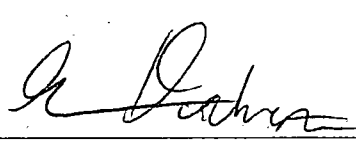


**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
INMATE GRIEVANCE FORM  
STEP 1**

|  |   |
|--|---|
| INMATE NAME: <u>Andrew Scott Durham</u><br>SCDC NUMBER: <u>274498</u> <span style="float:right;">JUN 27 2023</span><br>INSTITUTION: <u>Livesay Corrections</u><br>HOUSING UNIT: <u>Dorm 2 Cube 16 Bunk B</u><br>WORK ASSIGNMENT: <u>Dormworker</u> | <p align="center"><b>OFFICE USE ONLY</b></p> Grievance No. <u>LIVC 0100-23</u><br>Code: General <u>md / w</u><br>Policy _____<br>Disc. Hear. _____<br>Class. _____<br>PREA _____<br>Date Received <u>6-28-23</u><br>IGC Initials <u>AKW</u> |
|--|---|

**STATEMENT OF GRIEVANCE** (Indicate the date of incident, and if the grievance is a challenge to SCDC Policy, specify which policy. Include supporting documentation and attach answered RTSM or Kiosk reference number.)

*I worked for Prison Industries at Livesay Corrections from March of 2021 to December of 2022. I understand that during this time I should have been receiving prevailing wages for my position based on the regional average. This according to policy S-26-3-430D.*

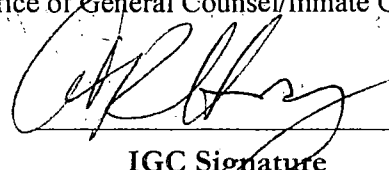
  
26 June 2023  
 Grievant Signature Date

**ACTION REQUESTED:**

*Would like to receive due back pay for hours worked.*

**ACTION TAKEN BY IGC:**  PROCESSED     UNPROCESSED     OTHER

Due to the nature of your appeal, it has been forwarded to the Step 2 level of appeal process. Please refer to the attached Prevailing Wage Memo provided by SCDC Office of General Counsel/Inmate Grievance Branch for additional information regarding your appeal.

  
6-28-23  
 IGC Signature Date

**WARDEN'S DECISION AND REASON:**

\_\_\_\_\_  
Warden Signature

\_\_\_\_\_  
Date

I accept the Warden's decision and consider the matter closed.

I do not accept the Warden's decision and wish to appeal.

\_\_\_\_\_  
Grievant Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
IGC Signature

\_\_\_\_\_  
Date

**INSTRUCTIONS FOR COMPLETING STEP 1 GRIEVANCE FORM**

1. An informal resolution shall be attempted prior to the filing of Step 1 by sending an Inmate Request to Staff Member (RTSM) form or Kiosk reference number to the appropriate supervisor. A copy of the answered RTSM must be attached to the grievance when the grievance is filed.
2. Complete each section in its entirety writing only in the space provided for inmate use. No additional pages will be permitted.
3. Only one (1) issue is to be addressed on each form.
4. Submit the completed form by placing it in the Grievance Box at your institution within eight (8) working days of the date on the RTSM response; policy grievances can be filed at any time. Disciplinary and Classification Review appeals must be submitted within five (5) working days of the hearing/review. Do not write in the space provided for the Warden's response.
5. If you are not satisfied with the Warden's decision, you may appeal to the appropriate responsible official within five (5) days of your receipt of the Warden's decision, by placing your Step 2 appeal form in the Grievance Box at your institution.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
INMATE GRIEVANCE FORM  
STEP 2

Office Use Only

|                                   |                                   |
|-----------------------------------|-----------------------------------|
| INMATE NAME: <u>Andrew Durham</u> | Grievance No. <u>L706-0100-23</u> |
| SCDC NUMBER: <u>274498</u>        | Code: General <u>mylws</u>        |
| INSTITUTION: <u>LWC</u>           | Policy _____                      |
| HOUSING UNIT: _____               | Disc. Hear. _____                 |
| WORK ASSIGNMENT: _____            | Class _____                       |
|                                   | PREA _____                        |
|                                   | Date Received: _____              |
|                                   | IGC Initials: _____               |
|                                   | Date Received: <u>7/11/23</u>     |
|                                   | IGA Initials: <u>IGB</u>          |

**RECEIVED**  
JUL 11 2023  
INMATE GRIEVANCE

INMATE'S REASON FOR APPEAL (state specific dissatisfaction):

In accordance with SCDC Policy GA-01.12, "Inmate Grievance System," due to the nature of allegations you have raised in your Grievance, it has been forwarded to the Inmate Grievance Branch Central Office and Office of General Counsel for a response. Inmate's signature has been adopted from SCDC 10-5, Step 1 Inmate Grievance Form.

