factual findings on this matter and in direct opposition to the substantial evidence in the record for this case, the ALJ made the following rulings:

1) "Additionally, [Respondent] is the single mother of two children, ages 2 and 3, who both attend daycare while she works."[15] R. p. 17 and 5.

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[14] Notably, although the ALC Final Order and ALC Amended Final Order both refer to Respondent as a "single" mother, the Respondent never testified that she is a "single mother." R. p. 17 and 5. Respondent's Counsel referred to Respondent as a "single mother of two," but statements made by Counsel during closing argument are not evidence. R. p. 151, line 14.

[15] "both" contained only in ALC Final Order.

2) "[Respondent] also presented evidence she is the sole caregiver for her children, ages two and three, who are in daycare while she is at work." R. p. 23 and 10.

3) "The Court finds that the additional of another child to the household… do constitute significant changes in personal… circumstances." R. p. 23 and 10.

4) "[Respondent] also testified she is the single mother of two young children who attend day care while she works." R. p. 24 and 11.

As already outlined above, Respondent never testified that she is a single mother, that she is a sole caretaker for her children, or that she added an additional child to her household between January 2016 and January 2018.[16] The fact that in January 2016 the Respondent was a mother to two young children was still true and still the same fact in January 2018. Further, the fact that Respondent's two children attend daycare while she works was also still true in January 2016 and January 2018. Thus, on the face of Respondent's testimony, nothing changed between January 2016 and January 2018 with regard to the Respondent's children or her ability to care for them. For these reasons and because the ALJ added "facts" that were never testified to by anyone, the ALJ's analysis with regard to the Respondent's children is flawed on multiple levels and should be vacated in its entirety.

[16] In the United States children (and people in general) are said to be a certain number of years old on the anniversary date of their birthday. Thus, a newly born infant is <u>not</u> said to be one year old. Instead an infant is said to be one year old only once they have lived for at least one year after their birth. Thus, if Respondent had a two year old child in January 2018, then her youngest child had to already be alive (born) in January 2016. Thus, by Respondent's own testimony she did not add a child to her house between January 2016 and January 2018.

D) Respondent had Already Taken Steps to Reinstate her Driver's License Following her Prior Habitual Offender Suspension

Since the *Davis* case, one of the considerations of whether prejudice exists due a delay in reporting a conviction to SCDMV is whether the person took steps to have their license reinstated during the delay. *Davis v. S.C. Dept. of Motor Vehicles*, 420 S.C. 98, 106, 800 S.E.2d 493, 497 (Ct. App. 2017). The *Davis* court, however, discussed taking steps to have a driver's license reinstated in the context of Mr. Davis having taking those steps and holding his reinstated driver's license for nearly two years before SCDMV attempted to impose the suspension mandated by his conviction. *Id.* Thus, it does not appear that the Davis court intended taking steps to reinstate a driver's license alone to be dispositive in these kinds of cases. In fact, a ruling that simply taking action to reinstate a driver's license via the statutory mandated steps would be extremely short sighted without also considering: 1) the amount of delay between the date of conviction and date upon which SCDMV first attempted to impose the mandated suspension; and 2) the length of time the person's license was actually reinstated following these steps. This shortsightedness is easily demonstrated with a fairly simple example:

1) Driver has a prior conviction for DUS that ends on June 18, 2020;
2) On June 15, 2020, Driver is convicted of DUI and the court submits the conviction to SCDMV on June 20, 2020, which within five days as required by statute;
3) On June 19, 2020, Driver comes to the SCDMV, files form SR-22 with SCDMV, pays his $100 reinstatement fee, and has his driver's license reinstated in full related to his prior DUS suspension;

4) On June 21, 2020, SCDMV processes the DUI conviction from June 15, 2020, and calculates that Driver's DUI suspension will start on July 6, 2020.

Following the argument that all that matters is that the Driver in this example has already taken all the steps necessary to have his license reinstated following the DUS conviction, without considering any other factors, the Driver could challenge having to serve the DUI suspension and have the suspension set aside. SCDMV does not believe that is holding of the *Davis* court. Rather, SCDMV believes the Davis court was saying that when a driver has taken steps to reinstate their driver's license, then the court should look at what steps were taken to regain the driver's license and how long the person had their driver's license reinstated related to the delay. In our above example, when considering these additional factors, it becomes clear that the DUI suspension should still be fully imposed. Thus, any holding simply considering that the person has already taken steps to have their license reinstated does not perform a full analysis and should be rejected in favor of the more comprehensive analysis put forth by the *Davis* court.

In this case, a letter dated October 31, 2017, informed Respondent her driver's license and driving privilege suspensions had ended. R. p. 118, lines 3-10 and 209. While it is true that this letter would not have been produced in October 2017 if SCDMV had received timely notification of Respondent's January 2016 DUS conviction, the mere creation and presence of this letter did not constitute prejudice and/or hardship for Respondent. Respondent, unlike the SCDMV, was well-aware that she had an additional DUS conviction that had not yet posted to her driving record (the January 2016 DUS conviction) and for which she had not yet served her suspensions. Therefore, Respondent knew she could not reasonably rely on the October 31, 2017, letter from SCDMV.

