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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM STATE ETHICS COMMISSION

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Appellate Case No. 2025-000875

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State Ethics Commission, .....Respondent,

v.

Kenneth Loveless, .....Appellant.

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# INITIAL BRIEF OF APPELLANT

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Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

ATTORNEYS FOR APPELLANT

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II. Did the State Ethics Commission err in failing to allow discovery into unauthorized communications between the State Ethics Commission and the Office of Inspector General?

III. Did the State Ethics Commission err in allowing Commissioner Bryant S. Caldwell to participate in the Final decision of the Commission when (a) he was not present during oral argument; (b) there was no public record of his decision to participate and (3) Loveless objected to his participation after learning of the plan for him to participate and Loveless' objection was not ruled on.

## STATEMENT OF THE CASE

From November 2018 to November 2022, Appellant Kenneth B. Loveless (hereafter "Loveless") was a publicly elected member of the Board of Trustees of the Lexington Richland County School District Five. Loveless was verbally attacked almost from the beginning by fellow Board members Edward K. White and Beth Hutchison, who went to great lengths to damage his reputation, while engaging in a conspiracy to harm Loveless.[1] After months of planning, White and Hutchison, District Five's attorney Michael Montgomery and others, launched a false factual attack against Loveless at a School Board meeting on September 14, 2020, despite the agenda not giving any hint that the attack was going to occur. Evidence establishes the attack was coordinated and well-planned.

In the wee hours of the morning after the School Board meeting, White, Hutchison and a third party, Kevin Scully, authored a "press release" that falsely stated that Loveless had used his position as a member of the school board to obtain a construction contract between the District and himself, through a commercial construction company of which Loveless had been the principal for more than 40 years. This was false and defamatory and was published repeatedly in various media outlets. *Loveless v. Scully*, Case No. 2022-CP-40-01307. *See also Loveless v. White*, Civil Action No. 3:23-cv-02001. Scully and others also viciously attacked Loveless on social media. *Loveless v. Scully, supra*.

The media frenzy and repeated attacks on Loveless prompted the filing of this complaint against Loveless with the State Ethics Commission by a parent. The complaint alleged, *inter alia*,

[1] By order dated July 25, 2025, Loveless was granted leave to amend his pleadings in Case No. 2022-CP-46-01307 to include as defendants in his conspiracy claim Edward K. White, Beth Hutchison and other individual co-conspirators. Prior to the ruling, Kevin Scully was the only defendant in the conspiracy action.

that Loveless improperly participated in matters related to a District contract with Contract Construction, Inc. (Contract Construction), for the construction of Piney Woods Elementary School (PWES). The Executive Director and/or the Commission found probable cause to believe Respondent violated the Ethics Act and a Notice of Hearing was issued on July 11, 2022, outlining the following charges:[2]

> **<u>COUNT ONE</u> FAILURE TO RECUSE FROM A GOVERNMENTAL DECISION IN WHICH A BUSINESS WITH WHICH ASSOCIATED HAD AN ECONOMIC INTEREST SECTION 8-13-700(B), S.C. CODE ANN., 1976, AS AMENDED.** That Kenneth Loveless, Lexington-Richland School District Five Board Member, did in Richland County, write a letter dated March 24, 2020 inquiring about construction work of a district facility by Contract Construction, Inc., a business with which he was associated, in violation of Section 8-13-700(B).
>
> **<u>COUNT TWO</u> FAILURE TO RECUSE FROM A GOVERNMENTAL DECISION IN WHICH A BUSINESS WITH WHICH ASSOCIATED HAD AN ECONOMIC INTEREST SECTION 8-13-700(B), S.C. CODE ANN., 1976, AS AMENDED.** That Kenneth Loveless, Lexington-Richland School District Five Board Member, did in Richland County, on June 15, 2020, participate in discussion about construction of a district facility by Contract Construction, Inc., a business with which he was associated, in violation of Section 8-13-700(B).
>
> **<u>COUNT THREE</u> FAILURE TO RECUSE FROM A GOVERNMENTAL DECISION IN WHICH A BUSINESS WITH WHICH ASSOCIATED HAD AN ECONOMIC INTEREST SECTION 8-13-700(B), S.C. CODE ANN., 1976, AS AMENDED.** That Kenneth Loveless, Lexington-Richland School District Five Board Member, did in Richland County, on September 14, 2020, participate in discussion about construction of a district facility by Contract Construction, Inc., a business with which he was associated, in violation of Section 8-13-700(B).
>
> **<u>COUNT FOUR</u> FAILURE TO RECUSE FROM A GOVERNMENTAL DECISION IN WHICH A BUSINESS WITH WHICH ASSOCIATED HAD AN ECONOMIC INTEREST SECTION 8-13-700(B), S.C. CODE ANN., 1976, AS AMENDED.** That Kenneth Loveless, Lexington-Richland School

[2] Upon receipt of the complaint, the Executive Director sent a letter to Loveless that stated that the Commission had determined "probable cause existed" to investigate the matter on February 17, 2021. This was false. It appears the Executive Director acted on her own. Public records reflect no meeting of the Commission on or between the date the Commission received the complaint (February 17, 2021) and the date the Executive Director mailed the complaint to Loveless on February 23, 2021. Loveless raised this omission to the Commission on numerous occasions, yet neither the Commission nor its counsel respond to or even acknowledged Loveless' assertion.

> District Five Board Member, did in Richland County, in June of 220, participate in a site visit of a district facility being constructed by Contract Construction, a business with which he was associated, in violation of Section 8-13-700(B).

On September 12, 2022, Loveless filed a Motion to Dismiss, which was denied on October 6, 2022 by Commissioner Starkes. On February 16, 2023, a hearing was held before a Hearing Panel. On March 24, 2023, the Hearing Panel found Loveless violated Section 8-13-700(B) of the Ethics Act as outlined in Counts One (1) through Three (3) in the Notice of Hearing. Loveless appealed within the Commission on April 3, 2023. On February 20, 2024, Loveless filed a Motion to Admit Additional Evidence and Motion to Stay Proceedings. This Motion was heard on March 21, 2024. On June 3, 2024, Loveless' Motion was denied. The Full Commission heard Loveless' appeal on January 16, 2025 and by order dated March 31, 2025 affirmed the Hearing Panel without addressing any of the arguments Loveless had asserted on appeal.

## STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of decisions by administrative agencies, including the State Ethics Commission. S.C. Code Ann. §§ 1-23-310 to -400. Section 1-23-380(A)(6) establishes the substantial evidence rule as the standard of review. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981). "An appellate court's review is limited to the determination of whether the Commission's decision is supported by substantial evidence or is controlled by an error of law." *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007). The Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact; however, the court may reverse or modify a decision of the agency if it is affected by an error of law, made upon unlawful procedure, in violation of constitutional or statutory provisions, or is clearly erroneous in view of the substantial evidence on the record as a whole. S.C. Code Ann. § 1-23-380(5).

## ARGUMENT

### I. THE STATE ETHICS COMMISSION IMPROPERLY INITIATED AND ADJUDICATED PROCEEDINGS AGAINST APPELLANT KENNETH B. LOVELESS WHEN ITS NOTICE OF HEARING FAILED TO ALLEGE A VIOLATION OF THE APPLICABLE STATUTE. LOVELESS' MOTION TO DISMISS SHOULD HAVE BEEN GRANTED.

The State Ethics Commission issued a Notice of Hearing against Loveless on July 11, 2022. Loveless moved to dismiss the allegations, alleging the Notice did not charge him with a violation of S. C. Code Ann. § 8-13-700(B). Commissioner Starkes heard Loveless' Motion to Dismiss and denied it by order dated October 6, 2022. Loveless argued that the statute, S.C. Code Ann. § 8-13-700(B), prohibited him from "making, participate in making . . . a governmental decision" yet the charges did not allege he had participated in or made any decision. In the common pleas world, the motion to dismiss was essentially a Rule 12(b)(6) motion, for failure to state a cause of action.

Commissioner Starkes[3] ruled that the essence of the complaint was that Loveless "improperly participated in Board discussions and/or other activities that involved a District Contract with . . . a business with which [Loveless] was associated." (Order dated Oct. 6, 2022, p. 1). In finding that the Notice of Hearing was sufficient, Commissioner Starkes cited S.C. Code Ann. § 8-13-700(B)(4), which Commissioner Starkes concluded prohibited Loveless from participating in "any votes, deliberations or other actions on the matter. . ." *Id.* at p. 4. Commissioner Starkes reasoned that Subsection (4) of § 8-13-700(B) merely "clarifies" the actual prohibition contained in the statute.

[3] In his argument before the Full Commission, Loveless pointed out prior precedent from the Commission cited by Commissioner Starkes, SEC AO2000-011, had been repealed by the Commission in a later advisory opinion. *See* SEC AO2020-002. The Full Commission failed to address this issue in its final order.

Loveless asserts that the Commission must apply the literal terms of the statute without extrapolating what the unambiguous terms might mean.

The statute reads provides in relevant part:

> No public official . . . may make, participate in making or in any way attempt to use his office. . . to influence a governmental **decision** in which he . . . or a business with which he is associated has an economic interest. . . A public official. . . who in the discharge of his official responsibilities, is **required** to take an **action** or **make a decision** . . .

S.C. Code Ann. 8-13-700(B) (emphasis added)(hereafter "the statute").

Very early in its existence, the Commission found that "S.C. Code § 8-13-700(B) is unambiguous in its requirements." *State Ethics Commission v. OHP and JDG,* Complaint No. 97-035 & 036 (order dated February 13, 1998).[4] That being the case, the Commission may not construe the statute and must only apply the statute as written. The Commission lacked authority to construe an unambiguous statute, and the Commission's reference to earlier advisory opinions, which included Subparagraph (4) of § 8-13-700, in its interpretation were incorrect.

The South Carolina Supreme Court has confirmed "that an agency cannot construe an unambiguous statute. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Miller v. Aiken*, 364 S.C. 303, 613 S.E.2d 364, 366 (2005); *Carolina Power & Light Co. v. City of Bennettsville*,

[4] In accepting a consent order for discipline where unpaid members of a hospital board had participated in votes and discussions which generated real estate commissions for their wives, and requiring disgorgement, the Commission did not recognize a distinction between "votes" and "discussions." The issue raised by Loveless in this matter was not raised by the Respondents in the 1998 ruling. The Commission had no reason to address the substantive difference between "votes" and "discussions" and the issue was not considered as a part of that consent order. Indeed, the consent order of discipline found that the public members of the board were "prohibited from discussing or otherwise affecting a matter in which disqualification is required" and ordered disgorgement of fees their *wives* had earned as a result of the real estate project in which the hospital had purchased property. *Id.* The Commission gave no explanation as to how it equated "discussions" with "otherwise affecting" a project.

314 S.C. 137, 442 S.E.2d 177, 179 (1994). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction, and a court has no right to look for or impose another meaning. *Tilley v. Pacesetter Corp*., 355 S.C. 361, 585 S.E.2d 292, 298 (2003); *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890, 892 (1995); see also *Timmons v. Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805, 817 (1970) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language"). Similarly, if a Court cannot construe an unambiguous statute, an agency certainly cannot since its powers are extremely limited by its enabling legislation.

From its creation in 1991, the Commission has construed S.C Code Ann. § 8-13-700(B) well beyond its meaning in what has been a decades-long pattern of applying the Commission's own expanded interpretation to § 8-13-700(B), despite its unambiguous language. In SEC AO92-014, the Commission construed the statute to conclude that even though the Chairman of Charleston County Council would not violate the State Ethics Act by taking proposed action "the Commission would advise against participation, to avoid even the appearance of impropriety." No such language appears anywhere in the statute, nor is it implied in anything contained in the State Ethics Act. Clearly the Commission has no authority to include the "appearance of impropriety" language in its advisory opinion, but its inclusion has remained unchallenged for more than twenty-five (25) years and is included in the "prior precedent" upon which Commissioner Starkes relied in denying Loveless' Motion to Dismiss.