Grievant Signature N/A Date N/A

RESPONSIBLE OFFICIAL'S DECISION AND REASON:

**SEE REVERSE SIDE FOR RESPONSIBLE OFFICIAL'S DECISION & REASON**

Responsible Official Signature Patricia Vincent Date 10-25-23

The decision rendered by the responsible official exhausts the appeal process of the Inmate Grievance Procedure. I hereby acknowledge receipt of the official's response and understand this is the Agency's final response to this matter.

Grievant Signature \_\_\_\_\_ Date \_\_\_\_\_ IGC Signature K. Gerra Date 11/02/2023

## INSTRUCTIONS FOR COMPLETING STEP 2 GRIEVANCE FORM

1. Complete form in its entirety, writing only in the space provided for inmate use.
2. State your specific reason for further appeal. Do not submit any new issues for review. No additional pages will be permitted.
3. Submit this completed form with your copy of the Step 1 form by placing in the Grievance Box within five (5) days of your receipt of the Warden's decision. Do not write in the space provided for the responsible official.
4. The decision rendered by the responsible official exhausts the appeal process of the SCDC Inmate Grievance Procedure.

**Durham, Andrew 274498,LIWC-0100-23**

In your grievance, you are requesting adjustments to your inmate pay pursuant to Torrence v. South Carolina Department of Corrections (2021). The South Carolina Court of Appeals' opinion in Torrence was filed on June 30, 2021. You submitted your Request to Staff Member regarding this matter on June 27, 2023, approximately two years after the Court of Appeals issued its opinion. Accordingly, your grievance is untimely under SCDC Policy ADM-15.13, section 12.1. This policy states as follows:

### **12. PROBLEMS WITH PAY:**

12.1 Inmates must report any problems in their pay to their institution's inmate pay designee utilizing the Automated Request to Staff Member (ARTSM) within 15 days of the payroll date error. The inmate should maintain a record of the ARTSM reference number. The inmate pay designee will review the case and determine whether any additional pay is owed. Payroll corrections will be limited to the following:

- If the inmate fails to notify the Agency in writing and within 15 days, no back pay will be given.
- The pay rate will be adjusted to the proper rate amount for future payrolls in accordance with these procedures.
- The inmate may receive additional pay owed for the previous two (2) pay periods only.

SCDC Policy ADM-15.13 (12.1) (Issue Date June 3, 2014).

Therefore, your grievance is denied.

You may appeal this decision under the South Carolina Administrative Procedures Act to the South Carolina Administrative Law Court. In order to appeal, you must complete the attached Notice of Appeal Form (Form) and submit it as instructed on the Form within 30 days of receipt.

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Andrew Durham, #274498, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 South Carolina Department of Corrections, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

Docket No. 23-ALJ-04-0483-AP

ORDER

This matter is pending before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to an appeal filed by Andrew Durham (Appellant), an inmate housed with the South Carolina Department of Corrections (the Department). Appellant filed a Notice of Appeal with the Court on November 3, 2023. This matter was assigned to the undersigned on November 20, 2023.

On January 30, 2024, the Department filed a bulk Motion to Extend Time to File Record for a class of cases assigned on November 20, 2023. Subsequently, the Department filed a case-specific Motion to File Out of Time and Motion to Extend Time to File the Record on February 1, 2024<sup>1</sup>. Pursuant to the Rules of Procedure for the Administrative Law Court (SCALC Rules), the Record on Appeal was due seventy days after the Notice of Assignment was filed, or January 29, 2024. See SCALC Rule 59.

Therefore, the Department filed the motion after the Record was due. In its motion, the Department requests a one hundred and eighty (180) day extension to file the Record due to the overwhelming volume of prevailing wage cases and because it anticipates legislation will soon be introduced to amend a prevailing wage statute, section 24-3-430(D) of the South Carolina Code. As of the date of this Order, Appellant has not filed a response to the motion.

