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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 22-ALJ-15-0013-AP

Appellate Case No. 2023-000693

Charles J. Madden, #00182326, Appellant,

v.

South Carolina Department of Probation, Parole, and Pardon Services Respondent

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REPLY BRIEF OF APPELLANT

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INTRODUCTION

"'When *I* use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean – neither more nor less." Lewis Carroll, *Through the Looking-Glass*, Ch. 6, p. 205 (1934) First Published in 1872.

In this case, Respondent[1] issued an order denying Appellant Charles Madden parole and stated as one of its reasons for denying parole "Failure to Successfully Complete a Community Supervision Program."[2] As the Administrative Law Court (ALC) correctly noted, and Respondent has conceded, if "community supervision program" is given its statutory meaning in this case the Parole Board's decision is erroneous and should be reversed. (Brief of Respondent to the ALC at p. 9, R._; ALC Order of Remand at p. 4–5, R._; Brief of Respondent at p. 5). Respondent does not, and cannot, dispute that there is a statutorily defined "community supervision program," the statutory community supervision program is prospective in nature and was not enacted until after Mr. Madden was convicted, or that the plain language of the statute exempts Mr. Madden from participation based on the crime he is convicted of. Respondent also cannot reasonably claim that denying Mr. Madden parole based on his failure to complete a program he is, by law, ineligible to

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[1] In its brief, Respondent asserts that "the Parole Board is a body independent from Respondent Department of Probation, Parole, and Pardon Services. The Parole Board members are appointed by the governor and do not draw a salary." (Brief of Respondent at p. 10) While Parole Board members are gubernatorial appointees who do are not salaried employees of the Department, neither fact establishes the separation between the Parole Board and the Department Respondent suggests. To the contrary, the South Carolina code makes abundantly clear that the Department and the Board are inexorably linked: The Department is responsible for developing Board member training (S.C. Code Ann. § 24-21-10), the Department's Director is responsible for developing written policies and procedures regarding the consideration of paroles and pardons by the Board (S.C. Code Ann. § 24-21-13), the Department's Executive Director is responsible for scheduling Board meetings, ensuring proper cases and investigations are prepared for the board, maintaining the Board's records, and performing administrative duties to support the Board (S.C. Code Ann. § 24-21-220). Moreover, the Board is represented in this, and every other parole appeal case, by the Department's counsel.

[2] At the outset, Appellant notes that Respondent, once again, misstates the facts of the crime Mr. Madden is currently incarcerated for when it asserts Mr. Madden "killed his father during the commission of an armed robbery." While an individual named William D. Willis stated – for the purposes of obtaining an arrest warrant – that probable cause existed to believe Mr. Madden committed murder during the commission of an armed robbery, the publicly available records, which Mr. Madden requests the court take judicial notice of, show Mr. Madden was never charged, indicted, tried, or sentenced for armed robbery. (McCormick County Public Records, R._). However, much as it did before the Administrative Law Court, Respondent here improperly attempts to present this statement of probable cause to the Court as if it were a fully adjudicated – and undisputed – fact. It is not.

participate in would fail to comport with even the limited due process rights afforded him in the parole process. Mr. Madden's argument requests the Court to apply well established legal principles to give a statutorily defined term its statutory meaning.

In contrast, Respondent asks the Court to join it on a trip through the looking glass to an alternate legal universe where state agencies are never wrong because they can re-define terms at their convenience. In Respondent's estimation, a state agency can invoke statutory language in a final decision or order and, when it is readily apparent the agency's decision is erroneous from the plain language of the statute, escape reversal by simply saying "that's not what *we* mean when *we* use that term." Respondent argues this Court must affirm the Administrative Law Court (ALC) and hold that South Carolina law permits the Parole Board to use the statutorily defined term "community supervision program" to mean something entirely different from its statutory meaning in its orders denying parole. Distilled to its essence, Respondent's argument is that when the *Parole Board* uses a word, it means just what the *Parole Board* chooses it to mean – neither more nor less. Respondent's arguments are without merit and the ALC's holding below is violative of Mr. Madden's due process rights. This Court should reverse the ALC's Order and either direct the Parole Board to grant Mr. Madden parole or require Respondent to grant Mr. Madden a new hearing to be conducted in full compliance with the statutorily mandated parole process.

