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**Aug 13 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA  
Administrative Law Court

S. Phillip Lenski, Administrative Law Judge

Appellate Case No.: 2021-000007

Andrew Davis Desilet ... Appellant,

v.

South Carolina Department of Motor Vehicles and  
South Carolina Department of Public Safety ..... Respondents.

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**FINAL BRIEF OF APPELLANT**

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**STATEMENT OF ISSUES ON APPEAL**

- I. ADMINISTRATIVE LAW JUDGE LENSKI COMMITTED AN ABUSE OF DISCRETION IN CONCLUDING THAT THE CLERICAL ERROR UNDERLYING THIS APPEAL COULD BE GIVEN SUBSTANCE AND HEIGHTENED BEYOND WHAT COULD BE CONSIDERED A CLERICAL ERROR.
  - A. RESPONDENT DMV WAS NOT PREJUDICED BY THE CLERICAL ERROR.
  - B. SUBSTANTIVE RIGHTS OF APPELLANT HAVE BEEN PREJUDICED DUE TO ADMINISTRATIVE LAW JUDGE LENSKI'S ABUSE OF DISCRETION.
  - C. ADMINISTRATIVE LAW JUDGE LENSKI COMMITTED AN ABUSE OF DISCRETION BY FAILING TO CONSIDER THE UNPRECEDENTED EFFECT OF THE COVID-19 PANDEMIC ON USPS OPERATIONS.

## STATEMENT OF THE CASE

This is an appeal from the Order Granting Respondent's Motion to Dismiss (hereinafter "Order") of the Honorable Judge S. Phillip Lenski, South Carolina Administrative Law Court (hereinafter "ALC"), entered on December 18, 2020. (R. p. 12) The Appellant, Andrew Davis Desilet, was arrested on March 1, 2020 for driving a motor vehicle while under the influence of alcohol, drugs or a combination of alcohol and drugs in violation of S.C. Code Ann. § 56-5-2950 (2018). (R. p. 1) Upon his refusal to submit to a breath, blood, or urine test, Respondent was charged with a violation of S.C. Code Ann. §56-5-2950 (2018) and received a notice of suspension. (R. p. 16) A hearing was held on August 4, 2020 before the State of South Carolina Office of Motor Vehicle Hearings (hereinafter "OMVH"). (R. p. 61) On August 5, 2020 OMVH Hearing Officer Samuel L. Johnson issued a Final Order and Decision (hereinafter "Decision") upholding the suspension of Appellant's driver's license. (R. p. 1) On August 17, 2020, Appellant served his Notice of Appeal of the Decision to the South Carolina Administrative Law Court (hereinafter "Notice"), South Carolina Department of Motor Vehicles (hereinafter "DMV"), South Carolina Department of Public Safety (hereinafter "DPS") and the State Trooper Brazell. (R. p. 18)

Despite clearly listing "South Carolina Department of Motor Vehicles" on the Notice's Proof of Service, the paralegal for Appellant's counsel inadvertently mailed the Notice for the DMV to the address for OMVH<sup>1</sup>. (R. p. 78) On August 28, 2020<sup>2</sup>, the

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<sup>1</sup> The correct address for S.C. DMV is P.O. Box 1498, Blythewood, SC 29016-0020; the Notice for S.C. DMV was inadvertently mailed to the address for the S.C. OMVH: 1205 Pendleton St., Suite 325, Columbia, SC 29201. Appellant notes that USPS never returned the incorrectly addressed Notice.