Since 1992, the Commission has repeatedly but improperly expanded on the language of the statute in its advisory opinions, and presumably to litigate proceedings for activities that are not prohibited by the statute. The Commission has repeatedly construed the unambiguous statute to broaden its meaning beyond the precise language of the statute and has continuously repeated its incorrect and

unlawful expansion of the statute. *See* SEC AO92-077, SEC AO92-115, SEC AO131, SEC AO92-145, SEC AO92-152, SEC AO92-221, SEC AO95-10, SEC AO98-99. Loveless is only the latest victim of the Commission's inability to apply the statute as written. In his motion to dismiss, Loveless correctly asserted that he had not been charged with making any decision[5] or participating in any vote and the charges against him lacked basis in law.

The Commission may have confused itself by referencing the mandates that are triggered when an affected individual does in fact have a conflict under § 8-13-700(B) by including Subsection (B)(4) as a part of the trigger for whether the statute applies. Section 8-13-700(B)(4) prohibits a public official from participating in any "deliberations[6]" only if he is required to take an "action" or participate in a "decision". Clearly if the public official cannot "vote" or "take action" under § 8-13-700(B), he similarly cannot deliberate in anticipation of the "vote" or "action." However, nothing in § 8-13-700(B) prohibits a public official from participating in discussions that do not require a "vote" or "decision."[7]

The Commission's prior advisory opinions have equated "deliberations" with "discussions" which is incorrect. Both state appellate courts have recognized repeatedly that the term "deliberation" is a process that leads to a decision and is not under any circumstance a "discussion" unless there is a pending "act" or "decision" that follows the "deliberations". *State v. Johnson*, 444 S.C. 442, 908 S.E.2d 102 (2024); *Jolly v. Fisher Controls International LLC*, 443 S.C. 511, 905 S.E.2d 380 (2024); *Pratt v.*

[5] Loveless has argued throughout these proceedings that the School Board members can only act as a group, and none of them has any unilateral authority, other than to vote. S. C. Code Ann. § 59-19-10.

[6] During argument, Loveless' counsel provided the Commission with a color-coded "flow-chart" of § 8-13-700(B), including subsection (B)(4) which demonstrated clearly that subsection (4) only applies when a public official is "required to take an action or makes a decision". In that event, per subsection (B)(4), the public official "must be excused from any votes, deliberations and other actions on the matter. . ."

[7] While the ultimate decision to recuse may belong to the affected public official or board member, subsection (4) also places the burden upon the "presiding officer" of the governing body to ensure that the impacted board member or public official is excused from any "votes" or "deliberations," and requires the presiding officer to document in the minutes the impacted member's disqualification from votes, deliberations, and decisions.

*Amisbud of SC Inc.*, Op.No. 6096 (Court of Appeals January 15, 2025); *State v. Dennis*, 444 S.C. 353, 907 S.E.2d 142 (2024).[8]

The Commission has misconstrued the language of Section 8-13-700(B)(4) to set the standard for when a public official's obligations are triggered. Subsection (B)(4) applies only if the public official is "required to take an action or make a decision." § 8-13-700(B). Moreover, the prohibition set forth in Subsection (B)(4) applies only to the *presiding officer* and not to the supposedly-conflicted public official. The only evidence introduced by the Commission here were videos of Board meetings and the minutes of meetings of the Board of Trustees on which Loveless served. The proof established only that Loveless participated in discussions, but there is no evidence he voted on anything related to Contract Construction, nor did he decide or influence any decisions by the Board. The voting records of each of those Board meetings confirm that no "action" or "decision" was taken on any of the topics in which Loveless participated in discussions. (ROA ---). If Subsection (B)(4) had any applicability here, the prohibition was on the presiding officer when the votes were taken, not on Loveless. The presiding officer is the only one whose conduct is addressed by Subsection (B)(4).

Thus, Loveless did not participate in "deliberations" since no vote was scheduled or taken on any of the occasions in which the allegedly-offending "discussions" occurred, and upon which these charges were prosecuted.[9] Indeed, the Notice of Hearing did not allege otherwise. All four "counts" against Loveless failed to allege a violation of the statute.

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[8] There are hundreds of published decisions from the South Carolina Supreme Court and the South Carolina Court of Appeals which discuss and therefore elucidate the meaning of the word "deliberations." Virtually all of them reference "jury deliberations," which obviously refer to discussions which occur prior to a jury taking "an action" or making "a decision." The "action" or "decision" is the statutory prerequisite which prohibits a public official from participating in "deliberations" which would lead to an "action" or "decision." Nothing in § 8-13-700(B)(4) prohibits a public official from participating in "discussions" which do not lead to an "action" or "decision." A pending "action" or "decision" as set forth in § 8-13-700(B) is clearly a prerequisite to the public officials' participation in "deliberations."

[9] Count 1 alleged a violation of § 8-13-700(B) in connection with a letter that Loveless wrote to the School Superintendent, which was neither a "discussion" nor a "deliberation."

In denying Loveless' Motion to Dismiss, Commissioner Starkes cited to a 2006 opinion of the Attorney General that says "[p]rimary jurisdiction for the interpretation of the Act is bestowed upon the State Ethics Commission." (Order dated Oct. 6, 2022, p. 4). While that interpretation has apparently supported the Commission's prior misapplication of the statute for decades, the United States Supreme Court has recently made clear that only the Courts can interpret the law, and that agencies have no special expertise in what the law is, such that the Courts cannot defer to agency interpretations of statutes since agencies have no expertise in construing the law.

In June 2024, the United States Supreme Court reversed decades of federal case law that had caused inappropriate federal judicial deference to agency construction of legal doctrines. *Loper Bright Enterprises et al. v. Raimondo, Secretary of Commerce*, 603 U.S. 369, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024). In the plurality opinion, Chief Justice Roberts overruled any requirement that federal courts defer to agency interpretations of statutes, noting that construction of statutes by administrative agencies are subject to strict construction and that only the Courts have authority to construe statutes or decide issues of law. The Chief Justice said such historic deference to agency interpretations of statutes is "misguided. . . because agencies have no special competence in resolving statutory ambiguities." *Id.* at 2266, 859. He also noted that the Constitution is framed as it is "to ensure federal judges could exercise judgment free from the influence of the political branches." *Id.* at 2268, 861.[10]

[10] The Court of Appeals recently cited *Loper Bright Enterprises v. Raimondo* favorably in *Colonial Pipeline Co. v. S. C. Dept of Revenue*,443 S.C. 448, 905 S.E.2d 129 (Ct App. 2024), which it read to support the legal doctrine that courts should not mechanically afford binding deference to agency interpretations, while "leaving in place *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)" which "endorses exercising independent judgment consistent with the 'respect' historically given to Executive Branch interpretations." *Colonial Pipeline Co*., 443 S.C. 448, 905 S.E.2d 129 (Ct App. 2024) (quoting *Loper*, 603 U.S.369, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024)).