REPLY

I. This Case Presents a Question of Statutory Interpretation and the ALC's Failure to Apply the Appropriate Standard Is Reversible Error:

Contrary to Respondent's assertions, Mr. Madden is not claiming that "community supervision program" must, in every circumstance, have the meaning given that term by the General Assembly. Nor is Mr. Madden attempting to apply a "hyper-technical definition" to the term "community supervision program." Mr. Madden is simply arguing that when a state agency

or board issues a final decision or order that uses a statutorily defined term, the term must be given its statutory meaning – particularly where, as here, the term is used as a finding of fact supporting the agency or board's conclusions of law.

Respondent attempts to avoid this issue and the well-established process for reviewing agency decisions entirely by claiming this case does not pose questions of statutory interpretation and, consequently, the two-step analysis set forth in *Kiawah* is inapplicable. This is so, according to Respondent, first because the "language at issue is the interpretation of the Parole Board's letter of rejection, not a statute or regulation" and second because "[t]he Board's letter is just that, a letter." Respondent's arguments are without foundation in either law or logic and must be rejected.

a. *Respondent's Notice of Rejection is a Final Decision or Order Subject to the Administrative Procedures Act.*

Contrary to Respondent's assertions, its Notice of Rejection is not merely a "letter," it is a final decision or order governed by Administrative Procedures Act (APA). This fact is readily apparent from examining the face of the document itself: the Notice is on Respondent's official letterhead, it is signed by the Associate Deputy Director for Paroles, Pardons, and Release Services, and it sets forth (and conspicuously notes with capitalized text) the Board's conclusions of law and findings of fact. (Notice of Rejection, R._); *See* S.C. Code Ann § 1-23-350.

More importantly, South Carolina's appellate courts have routinely stated that Respondent's notices of rejection are final decisions or orders subject to the APA. In the oft-cited *Cooper* decision the Supreme Court of South Carolina held that:

> [b]ecause the limited appeal of parole decisions is governed by the APA, ***the Parole Board and the ALC must comply with its provisions.*** Pursuant to the terms of the APA, a ***final decision*** in an agency adjudication of a contested case "shall include findings of fact and conclusions of law, separately stated."

Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 500, 661 S.E.2d 106, 112

(2008), *abrogated by Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 886 S.E.2d 671 (2023) (emphasis added). The court also noted, in response to the Department's concern that its holding would generate an "overabundance of appeals," that parole appeals could be limited if "the Parole Board issues ***orders*** that are sufficiently detailed for the ALC to conduct appellate review." *Id.* The Court went on to hold that because the Parole Board had apparently only considered the nature of the appellant's crime and ignored other factors it was required to consider, it had no choice but conclude "the ***order*** was defective." *Id.*

The next year the Supreme Court of South Carolina issued its opinion in *Compton* to clarify its holding in *Cooper*. *Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 685 S.E.2d 175 (2009). While the *Compton* court held the parole board was not required to fully set forth detailed and specific findings of fact in its orders, the Court's decision again refers to the Parole Board's notice of rejection as an order:

> Because the Parole Board in *Cooper* neither offered an explanation nor indicated it had considered the statutory criteria or the criteria set forth in Form 1212, we had no other choice but to determine ***the order*** was defective and the decision was arbitrary and capricious. We emphasized that this result could be avoided in the future if the Parole Board clearly states ***in its order denying parole*** that it considered the factors outlined in section 24–21–640 and the fifteen factors published in Form 1212, and that if the Parole Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC will have limited authority to review the decision.

Compton at 479, 685 S.E.2d at 177 (emphasis added). Multiple recent holdings from this Court likewise refer to notices of rejection issued by Respondent as "orders" of the parole board. *Williams v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, No. 2021-001145, 2023 WL 2520564 (S.C. Ct. App. Mar. 15, 2023); *Brown v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, No. 2021-000533, 2023 WL 2519250 (S.C. Ct. App. Mar. 15, 2023); *Bagley v. S.C. Dep't of Prob., Parole,*

& Pardon Servs., No. 2019-002102, 2022 WL 2718759 (S.C. Ct. App. July 13, 2022); *Burton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 2016-002131, 2018 WL 3301885 (S.C. Ct. App. July 5, 2018).

