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Apr 30 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATION LAW COURT

Hon. S. Phillip Lenski, Administrative Law Judge

Case No. 2024-002073

Anthony Crosby, Appellant,

v.

South Carolina Criminal Justice Academy, Respondent.

MEMORANDUM IN SUPPORT OF
RESPONDENT'S MOTION TO DISMISS

As will be shown below, the present case involves Rule 40(B), SCALC, not Rule 29(D)(4), SCALC. As such, this appeal should be dismissed.

Rules 9 – 32, SCALC apply to contested cases before the administrative law court (“ALC”). Rule 9, SCALC addresses the powers and duties of the administrative law judge (“ALJ”) presiding over contested case hearings. Rule 11, SCALC, governs the procedure for requesting a contested case hearing with the ALC. Rule 13, SCALC, governs the procedure for notifying the parties of the assignment of the case to an ALJ. Rule 15, SCALC, addresses the notice of contested case hearing. Rules 17 – 23, SCALC, governs pre-hearing procedures for the contested case before the ALJ. Rules 25 – 32, SCALC, governs the hearing procedures before the ALJ. These rules fall under Section II, which is titled “Contested Cases”.

Rule 29, SCALC, governs the contested case hearing before an ALJ. Rule 29(D), SCALC, states that any “party may move for reconsideration of a final decision of an administrative law judge in a contested case to alter or amend the final decision, subject to the grounds for relief set forth in Rule 59, SCRCPC, as follows: (4) The time for appeal for all parties shall be stayed by a timely motion for reconsideration, and shall run from receipt of an order granting or denying such motion. Furthermore, prior to filing a notice of appeal from the decision, a party must file a motion for reconsideration. If no order is filed regarding the motion, the time for appeal shall begin to run thirty (30) days from the date the motion is deemed denied pursuant to subsection (D)(2).”¹ (Effective April 8, 2024) (emphasis added)

Rule 29, SCALC, only applies to final decisions that an ALJ issues pursuant to a contested case held before that judge. The present case was not a contested case held before an ALJ. Therefore, this rule is inapplicable. Respondent would argue that even if this rule were applicable, this appeal should still be dismissed. Rule 29(D)(1), SCALC, states that “Within ten (10) days after notice of the order concluding the matter before the administrative law judge, a party may move for reconsideration of the decision, provided that a notice of appeal from the decision has not been filed. . .” As shown above in Rule 29(D)(4), SCALC, a motion for reconsideration must be filed prior to filing a notice of appeal. Appellant never filed a motion for reconsideration. Therefore, even under this inapplicable rule, Appellant has not met the requirements to perfect his appeal before this court.

¹ This rule was in effect when this case was before the ALC. The rule was amended on April 14, 2025, and was not cited in this memorandum as it was not in effect when this case was before the ALC.

This present case is governed by Rule 40(B), SCALC. Rules 33 – 41, SCALC, govern cases on appeal to the ALC from Final Agency Decision from certain agencies; Respondent is one such agency, and these rules are binding on this case. These rules fall under Section III, which is titled “Matters Heard on Appeal from Final Decisions of Certain Agencies.”

Rule 33, SCALC, states that the “notice of appeal from the final agency decision shall be filed with the Court and a copy served on each party and the agency whose final decision is the subject of the appeal within thirty (30) days of receipt of the decision from which the appeal is taken”

Rule 35, SCALC, governs the ordering of a transcript. Rule 36, SCALC, governs the record on appeal. Rule 37, SCALC, governs the parties’ briefs. Rule 40, SCALC, governs ALJ’s opinion and motion for rehearing. Finally, Rule 41, SCALC, governs the notice of appeal. Therefore, Appellant must comply with all the above rules to perfect his appeal.

Rule 40(B), SCALC states: “Prior to filing a Notice of Appeal from the decision of an administrative law judge, a party must file a motion for rehearing stating with particularity the points supposed to have been overlooked or misapprehended by the court. A motion for rehearing must be filed within ten days of receipt of the order. The opposing party may file a response to the motion within ten (10) days of the filing of the motion. The time for appeal is stayed by a timely motion for rehearing and runs from receipt of an order granting or denying the motion.”² (emphasis added) It should be noted that this rule was amended in 2021 (three years prior to this ALC final order and appeal) and specifically states, in part, “The 2021 amendment changed the rule to require a motion for rehearing as a prerequisite to filing a notice of appeal from the administrative law judge’s decision.” (emphasis added)

² In the Motion to Dismiss, at times I incorrectly used the term “motion to reconsider” when I meant to say, “motion for rehearing”. I apologize for any confusion this may have caused.

The word “must” is a synonym for the word “shall”. (<https://www.merriam-webster.com/thesaurus/shall>) “The term ‘shall’ in a statute means that the action is mandatory.” Johnston v. S.C. Dept. of LLR, 365 S.C. 293, 296, 617 S.E.2d 363, 364 (2005) In order for the present case to be properly before this Court, Appellant was required to file a motion for rehearing within ten (10) days of receipt of the order and failed to do so. Appellant admits so in his Response to Respondent’s Motion to Dismiss. By way of analogy, an individual must, or shall, purchase an airline ticket before boarding an airplane. Without the airline ticket, the individual is not allowed to board the airplane. In the present case, Appellant is the individual; the airline ticket is Rule 40(B) and the requirement for filing a motion for rehearing prior to filing a notice of appeal; and this Court is the airplane. Rule 40, SCALC, does not provide any exceptions it simply states “a party must file a motion for rehearing” before “filing a Notice of Appeal from the decision” of the ALJ. This acts as a complete bar to this appeal being before this Court, regardless of any potential reasons Appellant puts forth.

The ALC Order in this case was filed on November 6, 2024, affirming the Final Agency Decision dated April 23, 2024. (R. p. 1 and 33) These facts establish that Rule 40, SCALC is the governing rule for this case. In Appellant’s initial brief, he states “On November 6, 2024, the Hon. S. Phillip Lenski summarily adopted the LETC’s factual findings and conclusions and affirmed the LETC’s decision to deny recertification. The Appellant filed his Notice of Appeal from Judge Lenski’s decision to this court on November 26, 2024. Tacitly, Appellant admits in his initial brief that he failed to comply with Rule 40(B), SCALC. Additionally, Appellant did not add an ALC motion for rehearing, pursuant to Rule 40(B), SCALC to his designation of matter to be included in the record on appeal, because the motion was never filed.

In the present case, Appellant failed to file a motion for rehearing pursuant to Rule 40(B), SCALC, which Appellant was required to do prior to filing a notice of appeal. As such, Appellant has failed to properly perfect his appeal, which Respondent believes is not properly before this Court and Respondent requests that this appeal be dismissed with prejudice.

/s/ James M. Fennell
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PROOF OF SERVICE

I, James M. Fennell, counsel for Respondent, hereby certify that service of the MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS in the above captioned matter was made, pursuant to Supreme Court Order Dated April 24, 2024, upon all counsel via email only to oleary_email@yahoo.com this 30th day of April, 2025.

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