Although the Court is aware of the significant number of existing prevailing wage cases, an extension of 180 days is excessive. Furthermore, although the Department asserts it needs more time to file the Record because it anticipates legislation being introduced to amend the prevailing wage statute, the Department has not explained how the passage of legislation would affect

<sup>1</sup> The Court deems the second, case-specific motion to supplant and replace the earlier bulk motion such that no further discussion or ruling is needed for the January 30, 2024 motion.



pending cases in any manner. Moreover, the passage of that legislation is speculative. There is no guarantee that legislation proposed by the Department will become law.

The Court therefore DENIES the motion for an extension.

However, the Court must nevertheless address the effect of the Department's motion for an extension of time on the briefing schedule in this matter. The Department has been justified in not filing the Record on Appeal during the pendency of this motion. In fairness, the Court believes it appropriate to adjust the schedule in this matter as set forth below to account for the filing and the Department's motion and the Court's ruling on the same.

**IT IS THEREFORE ORDERED** that the Department's motion for a 180 day extension to file the Record on Appeal is Denied.

**IT IS FURTHER ORDERED** that the Department shall file the Record on Appeal within forty-five (45) days from the date of this Order.

**IT IS FURTHER ORDERED** that Appellant shall file his brief within thirty (30) days from the date the Record on Appeal is filed.<sup>2</sup>

**IT IS FURTHER ORDERED** that the Department shall file its brief within thirty (30) days from the date the Appellant's brief is filed.

**IT IS FURTHER ORDERED** that Appellant may file a reply brief within ten (10) days from the date the Department's brief is filed.

**AND IT IS SO ORDERED.**



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The Honorable Robert L. Reibold  
Administrative Law Judge

February 6, 2024  
Columbia, South Carolina

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<sup>2</sup> If Appellant has filed a brief prior to the date of this Order, Appellant may file an amended initial brief on or before the due date provided in this Order. Any such amended brief must be designated as such and will otherwise remain subject to the applicable rules of the Court.

CERTIFICATE OF SERVICE

I, Van Whitehead, hereby certify that I have on this date served this order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in cursive script that reads "Van Whitehead". The signature is written in black ink and is positioned above a solid horizontal line.

Van Whitehead  
Judicial Law Clerk

February 6, 2024  
Columbia, South Carolina

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Andrew Durham, #274498, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 South Carolina Department of Corrections, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

Docket No. 23-ALJ-04-0483-AP  
  
ORDER DISMISSING APPEAL

RECEIVED  
MAR 15 2024  
SC Court of Appeals

STATEMENT OF THE CASE

This matter is pending before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to an appeal filed by Andrew Durham (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (SCDC or the Department). In the present appeal, Appellant asserts that the Department is not paying him a prevailing wage under sections 24-3-315 and 24-3-430 of the South Carolina Code (2007) and he is seeking to be paid the prevailing wages for his work as a woodworking machine operator<sup>1</sup> in the prison industries program. For the reasons discussed herein, the Court dismisses the appeal for lack of appellate jurisdiction based upon Appellant's failure to exhaust his administrative remedies.

PROCEDURAL HISTORY

On June 26, 2023, Appellant filed a Step 1 Grievance contending that he was not paid a prevailing wage. On June 28, 2023, the Department elevated the matter to a Step 2 Grievance without responding on the merits. The responsible official denied the Step 2 Grievance on October 25, 2023, explaining that Appellant's grievance was untimely under SCDC Policy ADM-15.13, section 12.1, which governs problems with inmate pay.

This appeal followed on November 3, 2023. It was assigned to the undersigned on November 20, 2023. Appellant filed his initial brief on January 26, 2024, prior to the date on which the Record on Appeal was due. Appellant's brief declares the issue on appeal to be: "SCDC violated Appellant's statutory rights pursuant to S.C. Code of Law 24-3-430(D) By paying an hourly wage below the prevailing wage according to S.C. dept. of employment and

<sup>1</sup> Job Code 51-7042.



workforce.”(sic)<sup>2</sup> The Department subsequently sought an extension of time in which to file the Record on Appeal. While the extension was denied, the filing of the motion itself resulted in a change to the timeline for service of the Record on Appeal. As of the date of this Order, the record is not yet due.

### FACTUAL BACKGROUND

Appellant is incarcerated in the custody of the Department. He asserts that he worked in the Prison Industries Program from March 2021 through December 2022. Appellant states that he was paid at a rate of \$7.25 per hour. Appellant contends that he should have received \$13.86 and \$13.98 per hour.

