THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

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

Case No. 2020-000980

Shante Michele Eugene — Respondent,

v.

South Carolina Department of Motor Vehicles — Appellant.

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF THE CASE

Respondent was arrested on May 31, 2013 on the offense of driving under suspension ("DUS"'). She was subsequently convicted of this charge on August 20, 2013. On June I, 2013, Respondent received another DUS charge and was convicted on February 4, 2014. On April 7, 2015, Respondent was charged with a subsequent DUS and pled guilty on January 13, 2016. The ticket number for the April 2015 offense was ticket number 57873GO. For this particular ticket, SCDMV records indicated a conviction date of January 13, 2016. On January 24, 2018, Respondent was notified that she was declared a habitual offender and her driving privileges would be suspended. Respondent obtained counsel and requested a hearing.

A hearing was held before OMVH Hearing Officer Brigette B. Autry on April 6, 2018. At the hearing, it was revealed that Appellant unilaterally changed the conviction date of Respondent's qualifying offense from January 13, 2016 to January 11, 2018 on Respondent's DMV driving record.

At the hearing, Respondent testified and presented supporting documents establishing that she had gone through considerable effort and expense to regain her driving privileges, not once but twice, after her prior suspension ended in October of 2017. Respondent's job with the U.S. Postal Service and her military service with the National Guard require substantial commutes and would most likely be lost if the Respondent lost her driving privileges again after having regained them.

At the hearing, SCDMV counsel argued that a notation on the bottom of the ticket itself indicated that January 11, 2018 was actually the date of conviction and decided unilaterally to change the date of conviction to January 11, 2018 on the day before the OMVH hearing without any evidence that this was the correct date of conviction. At the request of Respondent's attorney and with no objection from SCDMV, the court held the matter open for Respondent to have an opportunity to supplement the record and provide additional documentation. Respondent requested a thirty (30) day extension which was also granted. Respondent submitted additional documents on May 14, 2018. SCDMV filed a response on June 7, 2018. Respondent submitted additional documents including the certified records from Beaufort Magistrate Court and an affidavit from Respondent's public defender that corroborated the Respondent, attesting to the fact that the actual date of conviction was in 2016 not 2018.

Without any explanation of why SCDMV maintained that it received a copy of the ticket number 57873GO on January 18, 2018, the Hearing Officer found that the Appellant was not at fault in creating the two-year delay in imposing the suspension. On April 1, 2019, Hearing Officer Autry issued a Final Order and Decision concluding that the suspension of Respondent's driving privilege be sustained.

This matter was then appealed to the Administrative Law Court. On April 25, 2019, Respondent served the notice of appeal of the Final Order and Decision of Office of Motor Vehicles (OMVH) Hearing issued on April 1, 2019 by Officer Brigette B. Autry. Both parties submitted Briefs. The Honorable H.W. Funderburk issued a Final Order on this matter on February 6, 2020. Appellant subsequently filed a Motion for Reconsideration in Part on February 10, 2020. The Honorable H.W. Funderburk issued an Amended Final Order June 19, 2020. This appeal follows.

STANDARD OF REVIEW

The standard of review for an appeal from the Administrative law court is established pursuant to S.C. Ann. 1-23-380. The ALC "may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are… (d) affected by other error of law or (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

ARGUMENT

I. THE ALJ DID NOT ERRONEOUSLY ENGAGE IN A REWEIGHING OF THE EVIDENCE IN THIS CASE IN VIOLATION OF S.C. CODE § 1-23-380(A) BUT INSTEAD CORRECTLY FOUND THE LOWER COURT HAD MADE AN ERROR OF LAW.