South Carolina has long done as the federal courts had done prior to the 2024 decision, which is to defer to agency interpretations of statutes when reviewing appeals from administrative agencies. *Kiawah Dev. Partners II v. S. C. Dep't of Health & Env't Control*, 411 S.C. 16, 766 S.E.2d 707 (2014); *Chapman v. S. C. Dep't of Social Services*, 420 S.C. 184, 801 S.E.2d 401 (Ct.App. 2017). South Carolina courts still afford deference to agency interpretations of statutes in some cases. *See Brown v. Bi-lo Inc*., 354 S.C. 436, 581 S.E.2d 836 (2003).

Pursuant to the mandates of *Loper*, such deference to agency interpretations of statutes is no longer permitted. Similarly, neither the Commission nor the Courts can continue to rely upon the opinions of executive agencies which step outside the bounds of their constitutional executive powers and attempt to construe what a statute means.[11]

In denying Loveless' Motion to Dismiss, Commissioner Starkes said his interpretation of § 8-13-700(B) was "supported by decades of guidance and enforcement actions." (Order dated Oct. 6, 2022, p. 4). While that may true, the guidance and enforcement actions during those decades were based on an inaccurate and inappropriate reading of § 8-13-700(B) by the Commission itself. Commissioner Starkes referred to it as the "clarifying" language of § 8-13-700(B)(4) in determining what actions were prohibited by § 8-13-700(B). (ROA ---). Not only

[11] While the plurality decision in *Loper* did not dwell on the separation of powers doctrine, the doctrine's applicability seems to leap from its pages nonetheless. The concurring opinion of Justice Thomas in *Loper* expressly addresses the separation of powers doctrine that prohibits political branches from stating what the law is. "*Chevron* deference . . . violates our Constitutions' separation of powers, as I have previously explained at length. (citations omitted). 603 U.S 369 at, 144 S.Ct. 2274 (opinion of Thomas, J.). Chief Justice Roberts plurality decision did, in fact, state that the now-abolished *Chevon* doctrine requires courts to decide what the law is and not defer to political branches of government. 603 U.S. 369, 144 S.Ct. 2244. Justice Gorsuch's concurring opinion also points out that the court's exclusive authority to construe the law rejects any permissible interference by executive branch agencies in determining the law to "review by political actors." 603 U.S. 369 at, 144 S.Ct. 2284 (opinion of Gorsuch, J.) (citing The Federalist No. 81, at 482.). "All of this served to ensure the same thing: 'A fair trial in a fair tribunal.' . . . [o]ne in which impartial judges, not those currently wielding power in the political branches would "say what the law is" in cases coming to court." *Id.* (citations omitted). It should go without saying that the State Ethics Commission is a part of the political branch and is subject to the ebs and flows in the executive branch of state government, which the plurality of Supreme Court justices said in *Loper* is an evil from which only the Courts are mercifully shielded.

was this interpretation wrong that (B)(4) "clarified" 8-13-700(B), but the Commission is also not permitted to look for clues to clarify what the statute meant since the statute was unambiguous. "[U]nder the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. . . Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory construction are not needed, and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578 (2000).

In light of *Loper* pointing out that only courts can construe issues of law, and since the Commission has, for decades, ignored the plain language of the statute in order to act well outside its jurisdiction, Commissioner Starkes' deference to "decades" of prior construction by the Commission is a fatal flaw and the Commission had no basis upon which to prosecute these charges against Loveless.

In 2000, the Commission continued its unlawful expansion of the circumstances in which recusal of a public official is required under the statute. SEC AO2000-011, relied upon by Commissioner Starkes, was issued *sua sponte*[12] by the Commission "in response to the ongoing concern the State Ethics Commission has regarding violations of . . . § 8-13-700(B) of the Ethics Reform Act of 1991." The statute permits the Commission to issue advisory opinions only when requested to do so "for public officials, public members and public employees for which it has proper jurisdiction to make findings of fact and impose penalties pursuant to this chapter." § 8-13-310(11)(b). In other words, the Commission may not simply issue an advisory opinion *sua sponte* on its own volition, as it did in SEC AO2000-011, to pontificate on the Commission's own concern regarding possible misunderstanding of the statute by people to whom it applies. The Commission had no authority

[12] The Commission is not permitted to issue advisory opinions *sua sponte*. S. C. Code § 8-13-320(11)(a) only permits the Commission to issue an advisory opinion when requested by a person whose public acts fall within its jurisdiction.

to issue SEC AO2000-011. When Commissioner Starkes relied upon it in denying Loveless' Motion to Dismiss, he did not note that SEC AO2000-011 had been expressly repealed by the Commission in a subsequent advisory opinion, SEC AO2020-002.

The Commission has struggled with its own *sua sponte* and gratuitous issuance of SEC EAO 2000-011. For instance, in SEC AO2003-002, the Commission properly followed the express language of the statute and limited the application of § 8-13-700(B) to "action" and "agency decisions" in concluding that agency staff[13] who serve as liaison to the decision-making body are not prohibited by § 8-13-700(B) from performing administrative tasks in support of the decision-making body which governed the agency. That was a permissible construction of the statute, since administrative staff do not make "decisions" or take "actions" and § 8-13-700(B) is not implicated.

In 2020, the Commission may have anticipated its error in expanding on the express language of the statute. In SEC AO2020-002, the Commission issued an opinion in which it addressed individual line items in budgets that are voted on by the agency's decision-making body, and said it was permissible for agency employees (staff) to participate in budget discussions[14] even if a family member might eventually benefit from a salary increase adopted by the agency. Recognizing the confusion its previous advisory opinions had created by expanding the language in § 8-13-700(B) to include "discussions," the commission <u>expressly</u> withdrew SEC AO2000-011 in SEC AO2020-002.