### JURISDICTION

The Court's jurisdiction to hear inmate appeals is derived from the decision of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). See also S.C. Code Ann. § 1-23-600(D) (Supp. 2023); *Allen v. S.C. Dep't of Corr.*, 439 S.C. 164, 170, 886 S.E.2d 671, 674 (2023) (“[T]he ALC has subject matter jurisdiction over inmate grievance appeals that have been properly filed.”); *Slezak v. S.C. Dep't of Corr.*, 361 S.C. 327, 331, 605 S.E.2d 506, 508 (2004) (“[T]he [ALC] has jurisdiction over all inmate grievance appeals that have been properly filed . . .”).

In *Al-Shabazz*, the Court held that the ALC's jurisdiction in inmate appeals is generally limited to state-created liberty interests typically involving: (1) cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result of a serious rule violation. 338 S.C. at 369, 527 S.E.2d at 750. However, the South Carolina Supreme Court subsequently clarified that the ALC has the authority to review the Department's failure to pay the prevailing wage. See *Wicker v. S.C. Dep't of Corr.*, 360 S.C. 421, 423-25, 602 S.E.2d 56, 57-58 (2004) (stating the ALC was authorized to review the Department's failure to pay the prevailing wage); *Adkins v. S.C. Dep't of Corr.*, 360 S.C. 413, 419, 602 S.E.2d 51, 55 (stating inmates could seek remedy for unfair pay by filing an inmate grievance.).

Moreover, as discussed in detail below, the Court's jurisdiction is further limited by the requirements of S.C. Code Ann. § 1-23-380.

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<sup>2</sup> Elsewhere in his brief, Appellant also referenced section 24-3-315.

## DISCUSSION

The Department denied Appellant's grievance as untimely pursuant to SCDC Policy ADM -15.13. Policy ADM 15.13 is globally entitled "Inmate Pay." It requires each warden to designate at least one Inmate Payroll Office for a correctional facility. SCDC Policy ADM 15.13 section 5. The office is responsible for entering inmate pay data into the Inmate Pay System. *Id.*

Policy 15.13 also establishes a system and procedure to handle problems with inmate pay. This policy is located in Policy ADM 15.13 section 12. This section is entitled "Problems With Pay." SCDC Policy ADM 15.13 section 12 reads:

### 12. Problems with Inmate Pay:

12.1 Inmates must report any problems in their pay to their institution's inmate pay designee utilizing the Automated Request to Staff Member (ARTSM) within 15 days of the payroll date error. The inmate should maintain a record of the ARTSM reference number. The inmate pay designee will review the case and determine whether any additional pay is owed. Payroll corrections will be limited to the following:

- If the inmate fails to notify the Agency in writing and within 15 days, no back pay will be given.
- The pay rate will be adjusted to the proper rate amount for future payrolls in accordance with these procedures.
- The inmate may receive additional pay owed for the previous two (2) pay periods only.

*Id.* at section 12.1. As this language indicates, the policy is phrased in mandatory terms. Inmates "must" (1) report "any" problems in their pay; (2) to their institution's inmate pay designee; (3) using the Automated Request to Staff Member (ARTSM);<sup>3</sup> and (4) within 15 days of the payroll date error. *Id.*

"The *inmate pay designee* will then review the case and determine whether *any additional pay is owed.*" *Id.* (emphasis added). If, after review, additional pay is owed, the "inmate pay designee will make the appropriate entry to deposit the additional pay into the inmate's pay account." *Id.* at section 12.2. Pay rate corrections may also be made. *Id.* The inmate pay designee

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<sup>3</sup> Inmates access the ARTSM system using a computer kiosk housed in the correctional facility.

is the person designated by the policy to “respond to inmate pay problems as prescribed in [section 12].” *Id.*

Nothing in Appellant’s submissions to the Department suggests an attempt to utilize the problems with pay system established by Policy ADM 15.13 section 12.1.<sup>4</sup> None of Appellant’s submissions to the Department reference ADM 15.13 or any of its provisions. Inmate pay complaints are commenced using the ARTSM, the automated kiosk, but Appellant initiated his wage complaint using the standard internal grievance system. Decisions on pay complaints, including whether additional pay is owed, are made by the inmate pay designee. Decisions on inmate grievances are made by different personnel.