Contrary to Appellant's argument that the ALJ reweighed the events and facts that were heard by the hearing officer, it can be clearly seen by the Amended Final Order that the ALJ found a clear error of law by the Hearing Officer. Such an error of law is not only covered by the statue that the Appellant relies on to assert that the ALJ violated, that specific statute requires the overturning of decisions made pursuant to an error of law. The ALJ specifically states, "[t]hus, this Court's review is limited to deciding whether the OMVH's Final Order and Decision is unsupported by substantial evidence or is affected by an error of law, an abuse of discretion, or is arbitrary or capricious. *Bass v. Kenco Group,* 366 S.C. 450. 457. 622 S.E.2d 577. 581 (Ct. App. 2005). The findings of the agency arc presumed correct and must be affirmed if supported by substantial evidence." Supplemental R p. 1 .

The ALJ makes it clear in his orders that he is making a ruling based on error of law and not based on a reevaluation of the facts presented and ruled on by the agency. "The Court finds the

Final Order and Decision to be affected by an error of law and to be clearly erroneous in view of the substantial evidence on the record." R p. 9.

The court goes on to state, "[i]t is axiomatic that the ALC may reverse because of an error of law. See. e.g .. *Olsen v. S.C. Dept. of Health & Envtl. Control*. 379 S.C. 57, 63, 663 S.E.2d 497. 501 (Ct. App. 2008) (finding an appellate court may reverse the decision of a lower court'[i]f the findings are affected by an error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion)'. An abuse of discretion occurs when an administrative agency's ruling is based upon an error of law, such as the application of the wrong legal principle; or when based upon factual conclusions, the ruling is without evidentiary support; or when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. *State v. Allen*. 370 S.C. 88, 94, 634 S.E.2d 653. 656 (2006)." Supplemental R p. 1.

The ALJ order does not make any additional findings of fact or reweighing of facts. The ALJ merely examines the hearing officer's analysis and application of the undisputed facts to the existing case law. The Hearing Officer found that Respondent's case was distinguishable from *Wilson v. S.C. Dept. of Motor Vehicles*, 419 S.C. 203, 786 S.E.2d 541 (Ct. App. 2017) and *Davis v. S. C. Dept. of Motor Vehicles*, 420 S. C. 98, 800, S.E.2d 493 (Ct. App. 2017) in 2 ways. First, that Respondent's license had only been reinstated one month after her previous habitual offender suspension ended and her license was reissued. Secondly, that the delay in Respondent's case was only 2 years. In examining the hearing officer's analysis of the *Wilson* and *Davis* cases and how they apply to the instant case, the ALJ finds that "while Hearing Officer Autry may be correct in her findings on these two points of distinction, this comparison falls short of the analysis in *Davis*.

There, although the Court of Appeals recognized that the delay exceeded the total time of the suspension, more importantly the Court identified two major factors leading to the finding of fundamental unfairness in violation of due process." R p. 8.

The ALJ made it clear that he relied on the *Davis* court finding prejudice and injury because Davis had already paid the reinstatement fees, met the requirements for reinstatement, and his license was reinstated for twenty months. In the instant case, the hearing Officer, while acknowledging the facts that Respondent had paid reinstatement fees, met the requirements for reinstatement (including obtaining SR-22 insurance and payment of $1000 in fines in fees to the state of Georgia), ignores these facts in making her ruling. R p. 133. The hearing officer further ignores Respondent's testimony that she would not have spent so much effort, time and money if she was not going to have her privileges reinstated. R pp. 121, 133. The hearing officer ignores this and only compares the difference in the amount of time that Respondent had her license back as compared to Davis.

As noted by the ALJ, the Davis court articulated another factor leading the determination of fundamental unfairness was that neither Davis or the DMV was at fault for the delay. "[I]n the *Davis* comparison, the Final Order and Decision fails to recognize the second factor considered by the Court of Appeals in *Davis* is also present and relevant in Appellant's [Respondent's] case: neither party was at fault for the delay. Moreover, the Court of Appeals also established fault - or lack thereof — as a primary consideration in *Wilson* 419 S.C. at 209, 796 S.E.2d at 545 (finding a due process violation ·-when sufficient evidence of prejudice exists in the record and neither party is at fault for the delay. However, when comparing Appellant's circumstances to those set forth in *Wilson*, the Hearing Officer ignored this lack of fault. R p. 9.