[13] By definition, administrative employees/staff are not public officials who vote or take actions. They are public employees who assist public officials, but only the public officials make "decisions" or take "action". *See* § 8-13-100 (definitions of "public employee in subsection (25) versus definition of "public official" in subsection (27)).

[14] In SEC AO2020-002 opinion, the Commission did not attempt to equate (and therefore confuse) "deliberations" with "discussions" as it did in the instant case.

In this Commission action, Loveless was charged with four counts of a violation of § 8-13-700(B), in that he (1) wrote a letter; (2) participated in discussions; (3) participated in discussions; and (4) participated in a site visit. The subpanel did not conclude that Loveless' participation in a site visit (Count 4) violated § 8-13-700(B). However, none of the circumstances which formed the charges against Loveless alleged that he participated in a "vote" or a "decision" and none of those actions is prohibited by § 8-13-700(B). Loveless was permitted to participate in discussions, but if he indeed was associated with Contract Construction, he was not permitted to participate in deliberations which led to votes or actions with respect to Contract Construction, nor did he do so. **The charges against Loveless do not allege that Loveless participated in any vote, decision or deliberations with respect to Contract Construction**. The Commission's inquiry necessarily ends there.

The full Commission completely ignored the United States Supreme Court's decision in *Loper,* although Loveless argued its applicability and asserted it required dismissal of the charges against him, both at the hearing and again in objecting to the proposed order from Commission Counsel, which also pretended *Loper* did not exist. (ROA _____). Loveless' Motion to Dismiss should have been granted. The counts against Loveless made no allegation that Loveless had voted or participated in any agency decision related to Contract Construction (the business with which he was allegedly associated) which is the only conduct prohibited by § 8-13-700(B). [15]

[15] Loveless pointed out in his motion to dismiss that the proceedings before this Commission had been initiated without authority because there was no factual allegation that a violation of § 8-13-700(B) had occurred, *i.e.* no "vote" or "decision." Loveless was charged with "writing a letter" (Count 1), "participating in discussions" (Counts 2 and 3) and "participat[ing] in a site visit" of a construction site (Count 4). Loveless was not charged with engaging in any "votes" or "decisions" regarding Contract Construction, a general contractor chosen by District Five to construct an elementary school before Loveless was elected to the Board, or any other person or entity. (ROA Melton testimony ____).

In the final hearing in this matter, Loveless pointed out his counsel's cross-examination of Commission's investigator Ryane Caldwell, when counsel asked Caldwell whether she believed Loveless had violated §8-13-700(B). While not considered remarkable at the time, Ms. Caldwell's statement was prescient, in that she carefully said that Loveless had violated the Commission's "historical interpretation" of the statute. (ROA__Testimony of Ryanne Caldwell, Tr. Feb. 16, 2023, p. 109, lines 1-9). That was the same thing as saying Loveless had not violated the terms of the statute. But Caldwell toed the party line in an effort to support her employer's decision to sanction Loveless.

As an agency of the State and a creature of statute, the Commission's authority is dependent upon statute. The Commission is possessed only with those powers specifically delineated or necessarily implied in their enabling legislation. *City of Columbia v. Board of Health and Environmental Control*, 292 S.C. 199, 355 S.E.2d 536 (1987), cited with approval in *Charlotte-Mecklenburg Hospital Authority et al. v. South Carolina Department of Health and Environmental Control et al*., Civil Action No. 06-ALJ-07-0713CC (Order dated December 9, 2009).

> [Administrative] bodies, being unknown to the common law, and deriving their authority wholly from constitutional and statutory provisions, will be held to possess only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted . . . 'Any reasonable doubt of the existence in the commission of any particular power should ordinarily be resolved against its exercise of the power.'

*Mungo v. Smith*, 289 S.C. 560,564, 347 S.E.2dd 514, 517 (1986). *See also Stoneledge at Lake Keowee Owners Association Inc. v. IMK Dev. Co.,* 435 S.C. 109, 866 S.E.2d 542 (2021) (Statutes in derogation of the common law are to be strictly construed, and a statute restricting the common law will not be extended beyond the clear intent of the legislature), quoting *Eades v. Palmetto Cardiovascular & Thoracic P.A.*, 422 S.C. 196, 201, 810 S.E.2d 848, 850 (2018).

It is true that pre-*Loper* Courts historically have deferred to the opinion of a state agency as to the interpretation of a statute it is charged with the duty of enforcing. *S.C. Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008). "It is well established that construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Lloyd v. South Carolina Department of Health and Environmental Control*, 328 S.C. 419, 428-29, 491 S.E.2d 582, 595 (Ct. Ap. 1999), cited with approval *Safety Disposal Systems Inc. v. South Carolina Department of Health and Environmental Control*, No. 01-ALJ-07-012CC, 2002 WL 1354623 at *26. However, the decision of the United States Supreme Court in *Loper* compels a fresh examination of prior Commission interpretations of § 8-13-700(B) and mandates dismissal of the charges against Loveless.

*Loper* compels the conclusion that Loveless' motion to dismiss should have been granted. "South Carolina Courts have long held that however clear the language is in a statute, the courts will not apply a construction that reaches an absurd result the Legislature clearly did not intend." *Charlotte Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control, supra*., citing *Kiriakides v. United Artists Communication Inc.,* 312 S.C. 271, 2275, 440 S.E.2d 364, 366 (1994) ("If possible, the court will construe the statute so as to escape the absurdity and carry the [legislative] intention into effect." *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 372 S.C. 519, 527, 642 S.E.2d 751, 755 (2007).

To be clear, the prohibition of § 8-13-700(B) must be restricted to votes or decisions by a public official, none of which were alleged against Loveless. Loveless was charged with writing a letter, participating in discussions at two (2) Board meetings at the school district, and participating in a site visit in his capacity as a member of the Board. None of those actions is prohibited by § 8-13-700(B).