Appellant does not appear to dispute that he failed to follow Policy ADM 15.13, Section 12.1. His brief on appeal does not mention much less address this policy, which was the sole reason cited by the Department below for denying his grievance. Appellant’s failure to address the Department’s conclusions that payroll policy applies to Appellant’s complaint and that Appellant’s claim was untimely under the payroll policy means that those conclusions are deemed conclusive on appeal. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (an unappealed ruling, right or wrong, is the law of the case).

Because ADM 15.13 applies to Appellant’s claim, the Court now turns to the effect of Appellant’s undisputed noncompliance with ADM 15.13. The Court concludes that Appellant’s noncompliance divests the Court of jurisdiction to entertain the appeal. ADM 15.13 provides an

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<sup>4</sup> The Court recognizes that, in some cases, an inmate’s grievance itself could be an attempt to invoke SCDC Policy ADM 15.13 section 12.1. In those cases, an inmate whose complaint was otherwise untimely might still have a claim to backpay for the fifteen-day period immediately preceding the filing of the grievance. Here, however, the Court cannot construe Appellant’s filing as an attempt to invoke provisions of the inmate pay policy. As discussed above, Appellant initiated the claim using the standard internal grievance procedure rather than the automated kiosk. Appellant made no reference to the pay provision or any of its terms. Notably, the Court does not construe ADM 15.13 and the inmate grievance system as mutually exclusive alternatives. Department rules and policies are ordinarily construed in the same manner as statutes. *See, e.g., Vector Marketing Corp. v. New Hampshire Dept. of Revenue Admin.*, 942 A.2d 1261, 1263 (N.H. 2008) (“We use the same principles of construction in interpreting administrative rules as we use with statutes”); *Lewis v. Jacksonville Bldg. & Loan Ass’n*, 540 S.W.2d 307, 310 (Tex. 1976); *State ex rel. Staples v. Young*, 418 N.W.2d 333, 336 (Wis. Ct.App.1987). The Court is therefore required to harmonize ADM 15.13 with the internal grievance system if possible. *Hodges v. Rainey*, 341 S.C. 79, 88–89, 533 S.E.2d 578, 583 (2000). ADM 15.13 can be construed so that both are effective. ADM 15.13(12.1) requires that inmates who question their rate of pay must report the issue through the Automated Request to Staff Member (ARTSM) within 15 days of the payroll date error. If, after doing so, the Department does not take proper corrective action as outlined in ADM 15.13, then the inmate may resort to the grievance system to address the Department’s violation of ADM 15.13. Both policies may be given effect in this manner. Were the Court to conclude otherwise, ADM 15.13 would simply cease to exist for cases involving the Prevailing Wage Act.

administrative remedy for disputes regarding an inmate's rate of pay.<sup>5</sup> Appellant did not avail himself of this avenue for relief in a timely manner.

The failure to timely avail oneself of an administrative remedy constitutes a failure to exhaust administrative remedies. As the United States Supreme Court explained in the *Woodford v. Ngo*:

Because exhaustion requirements are designed to deal with parties who do not want to exhaust, administrative law creates an incentive for these parties to do what they would otherwise prefer not to do, namely, to give the agency a fair and full opportunity to adjudicate their claims. Administrative law does this by requiring proper exhaustion of administrative remedies, which “means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).” *Pozo*, 286 F.3d, at 1024 (emphasis in original). This Court has described the doctrine as follows: “[A]s a general rule ... courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice.*” *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952) (emphasis added in *Woodford*). See also *Sims v. Apfel*, 530 U.S. 103, 108, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000); *id.*, at 112, 120 S.Ct. 2080 (O'Connor, J., concurring in part and concurring in judgment) (“On this underlying principle of administrative law, the Court is unanimous”); *id.*, at 114–115, 120 S.Ct. 2080 (BREYER, J., dissenting); *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155, 67 S.Ct. 245, 91 L.Ed. 136 (1946); *Hormel v. Helvering*, 312 U.S. 552, 556–557, 61 S.Ct. 719, 85 L.Ed. 1037 (1941); 2 K. Davis & R. Pierce, *Administrative Law Treatise* § 15:8, pp. 341–344 (3d ed.1994). Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.

*Woodford v. Ngo*, 548 U.S. 81, 90–92, 126 S. Ct. 2378, 2385–86 (2006).