Put plainly, Respondent's claim that its Notice of Rejection is not subject to the same judicial review as other agency orders or decisions because it is nothing more than a "letter" is incorrect and should be rejected.

b. *Respondent's Order Issued March 2, 2023 is Also an Agency Order Subject to the Administrative Procedures Act.*

In response to the ALC's order remanding this case to the Parole Board for clarification on what the Board mean when it used the term "community supervision program," the Board issued an order stating that

> In this and all cases, the Board's position regarding reason for rejection #5 [Failure to Successfully Complete a Community Supervision Program] is that it includes any and all supervision programs, including but not limited to: probation, parole, community supervision, shock parle, supervised furlough, or any other program.

(Parole Board Order of March 2, 2023, at pp. 2, R._). The document's header states that it is an "ORDER" and the body text states that "THE BOARD HEREBY ORDERS that" it intends "community supervision program" to have the meaning stated above. (*Id.*) It concludes with stating the contents of the document are "ORDERED THIS DAY OF March 2, 2023" and bears the signature of six Parole Board members. (*Id.*). Stated simply, there can be no argument that this document is an order, issued by the Parole Board.

c. *The Administrative Law Court Erred by Failing to Apply the Statutory Definition of "Community Supervision Program" to Either of Respondent's Orders.*

Mr. Madden, Respondent, and the ALC all agree there is a statutorily defined community supervision program, established by S.C. Code Ann. § 24-21-560. (Brief of Respondent to the

ALC at p. 9, R._; ALC Order of Remand at p. 4–5, R._; Brief of Respondent at p. 5). Contrary to Respondent's assertion, its Notice of Rejection does not "just happen" to use language that "mirrors" statutory text: it unequivocally states, as a finding of fact, it denied Mr. Madden parole because he "fail[ed] to successfully complete a community supervision program." (Notice of Rejection, R._). "Community supervision program" is – verbatim – the name of a statutorily defined program which the General Assembly has charged the Respondent itself with establishing and monitoring. S.C. Code Ann. § 24-21-560.

Because Respondent's Notice of Rejection is final decision or order of an agency, subject to the Administrative Procedures Act, it must be read and interpreted in the same manner as other state agency orders and final decisions. Respondent's use of a the statutorily defined term "community supervision program" as a finding of fact necessarily implicates the interpretation of a statute that is administered by the Respondent.

Interpretation of a statute or regulation administered by a state agency involves a two-step process. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). Courts must first look to whether the language of a statute or regulation speaks directly to the issue and, if so, the clear meaning of the statute must be applied. *Id.* (citing *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003)). If the agency's interpretation or application of the statute is contrary to the plain language of the statute, the Court should reject the agency's interpretation. *Id.* "An administrative construction affords no basis for the perpetuation of a patently erroneous application of the statute." *Jack's Custom Cycles, Inc. v. S.C. Dep't of Revenue*, 439 S.C. 35, 48, 885 S.E.2d 433, 440 (Ct. App. 2023), *reh'g denied* (Apr. 26, 2023). "Where the terms of the statute are clear, the court must apply those terms according to their literal meaning; courts may not disregard a statute's plain language or resort to a forced

interpretation to expand or limit the scope or meaning of a statute." *Brown v. S.C. Dep't of Health & Env't Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (internal citations omitted).

Indeed this Court has, in a similar case involving interpretation of a different code section administered by Respondent (S.C. Code Ann. § 24-21-10(F)(1)) reversed an ALC decision based in part on applying the two-step analysis set forth in *Kiawah*. *See Burton*, 2018 WL 3301885, at *1. Elsewhere, the Supreme Court of South Carolina has likewise applied, without specifically identifying, the two-step process set forth in *Kiawah* to find Respondent's interpretation of S.C. Code Ann. § 24-21-645 was erroneous. *See Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 414-19, 745 S.E.2d 110, 120-22 (2013) (Finding § 24-21-645 to be ambiguous and susceptible to multiple meanings *before* performing analysis of whether to defer to Respondent's interpretation of the statute).

