STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of Motor Vehicles, Appellant, vs. Jason K. Cain, Respondent.	)	Docket Number: 06-ALJ-21-0790-AP **EN BANC ORDER**

PER CURIAM: This matter is an appeal by the South Carolina Department of Motor Vehicles (Department) from a Final Order and Decision of the South Carolina Division of Motor Vehicle Hearings (DMVH). In this appeal, the Department argues that the failure by DMVH hearing officers to follow Department Policy VS-001 in suspension reduction hearings held pursuant to S.C. Code Ann. § 56-1-1090(c) (Supp. 2006) constitutes reversible error. This issue has been raised in numerous appeals to the Administrative Law Court (ALC). Therefore, pursuant to ALC Rule 70, the ALC has chosen to decide this issue *en banc* to uniformly and efficiently adjudicate these cases.

LAW/ANALYSIS

The DMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660 (Supp. 2006). Section 56-1-1090(c) states in pertinent part:

> [U]pon petition to the Division of Motor Vehicle Hearings and for good cause shown, the hearing officer may restore to [a person declared to be a habitual offender] the privilege to operate a motor vehicle in this State *upon terms and conditions as the department may prescribe*, subject to other provisions of law relating to the issuance of drivers' licenses. The petition permitted by this item may be filed after two years have expired from the date of the decision of the department finding the person to be an habitual offender. At this time and after hearing, the hearing officer may reduce the five-year period of [subsection] (a) to a two-year period for good cause shown.

S.C. Code Ann. § 56-1-1090(c) (Supp. 2006) (emphasis added). In late 2005, the Department issued Department Policy VS-001, which sets forth "conditions" which must be met in order for

a Section 56-1-1090(c) suspension reduction to be granted. The Department contends that, before a Section 56-1-1090(c) suspension reduction may be granted, DMVH hearing officers are "obligated to ensure" that all conditions of Department Policy VS-001 are met. According to the Department, the failure to do so constitutes reversible error.

We disagree. Because Department Policy VS-001 has not been promulgated as a regulation, it does not have the force or effect of law. See S.C. Code Ann. § 1-23-10(4) (2005) ("Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law."). In other words, Department Policy VS-001 cannot act as a "binding norm" on DMVH hearing officers unless the Department promulgates it as a regulation. See, e.g., Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 636 S.E.2d 598 (2006); Home Health Serv., Inc. v. S.C. Tax Comm'n, 312 S.C. 324, 440 S.E.2d 375 (1994). As the South Carolina Supreme Court has recently explained:

> When [an] action or statement "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion," then it is a binding norm which should be enacted as a regulation. But if the agency remains free to follow or not follow the policy in an individual case, the agency has not established a binding norm.

Sloan, 370 S.C. at 476, 636 S.E.2d at 610 (quoting Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983). Thus, because the Department has not promulgated Department Policy VS-001 as a regulation, DMVH hearing officers are not required to treat it as anything more than a non-binding guideline. Therefore, a DMVH hearing officer's failure to follow any of the conditions set forth in Department Policy VS-001 does not *per se* constitute reversible error.

AND IT IS SO ORDERED.

ANDERSON, GEATHERS, GOSSETT, MATTHEWS and MCLEOD, JJ., concur.

KITTRELL, C.J., not participating.

March 23, 2007
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).
This 23rd day of March, 2007
By: Amanda M. Scott
Judicial Law Clerk