The facts of *Woodford* are similar to the facts of this case. *Woodford* involved a California inmate. Although the time frames differ slightly, the inmate grievance process in California is similar to that contained in SCDC Policy GA. 01.12(13.2). To initiate an inmate grievance in California, an inmate must fill out a simple form. *Id.* at 85-86. Then, as explained on the form

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<sup>5</sup> SCDC Policy ADM 15.13 section 12.1 expressly provides that no back pay will be given if the inmate's notification is untimely. In contrast, section 12.1 does not specify what penalty will be imposed upon an inmate's request to adjust his pay rate to the correct amount for future pay periods if the inmate's request is untimely. The Court concludes, however, that section 12.1's requirement that inmates must report problems in their pay to their institution's inmate pay designee within 15 days of the payroll date error applies equally to all payroll complaints. An inmate whose complaint is untimely is therefore entitled to no relief. Of course, any bar would apply solely to the pay period about which an inmate has complained. Complaints associated with future pay periods, including requests to adjust the pay rate for future pay, would not be affected by the untimeliness of a complaint about a prior pay period.

itself, the prisoner “must first informally seek relief through discussion with the appropriate staff member.” *Id.* The staff member fills in part C of the form under the heading “Staff Response” and then returns the form to the inmate. *Id.* If the prisoner is dissatisfied with the result of the informal review, the inmate may pursue a formal review process which involves a written complaint on a specified form. *Id.* The inmate then must submit the form, together with a few other documents, to the appeals coordinator within fifteen working days of the action taken. *Id.* If the prisoner receives an adverse determination at this first level the inmate may proceed to the second level of review conducted by the warden by completing section F of the form and submitting the form within fifteen working days of the prior decision. *Id.* In *Woodford*, the United States Supreme Court held that an inmate failed to exhaust administrative remedies because the inmate filed his formal grievance well after the applicable fifteen working day deadline. *Id.* at 102.

*Woodford* was decided under the federal Prison Litigation Reform Act but the South Carolina Supreme Court took a similar position in *Brown v. James*, a case involving a school board’s authority to terminate a teacher under the Teacher Employment and Dismissal Act, S.C. Code Ann. § 59-24-420 (2004). *Brown v. James*, 389 S.C. 41, 48, 697 S.E.2d 604, 608 (Ct. App. 2010). The court in *Brown* stated that “[i]n order to fully exhaust [the teacher’s] administrative remedies, [the teacher] was required to request a hearing before the Board *within the time frame* prescribed by the Employment and Dismissal Act.” *Id.* 389 S.C. at 51, 697 S.E.2d at 609 (emphasis added). While the court in *Brown* concluded that the teacher’s circuit court action was not barred by exhaustion of administrative remedies, *Brown* is notable for its stance on compliance with applicable deadlines as part and parcel of exhaustion of administrative remedies. It is undisputed that Appellant did not timely avail himself of possible redress under ADM 15.13. The Court therefore concludes that Appellant failed to exhaust his administrative remedies.

The South Carolina Court of Appeals held that subject matter jurisdiction is distinct from the doctrine of exhaustion of administrative remedies. *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 100, 674 S.E.2d 524, 538-20 (Ct. App. 2009). As the Court of Appeals explained, “subject matter jurisdiction is the power of a court to hear and determine a class of cases.” *Id.*, 382 S.C. at 100, 674 S.E.2d at 528 (quoting *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93-94, 668 S.E.2d 795, 796 (2008)). In contrast, the failure to exhaust administrative remedies goes to whether a suit is premature. *Id.*, 382 S.C. at 100, 674 S.E.2d at 529. The *Capital City* court described the

doctrine of exhaustion of administrative remedies as a rule of policy and convenience rather than a rule of jurisdiction. *Id.*

Exhaustion of administrative remedies in Circuit Court is of course not generally jurisdictional. This case, however, is pending before the Administrative Law Court, which alters the analysis. Our Supreme Court has emphasized that in administrative matters, statutory provisions control. In *Bone v. U.S Food Serv.*, the South Carolina Supreme Court stated:

[t]oday we reiterate that appeals in administrative agency matters are handled differently than appeals in other cases. The South Carolina General Assembly enacted the APA's mechanisms for review to provide uniform procedures after the exhaustion of administrative remedies; the APA's provisions are controlling in these agency matters and supersede any conflicting provisions.