In this case, Respondent's assertion that "community supervision program" – when used as a finding of fact in its Notice of Rejection – means every form of supervised release is directly contrary to the plain language of S.C. Code Ann. § § 24-21-560 and the Legislature's use of that term elsewhere. The ALC's failure to apply the plain statutory meaning of "community supervision program" to the facts presented and improper deference to Respondent's claimed definition (which notably expands the meaning of the term) was clear error and this Court should reverse its decision.

II. Respondent's Arguments Misstate the Administrative Law Court's Jurisdiction and the Nature of its Review.

Respondent, throughout its brief, repeatedly asserts that the ALC lacks jurisdiction over appeals from the Parole Board and/or that the ALC has "extremely limited" jurisdiction over parole appeals. (Brief of Respondent, *passim*). Respondent goes so far as to assert that "the ALC does not have the jurisdiction to even hear a routine denial of parole, much less consider the weight of

the evidence the Board used when it denied parole in a routine hearing." (*Id.* at 13). Respondent's assertions are incorrect.

The Supreme Court of South Carolina recently clarified the nature of the ALC's jurisdiction over inmate appeals, including parole appeals, in *Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 886 S.E.2d 671 (2023). In *Allen* the Court granted certiorari to review this Court's decision to affirm the ALC's dismissal of an inmate grievance. *Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 167, 886 S.E.2d 671, 672 (2023) While the Supreme Court affirmed this Court's holding, it took the opportunity to clarify "the confusion that has arisen in past jurisprudence between the subject matter jurisdiction of the ALC and the requirement that an inmate allege deprivation of a state-created liberty interest for the ALC to grant relief." *Id.* The Supreme Court unanimously held that – regardless of whether an inmate asserts deprivation of a state-created liberty interest – "the ALC has subject matter jurisdiction over inmate grievance appeals that have been properly filed." *Id.* at 170, 886 S.E.2d at 674. Pursuant to this holding, Respondent's assertion that the ALC lacks jurisdiction over routine denials of parole is meritless and should be ignored.

The *Allen* court went on to discuss the history and nature of the ALC's appellate review in inmate appeals. *Id.* at 168-71, 886 S.E.2d at 673-74. Beginning with *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000), South Carolina courts have held that administrative decisions regarding inmates are reviewed only for a denial of the inmate's due process rights. *Id.* at 168, 886 S.E.2d at 673. Because the rights of procedural due process apply only to deprivations of interests guaranteed by the Fourteenth Amendment's protection of liberty and property, an inmate must allege the denial of a state-created liberty interest before he is entitled to relief. *Id.* at 168-69, 886 S.E.2d at 673. Thus, the ALC may summarily dismiss an inmate's appeal if the inmate's claim fails to implicate a state-created liberty interest. *Id.* While the ALC has *jurisdiction* to hear claims

that do not implicate such an interest, it is not required to hold a hearing in every matter and may dismiss matters that do not raise due process concerns. *Id.* at 171, 886 S.E.2d at 674. The ALC may, however, grant an inmate relief from an erroneous administrative decision if the decision deprives the inmate of due process. *Id.*

In this case, Mr. Madden has sufficiently alleged a cognizable deprivation of the limited due process rights he is guaranteed during the parole process. Because Respondent's erroneous decision deprives Mr. Madden of the limited due process rights provided during the parole process, the ALC may grant him relief. *Id.* While parole is a privilege, and Mr. Madden has no right to demand Respondent grant him parole, he does have the right to demand Respondent adhere to S.C. Code Ann. § 24-21-640 and fully consider the factors published in Respondent's "Criteria for Parole Consideration." *Cooper* at 499, 661 S.E.2d at 112. Stated differently, Mr. Madden has a "substantial personal right to statutorily correct parole review." *Barton* at 413, 745 S.E.2d at 120 (2013). Inherent in Mr. Madden's right to a statutorily correct parole review is the right to expect Respondent will not deny him parole based on clearly erroneous findings of fact.