<sup>2</sup> Appellant notes that this Notice was issued to Respondents. (R. p. 78)

Clerk for the ALC, Jana E. Shealy, filed the Notice of Assignment for the Appeal of the Decision, setting a deadline for the receipt of the Record on Appeal for no later than forty-five (45) days, or by October 12, 2020. (R. p. 24) On September 26, 2020, the DMV filed and served a Notice of Motion and Motion to Dismiss Appellant's Appeal of the Decision (hereinafter "Motion to Dismiss"), arguing that it had not been properly served Notice. (R. p. 25) On October 2, 2020, counsel for Appellant filed his Response to the DMV's Motion to Dismiss. (R. p. 27) DMV's Notice of Motion and Motion to Dismiss of September 26, 2020 incorrectly states the decision appealed from was rendered on April 5, 2020, when it was rendered on August 5, 2020. (R. p. 25) DMV filed its Amended Motion to correct this on October 5, 2020<sup>3</sup>. (R. p. 34) On October 12, 2020, Kellie S. Reaves, paralegal to counsel for Appellant, Jack B. Swerling, filed an Affidavit stating that she made a "clerical mistake" in addressing and mailing the Notice to the DMV. (R. p. 77) Appellant filed and served his Brief of Appellant for the Appeal of the Decision on October 21, 2020. (R. p. 42) Administrative Law Judge Lenski issued the Order underlying this Appeal on December 18, 2020. (R. p. 12) On January 5, 2021 Appellant filed the Notice underlying this Appeal and a Motion to Stay Order Pending Appeal. (R. p. 5) On February 4, 2021, this Court issued an Order granting Appellant's Motion to Stay and held Appellant's driver's license suspension was stayed during the pending resolution of this Appeal. (R. p. 15)

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<sup>3</sup> In the Order Granting Respondent's Motion to Dismiss, ALJ Lenski recognizes in FN. 1 that the only correction to DMV's original Notice of Motion and Motion to Dismiss is a "typographical error pertaining to the date the agency decision was rendered," and that the "Amended Motion merely corrects that error." (R. p. 12)

## **STATEMENT OF FACTS**

The Statement of Facts is interwoven with the Statement of the Case.

## **STANDARD OF REVIEW**

An Appellate Court may reverse the decision of the ALC if it is affected by an error of law or is “arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” *South Carolina Dep't of Motor Vehicles v. Blackwell*, 389 S.C. 293, 295, 698 S.E.2d 770, 771 (2010). This Court may reverse the decision of the ALC if substantive rights of the Petitioner (Appellant herein) have been prejudiced because the administrative findings, inferences, conclusions, or decisions are (1) violative of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610.

## **ARGUMENT**

- I. ADMINISTRATIVE LAW JUDGE LENSKI COMMITTED AN ABUSE OF DISCRETION IN CONCLUDING THAT THE CLERICAL ERROR UNDERLYING THIS APPEAL COULD BE GIVEN SUBSTANCE AND HEIGHTENED BEYOND WHAT COULD BE CONSIDERED A CLERICAL ERROR.

A. Respondent DMV was not prejudiced by the clerical error.

In *Weatherford v. Price*, this Court stated, “that a mere clerical error in a Notice of Appeal” does not warrant the dismissal of the appeal, especially where counsel

demonstrates no prejudice as a result. *Weatherford v. Price*, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct.App.2000). In *Mason v. Mason*, an appeal was found to be proper because a party to the appeal “at least had notice he was a party to the appeal within the time required to file an appeal from the [special referee’s] decision.” *Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405 (Ct.App.2015). In the present matter, a Notice of Assignment of Appellant’s Appeal of the Decision was filed and mailed to the Appellant and Respondents DMV and DPS from this Court on August 28, 2020, at least giving Respondent DMV notice that it was party to the Appeal, on or by September 4, 2020<sup>4</sup>. Respondent DMV cannot and does not assert that it never received any notice or suffered prejudice as a result, as its Notice of Motion and Motion to Dismiss was filed on September 26, 2020. This is distinguishable from *Conner v. City of Forest Acres*, where the Court found prejudice to a party due to the appellant’s failure to list said party as a respondent on the notice of appeal, because Respondent DMV was clearly listed on the Notice and did in fact receive notice. *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002)

In *Weatherford*, the Court found that, “though the [appellant] did not ‘technically’ appeal from the trial court’s original order by referring to it in the Notice of Appeal,” this failure was considered “of a clerical nature only.” While a clerical error was made on Appellant’s Proof of Service for the Notice; there is no evidence that the address on the envelope mailing Notice to the DMV was also incorrect. Appellant never received any returned mail or notice that the actual Notice itself was addressed incorrectly, and thus was never given an opportunity to cure this clerical error.