399 S.C. 566, 585, 733 S.E.2d 200, 210 (2012) (*adhered to on reh'g*, 404 S.C. 67, 744 S.E.2d 552 (2013)).

This principle affects the application of exhaustion of administrative remedies in administrative matters. As the United States Court of Appeals for the District of Columbia has explained in addressing exhaustion of administrative remedies under federal administrative law:

the word “exhaustion” now describes two distinct legal concepts. The first is a judicially created doctrine requiring parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court. We will call this doctrine “non-jurisdictional exhaustion.” . . .

The second form of exhaustion arises when Congress requires resort to the administrative process as a predicate to judicial review. This “jurisdictional exhaustion” is rooted, not in prudential principles, but in Congress' power to control the jurisdiction of the federal courts. Whether a statute requires exhaustion is purely a question of statutory interpretation.

*Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247–48 (D.C. Cir. 2004) (internal citations omitted). Our Court of Appeals has noted that the common law doctrine of exhaustion of administrative remedies is commonly and mistakenly conflated with the jurisdiction of an appellate court to entertain an administrative appeal. *Adamson v. Richland Cnty. Sch. Dist. One*, 332 S.C. 121, 125, 503 S.E.2d 752, 754 (Ct. App. 1998) (“[t]he requirement of exhaustion of administrative remedies vis-a-vis a court's authority to hear a case involving an agency, where a plaintiff has not asked the agency for relief, is often confused”). It has drawn a clear distinction between the two exhaustion requirements. In *Vaught v. Waites*, for example, the Court of Appeals discussed the common law doctrine of exhaustion of remedies, but, in doing so, also stated that

“[w]e express no opinion whether failure to exhaust administrative remedies is jurisdictional under the Administrative Procedures Act.” 300 S.C. 201, 205 at n. 2, 387 S.E.2d 91, 93 at n. 2 (Ct.App. 1989) (*overruled on other grounds by Paradis v. Charleston County Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774 (2021)).

The ALC is a creature of statute and must depend entirely upon constitutional and statutory provisions for its authority and jurisdiction. *See generally* S.C. Code Ann. §§ 1-23-500, *et seq.* (Supp. 2023). “The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC’s powers.” *Amisub of S.C., Inc. v. S.C. Dep’t of Health & Env’t Control*, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013). It follows that where the Legislature has prescribed requirements which must be satisfied before the ALC may address a matter, those requirements are jurisdictional.

Whether exhaustion of remedies is jurisdictional in the ALC therefore depends upon whether exhaustion of remedies is statutorily mandated. *See S.C. Dep’t of Health & Env’t Control v. Blocker*, No. 15-ALJ-07-0554-CC, 2016 WL 5867852 at 6 (S.C. Admin L. Ct. Oct. 3, 2016) (stating discretion whether to apply doctrine of exhaustion of remedies disappears when the administrative remedies are prescribed by statute). *See generally Responsible Econ. Dev. v. S.C. Dep’t of Health & Env’t Control*, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007) (“[R]egulatory bodies...have only the authority granted them by the legislature.”).

This matter is an appeal from a decision by the Department. The Court has authority to preside over all appeals from final decisions of contested cases from the Department of Corrections. S.C. Code Ann. § 1-23-600(D) (Supp. 2023). Review of such decisions must be conducted in the same manner as prescribed by Section 1-23-380 for judicial review of final agency decisions. S.C. Code Ann. § 1-23-600(E) (Supp. 2023). Section 1-23-380 in turn provides in pertinent part that: “[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 pursuant to this article and Article 1.” S.C. Code Ann. § 1-23-380 (Supp. 2023) (emphasis added). This statute expressly refers to exhaustion of all administrative remedies as a condition precedent to judicial review. The statute is titled “Judicial review upon exhaustion of administrative remedies.” *Id.* (emphasis added). By acknowledging that judicial review is available upon exhaustion of administrative remedies, the section’s title confirms the exhaustion of administrative remedies is a statutory condition precedent to judicial review. *See Lindsay v. S. Farm Bureau Cas.*

*Ins. Co.*, 258 S.C. 272, 277, 188 S.E.2d 374, 376 (1972) (“It is ‘proper to consider the title or caption of an act in aid of construction to show the intent of the legislature’”).