## II. THE STATE ETHICS COMMISSION ERRED IN FAILING TO ALLOW DISCOVERY INTO UNAUTHORIZED COMMUNICATIONS BETWEEN THE STATE ETHICS COMMISSION AND THE OFFICE OF INSPECTOR GENERAL.

While the matter was pending before the Full Commission, Loveless received a copy of a public Report of the Office of the State Inspector General dated August 2023 which, among other things, described the "methodology" that office used to produce a report in response to District Five's request and the Governor's request to review "procurement-related issues."[16] (Exhibit A, Motion to Admit Additional Evidence, p. 1). The report is published at *https://oig.sc.gov/index.php/reports.*

According to the report, the OIG's methodology included a review of "relevant documentation, including emails. . . and conducted interviews of . . . as well as . . . the State Ethics Commission. *Id.* The report also stated that the OIG "is appreciative of the collaboration with. . . the State Ethics Commission. . ." *Id.* p. 17.

In January 2024, in an attempt to determine what information the Commission provided to OIG or vice versa, Loveless' counsel submitted a FOIA request dated January 23, 2024 to the Commission. (ROA ---). One document was produced in response, specifically, an email from an investigator with the OIG to SEC Executive Director Meghan Walker a/k/a Meghan Dayson requesting an audio recording of the hearing held February 16, 2023. (ROA ___).

This limited FOIA response appears to indicate that the OIG was actively conducting its investigation at the same time the Commission panel was deliberating, prior to issuing the March 24, 2023 Order. On February 13, 2024, Loveless requested the Director to issue subpoenas that Loveless

[16] The request from the School District was not attached to the OIG report. The second of two letters from the Governor is attached as Exhibit 2 to Loveless's Reply to Response to Motion to Admit Additional Evidence filed March 21, 2024. Loveless does not have the Governor's first letter. The Governor's second letter (dated January 17,2023) references an earlier letter from the Governor to the OIG dated December 1, 2022, which is among the documents sought by the additional discovery requested by Loveless.

prepared and filed with the Commission. (ROA ____). The purpose of the request for subpoenas was to obtain evidence of whatever interaction had occurred between the OIG and the SEC, which Loveless asserts occurred during the deliberations by the Commission panel following the hearing in February 2023. The Commission declined to issue the subpoenas requested by Loveless and Loveless subsequently filed a motion to admit additional evidence. Pursuant to SEC Reg. 52-806, the Commission is expressly authorized to permit the admission of additional evidence into the record following an appeal from the Decision and Order of the hearing panel.

The Office of Inspector General is authorized to conduct investigations; however, it is not authorized to secretly conduct interviews or coordinate with another agency[17] in a "collaboration" as set forth in the OIG's report. This must be true particularly when the agency with which it consults is deliberating on a dispositive motion. S.C. Code § 1-6-20(B) ("The State Inspector General is responsible for investigating and addressing allegations of fraud, waste, abuse, mismanagement, violations of state or federal law, and wrongdoing in agencies."). It is undisputed that the contacts between the OIG and the SEC occurred, at least initially, before the panel's Decision and Order on March 24, 2023. Loveless has every right to know the details about the "collaboration" between the OIG and the Commission, particularly when the "collaboration" immediately preceded the Commission's ruling.

In conducting its investigation, the OIG has no authority to conduct informal interviews. Importantly, its only authority to examine witnesses is "under oath." Section 1-6-50(A)(2). There is no authority for unrecorded general conversations with anyone, especially with an agency who is

[17] See also S.C. Code § 1-6-20(E), which authorizes other agencies to provide documents on request of the Inspector General. Specifically, agencies are required to provide "documents, reports, answers, records, accounts, papers and other necessary data and documentary information to perform the mission of the State Inspector General." *Id.*

prosecuting Respondent at the time the OIG is conducting its investigation. The OIG is possessed only with those powers specifically delineated or necessarily implied in their enabling legislation. [18]

The Commission held a hearing on Loveless' motion for additional discovery on March 21, 2024. The motion was denied by order dated June 3, 2024.

If the "collaboration" between the OIG and agents of the SEC involved discussions that were not of record, they were illegal. Loveless has a right to know what occurred. Since multiple FOIA attempts have not produced any evidence of the "collaboration", limited discovery should have been allowed. The OIG does have authority to file a complaint with the SEC, but not to "collaborate." S.C. Code § 1-6-60.

Once the OIG's report was issued, the records which it maintains become public. S.C. Code 1-6-100(B).[19] The only exception to the ability of the OIG to provide documents is if "an individual discloses information alleging fraud, waste, abuse, mismanagement, misconduct, violations of state or federal law, and wrongdoing in an agency in good faith" and other conditions are met. S.C. Code Ann. § 1-6-100(A).

Loveless has provided evidence that with respect to at least one company whose representatives were interviewed, the OIG destroyed records it examined during the OIG investigation at the request of the third party whose records were reviewed, to prevent the materials from becoming public.[20] That

[18] *See* cases cited and discussion *supra* p. 15.

[19] The statute provides that the records "are subject to public inspection pursuant to Chapter 4 of this title." However, there is no Chapter 4 of Title 1. Respondent has written to the OIG and requested copies of records maintained by the OIG. However, if informal interviews were conducted, which the SEC's executive director has denied, they would not be "of record" nor were they authorized by statute.

[20] "Please accept this letter as attestation that the OIG has destroyed and no longer retains any privileged business record or other materials provided for review by your client, Mr. Gregory Hughes of Contract Construction, Inc." (Exhibit B to Request for Subpoenas). The letter further discusses an agreement between Counsel for Contract Construction and the OIG that the OIG "would not retain copies of the records." It is apparent the OIG took steps, not authorized by statute, to minimize the records that would eventually become public. At all times, the case against

evidence will not be of record in the OIG's files. (Ex. B to Request for Subpoenas)[21] The statutes vesting authority in the OIG do not permit the OIG to destroy documents obtained in the course of its investigation.[22] But the evidence is undisputed that, according to OIG, it did, in fact, destroy records it obtained in the course of its investigation. *Id.*

Loveless raised sufficient issues of concern that these proceedings have not been conducted in strict compliance with the statutes that govern the Commission's power and proceedings. Loveless should have been permitted to explore these questions to ensure that the record clearly reflects whether there has been inappropriate communication between agents of the SEC and the OIG such that his procedural due process rights may have been infringed by flaws in these proceedings. *Richardson v. $220,771.00*, 437 S.C. 290, 878 S.E.2d 868 (2022), *citing Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).[23]

## III. THE STATE ETHICS COMMISSION ERRED IN ALLOWING COMMISSIONER CALDWELL TO PARTICIPATE IN THE FINAL DECISION OF THE COMMISSION WHEN (A) HE WAS NOT PRESENT DURING ORAL ARGUMENT; AND (B) THERE WAS NO PUBLIC RECORD OF HIS DECISION TO PARTICIPATE.