The ALJ analyzes the hearing officer's findings based on *Davis* and *Wilson* and points out the fact that instead of focusing on the two primary factors the court laid out in *Davis*, the Hearing Officer instead focuses on the delay. "However, the court finds that the *Davi*s decision only noted that the delay exceeded the time period of the suspension but set forth two other distinct deciding factors in its analysis." R p. 8. The ALJ determined that the *Davis* court didn't rely on the fact of the time period of suspension versus the delay, it only mentions it. The ALJ found that Hearing Office incorrectly compared the suspension period to the delay period as if it was a factor.

Furthermore, the ALJ found an additional error of law in that the Hearing Officer applied an evidentiary standard that is incorrect. Hearing Officer Autry specifically found that there was no "severe economic hardship" to Respondent which is not a standard found in either *Davis* or *Wilson*. R p. 188. There is no case law authorizing the Hearing Officer to implement and apply a "severe prejudice" or "severe economic hardship" standard of the prejudice that is required to be shown. In *State v. Chavis, 261 S.C. 408, 200 S.E. 2nd 390, 392 (1973)*, the only language used by the court is was a showing of "real prejudice".

This is further clarified by the *Wilson* case. In *Wilson*, *Wilson* presented to the court that she would suffer "severe economic hardship" if the suspension was imposed. The court declined to adopt that language as the standard and maintained that what was required was "a showing of a high likelihood of injury or potential prejudice" *Id*. at 497 (2017) (emphasis added). Even though the Hearing Officer also cited *Davis* in her order, the *Davis* case does not create any higher standard of proof required by the Appellant but simply follows the same standard of *Wilson* as to prejudice. Furthermore, in *Wilson*, the prejudice or injury suffered was the potential loss of employment and her then subsequent inability to pay two mortgages. The only distinguishable factor between *Wilson* and the instant case is that Appellant would suffer more potential prejudice as she would not only

lose her job, she could also lose her commission in the National Guard, and all of the benefits therefrom.

Thus the ALJ correctly ruled as follows; "Therefore, in concluding that Appellant failed to present 'specific evidence that she could suffer a severe economic hardship.' Hearing Officer Autry applied a heightened standard of injury and prejudice and based her decision on an incorrect legal principle, therefore making an error of law." R p. 11.

Appellant's argument relies solely on the contention that the ALJ somehow reweighed the facts found by the Hearing Officer, despite the fact that the ALJ order does not support this contention. Instead, it is clear that the ALJ found that the Hearing Officer misapplied the standards articulated in *Davis* and *Wilson*. Appellant does not address this issue at any time during its brief on this Appeal or previously in its Motion to Reconsider. Appellant's refusal to accept the first order of the court left the ALJ with only one legal option due to the Hearing Officer's imposition of the improper standard. Instead Appellant completely ignores the sound reasoning behind the ALJ's ruling and completely ignores the fact that the hearing officer applied a heightened standard that is not supported by case law.

Appellant goes on at length about the ALJ reweighing facts, however, all Appellant does is reargue why the facts accepted and established by both courts should not result in a finding against the DMV. Appellant is trying to re-litigate its case under the thin guise of a complaint about the ALJ's analysis of the facts as established by the evidence that the DMV had an opportunity to challenge at the original hearing. For example, Appellant challenges Respondents assertion that she had no one to give her a ride to get back and forth to Charleston for work. Appellant attacks this in its brief by stating, "this testimony was vague and undeveloped." If Appellant had a problem with this testimony, Appellant's had every opportunity to challenge that testimony at the time of the

hearing. Counsel was present, had an opportunity and did cross exam Respondent at the hearing. If Appellant wanted to establish additional facts to corroborate this assertion. Appellant argues "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." That is blatantly untrue. Respondent's testimony at the hearing specifically attested to the fact that she began employment at USPS in May of 2016 and at that time, she had been staying with her cousin who lived in Charleston. R. p. 131. She further testified that her cousin no longer lived in Charleston so she is now required to commute approximately an hour and fifteen minutes and an hour and a half from Beaufort. R pp. 130-131.