Despite her knowledge that SCDMV had not received her January 2016 DUS conviction, Respondent testified that after receiving the letter dated October 31, 2017, from SCDMV she took action to get her driver's license back. R. p. 120, lines 4-7. The only action Respondent took after receiving the October 31, 2017, letter from SCDMV to regain her driver's license was to take and pass the knowledge and skills tests on or before November 13, 2017.[17] R. p. 267. Due to Respondent's many suspensions and the amount of time she had been suspended, successful completion of the knowledge and skills tests were required before SCDMV could legally issue Respondent a renewed driver's license. The knowledge test typically takes 15-20 minutes to take and costs $2.00. See http://www.scdmvonline.com/Fees. The skills test typically takes 20-30 minutes (depending on traffic) and costs nothing to take. See *Id.* and https://www.scdmvonline.com/qflowweba/appointment.aspx. Thus, although Respondent's testimony made it sound as if she put great effort, resources, and money into regaining her driver's license after receiving the October 31, 2017 letter, that is simply not accurate. Moreover, no matter when Respondent sought to regain her driver's license, Respondent was going to have to take and pass the knowledge and skills tests. Having to take the knowledge and skills tests a bit earlier and at a cost of $2.00 does not demonstrate prejudice or hardship for Respondent.

[17] The October 31, 2017 letter is a form letter that is produced by SCDMV's automated system when a person has met all their reinstatement requirements for all known suspensions. Thus, at the time the letter is produced, the driver will have already met all their reinstatement requirements for all known violations, such as paying reinstatement fees, serving their suspension time, enrolling in or complete ADSAP, etc… The exact reinstatement requirements vary from suspension to suspension, but are all tracked in SCDMV's Phoenix system.

Respondent next testified that after she received her driver's license back on November 13, 2017, she received another letter from SCDMV dated November 15, 2017, informing her that she was under suspension in Georgia and needed to resolve that Georgia suspension or SCDMV would have to cancel her driver's license. R. p. 121, lines 8-23, p. 122, lines 8-22, and 210. Respondent testified that she did clear up the issue in Georgia. R. p. 133, lines 11-14, and p. 211. On cross examination, Respondent admitted that whether this habitual offender suspension was started in 2016 or 2018 she would have had to eventually deal with the Georgia suspension issue and get that issue resolved to regain and keep her driver's license. R. p. 135, lines 13-24. Significantly, the ALC Final Order and ALC Amended Final Order both refer to Respondent paying fines and fees in the approximate amount of $1,000 to clear up Respondent's issues in Georgia. R. p. 16, 22, 4, and 9. However, there is no evidence in the record of any such payments. The only time payment of $1000 to clear up the issues in Georgia was mentioned was by Respondent's Counsel in closing argument, but statements made by Counsel during closing argument are not evidence. R. p. 151, lines 9-12.

The only evidence presented regarding the steps Appellant took to reinstate her driver's license is: 1) Appellant had to take and pass the knowledge and skills tests with SCDMV; 2) the knowledge test cost Respondent $2; 3) the Respondent had to clear up suspension issues in Georgia; 4) the Respondent's driver's license was reinstated on November 13, 2017; 5) on November 15, 2017, Respondent was notified that she still had driver's license issues to resolve (the Georgia issues); 6) Respondent did not fully clear up the Georgia issues until December 14, 2017; and 7) on January 24, 2018, SCDMV notified Respondent about the suspension at issue in this case. Thus, in this case,

Respondent only went about forty days with a reinstated driver's license theoretically believing that she was free and clear of any further driver's license issues. As pointed out by the OMVH Hearing Officer, forty days of reinstatement is very different than the twenty months that occurred in the *Davis* case. Despite this significant difference in time, the ALJ found that the difference was irrelevant and all that matter is that both Davis and Respondent took steps to have their driver's license reinstated. R. p. 22 and 9. As outlined above, this limited analysis ignores the full analysis set out in the *Davis* case and ignores the fact that reinstatement requirements are statutorily mandated and in most cases do not go away over time. See, for example, S.C. Code §§56-1-390, 56-5-2990, and 56-25-20. The requirement to pay a $100 reinstatement fee, for example, never times out. S.C. Code §56-1-390. Therefore, a finding of prejudice based solely on the payment of reinstatement fees fails to consider the fact that those reinstatement fees must be paid eventually and never time out.[18]

For the reasons explained in detail above, the OMVH Hearing Officer correctly analyzed the reinstatement actions taken by Respondent in this case taking into consideration all the factors set forth in the *Davis* case. The ALJ, however, considered "facts" not in evidence, limited its analysis to only whether Respondent's driver's license had been reinstated, and failed to analyze any of the other relevant information as set forth in *Davis*.

There is no question that during this hearing the Respondent presented evidence that serving this suspension would be difficult for her, but she presented no evidence that demonstrated that these difficulties in January 2018 were any different than the hardship

[18] A requirement to file future proof of financial responsibility (commonly referred to as filing form "SR-22") can time out for certain suspensions. S.C. Code §56-9-630.

in January 2016. The OMVH Hearing Officer recognized this failure in Respondent's case and ruled appropriately based on this failure. The ALJ, however, engaged in blatant reweighing of evidence even though such reweighing is not permitted at the appellate level. *Dorman v. DHEC, supra*; *Hamm v. American Telephone & Telegraph Co.*, *supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 S.E.2d 296 (1972) (A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion). Due to this reweighing of evidence, the ALJ's order should be overruled and the OMVH's Final Order and Decision should be affirmed.

CONCLUSION

For the reasons set forth above, the SCDMV respectfully requests that that ALJ orders reweighing the evidence in this case be vacated in their entirety and the OMVH's Final Order and Decision be affirmed.

Respectfully submitted,

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December 8, 2020
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable H. W. Funderburk, Jr., Administrative Law Judge

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Case No. 2020-000980

Shante Michele Eugene . . . . . Respondent,

v.

South Carolina Department of Motor Vehicles . . . . . Appellant.

CERTIFICATE OF COUNSEL

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

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December 8, 2020
Blythewood, SC