Respondent's assertions that the ALC should have summarily dismissed Mr. Madden's appeal because Respondent stated it complied with statutory requirements as required by *Cooper* and *Compton*, when there is evidence in the form of a plainly erroneous finding of fact that it did not, is misplaced. Respondent's argument that it may avoid judicial review in every parole case simply by stating it complied with the statutorily mandated procedure whether it actually complies or not improperly places form over substance and would lead to absurd results.

In Respondent's view, its decisions are *never* subject to judicial review – no matter how erroneous its findings of fact may be – so long as it copies and pastes the language dictated by *Cooper* and *Compton* into its notices of rejection. Respondent could, for example, deny parole

based on an offender's "use of a deadly weapon in this or a previous offense" even though no such weapon was used and, so long as its notice of rejection states it complied with the requisite statutes the ALC is, according to Respondent, powerless to review its decision. In sum, Respondent argues that an offender's does not have a right to due process, only the right to have Respondent summarily assert that it has complied with due process.

Respondent's arguments on this issue evidence a fundamental misunderstanding of Mr. Madden's limited due process rights during parole proceedings. Mr. Madden's due process rights are, as Respondent asserts, limited. But they are not so limited that they only require Respondent to *claim* it has complied with statutory requirements; due process dictates that Respondent *actually* comply. *See Barton* at 413, 745 S.E.2d at 120; *Cooper* at 499, 661 S.E.2d at 111-12. Respondent's arguments to the effect that merely reciting the language contained in *Cooper* and *Compton* is, standing alone, sufficient to satisfy due process are without merit and should be rejected.

III. Permitting Respondent to use "Community Supervision Program" in a Manner Inconsistent with its Statutory Meaning and Respondent's use of that Term Elsewhere Violates Due Process.

Respondent urges that the Court must accept its definition of "community supervision program" because it is the sole entity authorized to grant or deny parole and "provide its own reasons for doing so." (Brief of Respondent at p. 1). While Respondent is, unquestionably, the sole authority regarding the grant or denial of parole, it must operate within certain parameters. *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111. Respondent may not, for example, render a decision without consideration of the criteria set forth in S.C. Code Ann. § 24-21-640 and its own published criteria because doing so violates due process. *Id.* As noted in Respondent's Policy and Procedure Manual:

> ... the Board or the panel should then enumerate its reasons for denying parole. ***Due process requires that these reasons be***

> ***sufficient to explain to the offender why he was denied parole.*** Further, due process also requires that the reasons for denying parole be rationally related to the written standards and criteria of parole which the Board has adopted and published.

S.C. Board of Paroles and Pardons, Policy and Procedures Manual, at 31 (November 2019). Thus, while the Supreme Court of South Carolina's holding in *Compton* permits Respondent to issue notices of rejection without specific, detailed findings of fact, due process requires – at minimum – Respondent to state its findings of fact in a manner that is sufficient to explain its reasons for denying parole. The issue is not, therefore whether Respondent understood its intended meaning of "community supervision program," it is instead what Mr. Madden would reasonably understand that term to mean after making an attempt to research the term's meaning.

In this case, a review of the Respondent's own website lead one to the conclusion that Respondent intended "community supervision program" to have its statutory meaning in its Notice and nothing – other than its arguments to the ALC and here – indicates it intended a broad, generic meaning. Respondent's website lists "Community Supervision Program" as a distinct "strategy" employed by the Department, and discusses the term in accordance with its statutory meaning:

> The Community Supervision Program is a release program for offenders who have been sentenced to a "No Parole" offense and have served 85% of their sentence at the SC Department of Corrections (SCDC). A "No Parole" offense is a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of 20 years or more. Individuals who committed one of these crimes on or after January 1, 1996, are not eligible for parole consideration at any time during their sentence. Offenders released to the Community Supervision Program have a two-year period of supervision. If at any time they violate the terms of supervision, a Circuit Court Judge may revoke any part of the remaining incarcerative portion of the sentence for up to one year at a time.