At the commencement of the final hearing before the Full Commission, Chairman Truslow did not announce, as had been done in prior hearings, which Commissioners were hearing the matter. (ROA 1.15.2025, P. __). (ROA ___; Hearing March 21, 2024, Tr. P. 5, lines 4 – 15; P.

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Loveless was pending before this Commission. Identifying what information was shared by the OIG with the SEC, or vice versa, is critical to Loveless's due process rights.

[21] It is unclear to Loveless and his counsel whether Loveless's Request for Subpoenas dated February 13, 2024 was ever submitted to the Commission for decision. Commission Counsel refused the request for subpoenas but did not indicate whether that was her decision or the Commission's.

[22] Inexplicably, much of the statutory authority of the SC OIG contradicts the *Quality Standards for Offices of Inspector General*, (last amended 2014), Association of Inspectors General.

[23] The procedural due process rights of a proceeding examine "(1) the private interest affected by the proceeding; (2) the risk of error created by the chosen procedure; and (3) the countervailing governmental interest supporting the challenged procedure." *Richardson*, *supra.* 437 S.C. 300. *Richardson* also discussed the application of South Carolina law to administrative penalties versus criminal fines and sanctions, which is especially applicable here.

7, lines 5-20);[24] (ROA __; Hearing February 16, 2023, Tr. P. 4, lines 2-5).

The Chairman requested proposed orders from both sides. When the proposed order was received from counsel for the Commission, it included in footnote one the following: "Commissioner Bryant S. Caldwell was not present during the Appeal Hearing held on January 16, 2025, but hereby joins in this Order pursuant to S.C. Code Ann. Regs. 52-805(D)." (ROA___ Proposed order from Commission Counsel).

Loveless nor his counsel had received any communication from the Commission about this development. To bring this to the Commission's attention, Loveless submitted an objection to the proposed order, pointing out several irregularities. (ROA Objection to Proposed order). The Commission ignored the objection (assuming it was received by the members who deliberated and issued the final order) and the Chairman signed the proposed order submitted by Commission counsel without edits. (ROA ___ Signed Order).

Loveless was attempting to subtly let the Commission know that Commission Counsel had access to information that had not been shared with Loveless. Obviously, Loveless was too subtle, because the Commission ignored the objection, and signed the proposed order which contained the statement that Commissioner Caldwell participated in the decision of the Full Commission.[25] Whether he actually did or not is unknown.

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[24] At the March, 2024 hearing, three Commissioners were present at the hearing (Truslow, Tyler and Tomlinson, and two Commissioners (Caldwell and Pinkston) participated by Zoom. *Id.*

[25] For the Record on Appeal, Loveless has labeled the "proposed order from Commission Counsel" at the top of each page. That was necessary because the actual order signed by the Commission is very similar to the order proposed by Commission counsel, with multiple pages being exact duplicates of the proposed order. There had been several occasions when it appeared that the orders signed by the Commission appeared to be drafted by Commission Counsel, but since Loveless was excluded from any communications between the Commission and Commission Counsel, those *ex parte* contacts passed without note. But it happened regularly. For instance, the hearing on Loveless' Motion to Dismiss was held on October 6, 2022, and the order was also signed on October 6, 2022, leading to the implication that Commission Counsel prepared the proposed order for Commissioner Starkes before the hearing was even held. Similarly, phrasing used by Commission Counsel in her memoranda to the Commission often used the same phrasing and citations that appeared in orders issued by Commissioner Starkes.

The Commission's failure to address the objection, and the signing of the Chairman of the same proposed order that contained the offending footnote, confirms that there were *ex parte* communications to which Loveless was not included throughout these proceedings. In retrospect, perhaps Loveless should have been less subtle. After all, evidence of *ex parte* communications proliferated during the proceedings before the Commission, but this was the first time Loveless actually pointed it out and asked for the Commission to act on it. But the Commission did nothing, thereby confirming that Commission counsel had access to information from which Loveless was deliberately excluded. If opposing counsel knows the answer to the question about Commissioner Caldwell's participation, that confirms the *ex parte* communications occurred.

While authoring this initial brief, Loveless still has no answer to the objection made to the inclusion of Commissioner Caldwell in the decision of this case. Commissioner Caldwell was not present at the oral argument and how and when Commission Counsel found out that Commissioner Caldwell had "decided" to participate has been withheld from Loveless. Loveless speculates whether Commission Caldwell even knows he participated in the decision of this case. There is nothing of record to indicate he participated at all.

If there is a separate Code of Ethics for the Members of the State Ethics Commission, Loveless cannot find it.[26] Since the Commissioners sit in an adjudicative capacity, it would make

[26] Pursuant to S. C. Code §8-13-310(F), Commission members may be removed by the governor or legislative house which appointed the member for "malfeasance, misfeasance, incompetency, absenteeism, conflicts of interest, misconduct, persistent neglect of duty or incapacity. . ." There is also a statutory prohibition which prohibits "the Governor, a member of the General Assembly, or anyone who is the subject of a pending investigation or open complaint to contact or attempt to contact, either directly or indirectly, a member of the commission . . . to influence or attempt to influence the outcome of a pending investigation or open complaint." Lastly, the Member of the Commission are likely "public officials" who are also subject to the State Ethics Act, but Loveless is aware of no circumstance where a member of the State Ethics Commission has had a complaint filed against him/her. It's possible, however, because the "public records" of the Commission are largely shielded from public view. The Commission's website provides very little useful information about past or pending cases, advisory opinions or anything else of substance, such as "probable cause" findings. https://ethics.sc.gov/

sense that the Code of Judicial Conduct would prohibit *ex parte* communications. "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of all the parties concerning a pending or impending proceeding." Rule 3(B)(7), CJC, Rule 501, SCACR.