B. Substantive rights of Appellant have been prejudiced due to Administrative Law Judge Lenski’s abuse of discretion.

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<sup>4</sup> Within thirty (30) days from the August 5, 2020 issuance of the Decision. R. p. 24.

“A person’s interest in his driver’s license is property that a state may not take away without satisfying the requirements of due process. Due process is violated when a party is denied fundamental fairness.” *Hipp v. S.C. Dep’t of Motor Vehicles*, 381 S.C. 323, 373 S.E.2d 416 (2009). In heightening the clerical error on Appellant’s Proof of Service to a substantive error<sup>5</sup>, ALJ Lenski has denied Appellant of his property interest in retaining his driver’s license and has denied Appellant his substantive right to due process for a determination that can further deprive him of this interest. Appellant has been denied the fundamental fairness of the opportunity to defend his right to his property—in this case—his driver’s license. In a time when daily operations of every industry across the world have suffered due to the COVID-19 Pandemic, the denial of this fundamental fairness threatens Appellant’s current and future ability to transport himself for gainful employment, another type of deprivation.

C. Administrative Law Judge Lenski committed an abuse of discretion in failing to consider the unprecedented effect of the COVID-19 Pandemic on USPS operations.

“The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by an Act of Congress, and supported by the people.” 39 U.S.C. §101(a). Since approximately mid-March of 2020, basic, fundamental operations of business and daily life have been completely disrupted. Every essential business and service provider across the United States, ranging from restaurants to Courts, has faced complications and adjustments that prior to the year 2020 had never been contemplated.

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<sup>5</sup> “While the court acknowledges that the error in this case may have been clerical in nature, the resulting lack of notice to the Department gives the error substance and heightens it beyond what could be considered a clerical error.” FN.2, Order of ALJ Lenski, issued Dec. 18, 2020. R. p. 12.

Without question, this applies to the United States Postal Service (USPS), an essential service provider for the nation. USPS has had to completely change and adjust its operations to address safety concerns and challenges arising due to the Pandemic<sup>6</sup>. These adjustments include, but are not limited to, procedures for receiving mail, procedures for cleaning facilities, procedures for delivering mail requiring signature, etc., undoubtedly resulting in inefficiencies for the customers it seeks to serve. Due to these inefficiencies, a clerical error made by Appellant's counsel was not cured as it would have been if USPS had been operating pre-Pandemic. USPS failed to return any incorrectly addressed mail to Appellant/counsel for Appellant, and, to Appellant's knowledge, his Notice had been mailed as required to effect service on Respondent DMV. No notice of the clerical error was provided to Appellant as it likely would have been if USPS had been operating as it had pre-Pandemic. Failing to consider this factor beyond the control of the Appellant constitutes a further deprivation of this right to due process and can be corrected as an abuse of discretion.

### CONCLUSION

Judge Lenski's Decision to dismiss Appellant's appeal to the Administrative Law Court was based on a clearly unwarranted exercise of discretion and has deprived Appellant of his substantive due process rights and must be reversed. Judge Lenski failed to consider the unprecedented effect of the COVID-19 Pandemic on the operations of USPS regarding service of the Notice on the parties, such as its failure to return any deficiently addressed

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<sup>6</sup> See *Delivering for America During COVID-19*, <https://about.usps.com/newsroom/covid-19/> (2020). See also *Media Statement*, <https://about.usps.com/newsroom/statements/usps-statement-on-coronavirus.htm> (2020).

mail to Appellant, thus depriving him of the opportunity to cure the clerical made by his counsel's paralegal. Appellant respectfully ask this Court to reverse the Decision of Judge Lenski and for all other relief as the Court deems just and proper.

Respectfully submitted,

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**CERTIFICATE OF COUNSEL**

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

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**CERTIFICATE OF COMPLIANCE**

The Undersigned Counsel hereby certifies that Appellant’s Final Brief complies with the South Carolina Supreme Court Order 2007-08-13-12 Amended by Order 2014-04-15-02, filed April 14, 2014.

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