SCDPPPS "Supervision Strategies"[3] Respondent's Policy and Procedure Manual only references the term once – in its listing of permissible "findings of fact." S.C. Board of Paroles and Pardons, Policy and Procedures Manual, at 31 (November 2019). The Manual does, however, reference the term "community supervision" to note that, again in accordance with the statutory meaning of "community supervision program," that "[t]he Board retains absolute and exclusive discretion to grant or deny parole in all cases, ***except community supervision***, once a prisoner has become eligible to be considered. ***Community supervision release is not reviewed by the Board.***" *Id.* at 5; *See* S.C. Code Ann. § 24-21-30 ("A person who commits a "no parole offense" as defined in Section 24-13-100 on or after the effective date of this section is not eligible for parole consideration, but must complete a community supervision program as set forth in Section 24-21-560 prior to discharge from the sentence imposed by the court.").

Respondent simply cannot use the term "community supervision program" to mean the specific program created by the General Assembly in S.C. Code Ann. § 24-21-560 on its own website and in its Policies and Procedures Manual and then, when convenient for its arguments, assert that it meant something else in its Notice of Rejection. Doing so fails to comport with due process as it deprives Mr. Madden and other offenders of the ability to fairly ascertain the reasons Respondent has denied parole and, further, prevents efficient judicial review of Respondent's decisions. Consequently, the ALC's holding below is in error and should be reversed.

IV. Respondent's Arguments Confuse "Community Supervision" With "Community Supervision Program."

Mr. Madden asserts that "community supervision program" should be given its statutory meaning in Respondent's Notice of Rejection. Respondent counters Mr. Madden's arguments by

[3] Available at https://www.dppps.sc.gove/en/Offender Supervision/Supervision-Strategies.

making much ado over common language and historical usage of two terms: "community supervision" and "community supervision program." However, the question before the ALC and now before this Court is not what "community supervision program" meant prior to the General Assembly defining it in S.C. Code Ann. § 24-21-560. Nor is the issue whether "community supervision program" means anything other than its statutory meaning in common parlance, or what the Board members individually and subjectively believe that term to mean. The question the is whether a state agency or board's use of statutory language in a final decision or order must be given its statutory meaning.

Respondent goes on to claim – falsely – that the South Carolina Code contains "***multiple*** references to a 'community supervision program' that do not clearly refer to CSP." (Brief of Respondent at p. 11) (emphasis added). To be clear, the term at issue in this case is "community supervision program;" not "community supervision." Respondent's Notice of Rejection states it denied parole based on Appellant's "Failure to Successfully Complete a Community Supervision ***Program.***" (R._) (emphasis added).

As noted in Appellant's Brief, the term "community supervision program" appears in Title 24, Chapter 21 of the South Carolina Code thirty-two times; none of which use "community supervision program" interchangeably or synonymously with "probation" or "parole." *See* S.C. Code Ann. §§ 24-21-5 *et. seq.* Going further and searching the entire South Carolina Code, the term "community supervision program" appears in several additional code sections, almost uniformly in reference to the statutorily defined program. Throughout the entirety of the South Carolina Code only two instances occur where the term "community supervision program" is used as a generic term: S.C. Code Ann. §§ 44-23-1150 and 44-48-40. One of these, only § 44-48-40 supports Respondent's assertion that the "community supervision program" is a broad phrase. *See*

S.C. Code Ann. § 44-48-40 (stating the agency with jurisdiction over a Sexually Violent Predator must notify the multidisciplinary team and Attorney General as soon as practicable before the Sexually Violent Predator is released as a result of revocation of "any type of community supervision program"); *See also* S.C. Code Ann. § 44-23-1150 (Defining "Actor" as one who supervises offenders "on parole, probation, ***or*** other community supervision programs.").

V. The Administrative Law Court Erred by Remanding this Case for a Party Litigant to Define a Term at Issue.

Citing *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env't Control*, 387 S.C. 265, 692 S.E.2d 894 (2010) Respondent asserts, incorrectly, that the ALC's order remanding the case and permitting Respondent to "clarify" its subjective meaning of a statutorily defined term at issue was not in error. (Brief of Respondent at p. 9). In *Charlotte-Mecklenburg Hosp. Auth.* several parties appealed an order from the ALC which granted one party partial summary judgment, granted in whole another party's motion for summary judgment, and remanded the case to the South Carolina Department of Health and Environmental Control (SC DHEC) to determine if any of the parties would be entitled to a Certificate of Need. *Charlotte-Mecklenburg Hosp. Auth.* at 266, 692 S.E.2d at 894. The Court held that the order of remand was not immediately appealable because the ultimate question at issue, whether any party was entitled to a Certificate of Need, remained unanswered. *Id.* at 266-67, 692 S.E.2d at 894-95. While the Court did not rule on the propriety of the order of remand itself, it did note that prior to remanding the case for further dispensation by SC DHEC the ALC had "found DHEC erroneously interpreted the State Health Plan" and that the ALC had "decided questions of law involved in th[e] matter." *Id.* at 267, 692 S.E.2d at 895.