The South Carolina Supreme Court construes section 1-23-380 in this fashion. Discussing section 1-23-380, our Supreme Court has stated that “the statute also provides that the appealing party *must* exhaust their administrative remedies *before* resorting to judicial review.” *Nucor Steel v. S.C. Pub. Serv. Comm’n*, 312 S.C. 79, 83–84, 439 S.E.2d 270, 272 (1994) (emphasis added). Or, as Justice Hearn explained:

Exhausting one's administrative remedies is a threshold requirement to obtaining review in the courts. Thus, prior to appealing to the circuit court or the court of appeals, the appellant must have already exhausted his administrative remedies and obtained a final decision from the agency. This is the effect of sections 1–23–380 and 1–23–610.

*Bone*, 399 S.C. at 585, 733 S.E.2d at 210 (emphasis added) (Hearn J., dissenting); *see also Wright v. S.C. Dep’t of Soc. Servs.*, No. 2008-UP-316, 2008 WL 9843964, at \*1 (S.C. Ct. App. June 25, 2008) (“[a]fter an aggrieved party ‘has exhausted all administrative remedies available’ within the Department, he may seek judicial review of the decision”).

The Court therefore concludes that section 1-23-380 imposes a mandatory statutory requirement that all administrative remedies be exhausted before judicial review is available.<sup>6</sup> Accordingly, exhaustion of administrative remedies is jurisdictional in appeals at the Administrative Law Court.

Because Appellant failed to exhaust his administrative remedies, and this failure deprives the Court of jurisdiction, dismissal is appropriate.<sup>7</sup> The Court recognizes that, if Appellant is

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<sup>6</sup> The Court is aware of that section 1-23-380 provides that a “preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” However, this part of section 1-23-380 applies, by its terms, only to intermediate or interlocutory appeals.

<sup>7</sup> Some courts view the failure to exhaust administrative remedies in administrative cases as depriving an appellate court of subject matter jurisdiction. *See e.g., Silverton Mountain Guides LLC v. U.S. Forest Serv.*, No. 3:22-CV-00048-JMK, 2023 WL 6148122, at \*8 (D. Alaska Sept. 20, 2023); *Abrons Fam. Prac. & Urgent Care, PA v. N. Carolina Dep’t of Health & Hum. Servs.*, 810 S.E.2d 224, 228 (N.C. 2018). Issues relating to subject matter jurisdiction may be raised at any time and should be taken notice of by the court on its own motion. *Ness v. Eckerd Corp.*, 350 S.C. 399, 402, 566 S.E.2d 193, 195 (Ct. App. 2002). However, even if the failure to exhaust administrative remedies is viewed as merely depriving the Court of appellate jurisdiction, the jurisdictional issue is still one which should be raised by the Court on its own motion. *See e.g., Gateway Assocs. Ltd. P’ship v. Techna Corp.*, 966 F.2d 1452 (Table) (1992 WL 112287) (6th Cir. 1992) (“[i]t is therefore ORDERED that the plaintiff’s appeal and the defendant’s cross-appeal are dismissed *sua sponte* for lack of appellate jurisdiction.”); *Dieffenbach v. Att’y Gen. of Vermont*, 604 F.2d 187, 199 (2d Cir. 1979) (“[w]e see no apparent reason for treating lack of appellate jurisdiction in any different manner [than subject matter jurisdiction], and the court may, on its own motion, dismiss the appeal”); *Hamze v. Hall*, 211 So.3d 47, 47 (Fla. Dist. Ct. App. 2016) (the “cause is *sua sponte* dismissed for lack of appellate jurisdiction.”); *Com. ex rel. Ransom Twyp. v. Mascheska*, 239 A.2d 386, 387 (Pa. 1968) (“[a]lthough this case was argued on its merits and

correct,<sup>8</sup> the outcome of this order may be considered harsh. Unfortunately, the Court simply lacks the authority to address Appellant's claims.

**ORDER**

**IT IS THEREFORE ORDERED** that this appeal is hereby **DISMISSED**.  
**AND IT IS SO ORDERED.**



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The Honorable Robert L. Reibold  
Administrative Law Judge

March 5, 2024  
Columbia, South Carolina

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neither party has objected to an assumption of jurisdiction by this Court, our lack of direct appellate jurisdiction can, and should, be raised sua sponte").

<sup>88</sup> The Court makes no determination one way or another regarding the propriety of the actions of the Department below. This order does not reach the merits of the case.

CERTIFICATE OF SERVICE

I, Van Whitehead, hereby certify that I have on this date served this order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in cursive script that reads "Van Whitehead". The signature is written in black ink and is positioned above a horizontal line.

Van Whitehead  
Judicial Law Clerk

March 5, 2024  
Columbia, South Carolina