Appellant argues that Respondent's testimony that she doesn't have anyone to give her a ride back and forth to Charleston for work is vague and undeveloped. Appellant does not explain how not having someone give Respondent a ride back and forth on a commute that is over an hour is vague and undeveloped. Furthermore, Appellant had the opportunity to cross exam Respondent and had every opportunity to flesh out any details or lack thereof on the record. Instead, Appellant wants to argue about what it considers shortcomings to the evidence presented at the appellate level despite having an opportunity to address those issue at the trial level and at the ALC level. Furthermore, Appellant wants to argue in a footnote about what the meaning of "stayed" is and argue facts outside of evidence b making suppositions that Respondent probably only stayed with her cousin 2 or 3 nights a year. Appellant had every opportunity to make those details a part of the record and at the very least make the argument to the Hearing Officer. Instead, Appellant does exactly what the Appellant complains that the ALJ did and argues facts outside the record.

Appellant also seems to have a hard time figuring out how Respondent could have a two year old in April 2018 after her conviction in January 2016. This argument is nonsensical and is not even a point that ALJ relied on making his ultimate ruling.

While arguing and making assumptions of facts not in evidence, Appellant continues to argue that the ALJ considered facts outside of evidence. Specifically, Appellant argues that the tests Respondent would have taken to receive her license back would have been minimal to Respondent, like the length of time of knowledge and skills tests, the procedure, and how much it costs, all trying to trivialize the prejudice suffered by Respondent in this matter. However, none of these facts were entered into the record. Appellant asserts that "although Respondent's testimony made it sound as if she put great effort, resources, and money into regarding her driver's license…. that is simply not accurate." Yet, Appellant's only attempts to refute the facts in the record with alleged facts that it did not bother to present or argue at the hearing level. Appellant continues arguing further facts not in evidence in its accompanying footnote. Appellant Brief p. 30 and footnote 17.

Additionally, the Appellant is also once again missing the point by trying to argue a heightened standard that is not indicated in the case law. As in *Chavis,* the case law requires a showing of "real prejudice" and does not give a certain level to that prejudice or require that it be severe or substantial. Appellant basically argues that whatever hardship the Respondent suffers or would suffer is not enough. If neither party was at fault in bring on the delay and the driver suffered some prejudice, the court can overturn that suspension as a violation of their due process rights.

Appellant also continues to argue that the ALJ referred to Respondent's payment of $1000 to clear up driving issues in GA was a fact not in evidence. Appellant continues by arguing that the only time this is mentioned in the record is by Respondents counsel in final argument. It is clear by reading the language in the transcript of the hearing, that there is a clear scriveners error by the

transcriptionist and that this testimony occurred in the middle of direct examination and indicates Respondent's response to questioning by her counsel and the court. R p. 121, lines 8-21. If read in context, there is testimony on line 8 where counsel hands the proposed exhibit to Respondent and asks Respondent to identify it. Respondent then testifies regarding the $1000 she paid Georgia to ensure her South Carolina driving privileges would not be suspended. Appellant cites this as the ALJ considering facts outside of evidence when it is clear this was testimony and documents entered into evidence. The hearing officer even asked if Appellant had an objection to the admittance of the document and to which Appellant did not. R p. 121, lines 24-25.

CONCLUSION

When examining the Amended Final Order of the ALJ's final order that Appellant's contention that the lower court engaged in some improper re-analysis or reweighing of the facts is simply incorrect. Appellant fails to even address the clear error of law and finding by the court. As such this appeal should be dismissed.

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