Unlike the facts presented in *Charlotte-Mecklenburg Hosp. Auth.*, the ALC in this case failed to make any determination over the questions of law it was presented and instead punted the

issue entirely. Respondent's reliance on this case, which is both factually dissimilar from the case at bar and does not reach the conclusion Respondent asserts, is misplaced and the Court should reject its arguments.

VI. The Administrative Law Court's Holding Below is not Supported by Evidence Properly Before it in the Record on Appeal.

Respondent, in compliance with SCALC Rule 61, submitted its Notice of Rejection as the sole document to be included in the Record on Appeal before the ALC. (Record on Appeal to the ALC, R._). In response, Mr. Madden moved the ALC to supplement the record. (Motion to Supplement, R._). Respondent opposed Mr. Madden's motion, asserting that ***any*** information beyond the four corners of its Notice of Rejection were irrelevant to the ALC's adjudication of Mr. Madden's appeal. (Respondent's Opposition to Appellant's Motion to Supplement, R._). The ALC denied Mr. Madden's motion and issued an order limiting the Record on Appeal to Respondent's Notice of Rejection. (ALC Order Denying Motion to Supplement, R._). Thus, the only facts properly before the ALC were those contained in Respondent's Notice of Rejection.

Despite arguing, and receiving a favorable ruling, that the only information the ALC should consider when adjudicating this matter was its Notice of Rejection, Respondent presented several extraneous facts to the ALC in its brief. Mr. Madden does not argue, as Respondent contends, that the ALC can never consider any facts beyond what it requires be presented under SCALC Rule 61. To the contrary, Mr. Madden made a motion requesting the ALC do just that; supplement the record to include the entirety of what Respondent claims to have reviewed before rendering its decision. Mr. Madden *does* argue, however, that when Respondent actively opposes the inclusion of additional information, asserts that anything beyond its Notice of Rejection is irrelevant, and succeeds in obtaining a ruling to that effect, it should be prohibited from presenting additional facts in support of its arguments.

In plain terms, Respondent simply cannot have it both ways. It cannot argue that facts beyond its Notice of Rejection are wholly irrelevant and then, after succeeding in that argument (and effectively foreclosing several of its opponent's arguments because they cannot be factually supported) assert the very facts it previously claimed were irrelevant in support of its arguments.

Respondent's arguments that the ALC's consideration of and reliance on facts beyond those contained in the Record on Appeal is appropriate are contrary to well-established law and long enshrined rules of procedure. The fact that an appellate court's review is limited solely to the facts contained within the Record on Appeal is stated in every appellate court of this State's rules and cited frequently in South Carolina authority. *E.g.* SCALC Rule 36(G); Rule 210(h), SCACR; *Fountain v. Fred's, Inc.*, 436 S.C. 40, 51, 871 S.E.2d 166, 172 (2022). In this case, the ALC limited the Record on Appeal, at Respondent's insistence, to a single page document. The ALC's consideration of, and reliance upon, any facts beyond that single page document is in contravention of the South Carolina Administrative Law Court Rules and South Carolina authority and, consequently, is in error. Respondent's arguments to the contrary are unavailing and should be rejected.

CONCLUSION

Respondent's Brief mischaracterizes Mr. Madden's arguments, misstates the Administrative Law Court's jurisdiction, misinterprets South Carolina authority, and wholly fails to rebut the arguments presented by Mr. Madden. Consequently, this Court should reverse the decision of the ALJ and remand the case with instructions for the Parole Board to either grant Mr. Madden parole or to conduct a rehearing compliant with the Board's statutorily required decision-making procedures.

Respectfully submitted,

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