There is, however, a Rule of Professional Conduct which prohibits Commission Counsel from having *ex parte* communications with any member of the Commission. Rule 1.8 was amended effective November 1, 1996 to add the following language:

> In any adversarial proceeding, a lawyer shall not serve as both an advocate and an advisor to the hearing officer, trial judge or trier of fact. A lawyer serving as an advocate in a particular matter shall not directly or indirectly engage in an ex parte communication with the hearing officer, trial judge or trier of fact concerning the proceeding.

(ROA ___ (Supreme Court order).

Throughout these proceedings, Commission Counsel Courtney Laster has been the prosecutor. She has also been adviser to the Commission, wearing both hats.[27] It is evident that Ms. Laster possessed inside information that influenced her to include details about Commissioner Caldwell's absence from the public hearing in her proposed order to the Commission. Additionally, she incorporated a statement indicating that Commissioner Caldwell would participate in the decision, further suggesting the use of insider knowledge. The Chairman of the Commission approved and signed the order drafted by Commission Counsel, seemingly without

[27] Online minutes for Commission meetings reflect that Courtney Laster is usually present for Commission meetings, including those where "probable cause" determinations are made. The minutes do not reflect whether Laster enters into executive session when the Commission votes on probable cause determinations, but that does not appear to be unique to the Commission. In all the District Five Board meetings that counsel has reviewed while handling this matter, the District does not record who enters and leaves Executive Session. The failure to record that information has been an impediment to useful information sought pursuant to the Freedom of Information Act for many years.

the consideration of the *ex parte* information highlighted by Loveless' counsel.[28]

Loveless is not asking the appellate court to sanction Commission Counsel for wearing two hats throughout these proceedings, Courtney Laster, or Commissioner Caldwell, or the Board Chair for violating Rule 1.8(l). Loveless is, however, pointing out, as he has throughout these proceedings, that the methods used by the Commission are erratic, one-sided and prejudicial. Not only does the Commission make up the rules as it goes along, but it also conducts its proceedings completely internally involving someone like Loveless only when it has to.

Loveless has complained about procedural steps throughout this process, and in his objections to the proposed order, he again pointed out one of the continuing themes, and with no response from the Commission. Loveless has been left out of the loop when anything happens at the Commission relative to his case. He usually reads about it in The State Newspaper. A FOIA request in 2023 reflects that the Executive Director emailed pleadings documents to a reporter at The State Newspaper the same date they are put in the United States mail to Loveless' counsel. (ROA ____). No similar courtesy was extended to Loveless' prior counsel, who at the time was out of the country and, with certified mail and restricted delivery affixed, delayed by two weeks Loveless' receipt of the email sent to the State newspaper reporter.[29]

The most mysterious circumstance relates to the Commission's conflicting statements as to when the Commission found probable cause to investigate the matter. Complainant hand-

[28] Loveless assumes his objections to the proposed order were passed along as was requested. If not, the problem is larger than it already appears.

[29] It appears that someone within the Commission offices alerts reporter Bristow Marchant from The State Newspaper that something has been issued before it is ever placed in the United States mail to Loveless' counsel. FOIA responses from the Commission reflect that Marchant emails and asks for a copy of what was just issued. (ROA___). Loveless has been unable to determine how Marchant finds out things that Loveless himself, a party to the proceeding, is not informed of. The service upon Loveless through his counsel via certified mail is all the more disconcerting since Commission staff had been communicating with Loveless via email since September, 2020.

delivered her complaint to the Commission's offices on February 17, 2021.[30] (ROA ---). By letter dated February 23, 2021, the Executive Director advised in a cover letter to Loveless that the "Commission" had found "probable cause" on the same date the complaint was received in its office, *i.e.,* February 17, 2021. (ROA __). However, there was no Board meeting on that date nor before the Executive Director sent the complaint to Loveless on February 23, 2021.

The first Board meeting in 2021 at which "probable cause" determinations were made occurred on January 21, 2021, and the next occurred on March 18, 2021. (Minutes 1.21.2021 and 3.18.2021). The commission received the complaint on February 17, 2021, and by February 23, 2021, mysteriously determined probable cause existed without convening a meeting for that purpose. Loveless has raised this procedural irregularity numerous times, most recently in his objections to the proposed order submitted by Commission Counsel. (ROA - Objections to proposed order). The Commission has <u>never</u> offered an explanation for this anomaly.

When viewed objectively, it almost appears as if the Commission set about to trap Loveless. The chronology of events is troubling.

September 21, 2020: Loveless writes letter to Commission asking for guidance.

September 25, 2020: Commission Counsel responds to Loveless, providing an "informal opinion" that under the hypothetical facts provided by Loveless, his company's contract with a District Contractor would require Loveless to provide notice to the Board Chair.

February 8, 2021: Loveless announces his recusal at a Board meeting. He also pointed out that this potential matter was brought to his attention for the first time on September 14, 2020.

February 11, 2021: District Five Board discusses whether to ask the Commission for an

[30] The complaint was notarized by the receptionist at the Commission's office when the complainant personally delivered her complaint. The Executive Director has explained to Loveless' counsel that this is a "service" provided to the public.

advisory opinion. On February 17, 2021, Commission Counsel responded to the Board chairman and said the Commission could not issue an advisory opinion, but it had reviewed the video of the Board meeting at which the matter was discussed, and stated "the Commission is prohibited from issuing opinions about another person without the authorization from the affected person." No law was cited for this statement, nor can Loveless find any authority that says this.[31]

February 18, 2021: Loveless requests another informal opinion from the Commission.

February 22, 2021: Commission Counsel responds to Loveless stating, *inter alia*, "**You are correct that the ultimate decision to recuse belongs to the public official**." (emphasis added).

February 23, 2021: Commission sends complaint filed by parent to Loveless and opens this investigation against Loveless. This occurred the day after Commission counsel advised Loveless that he was the ultimate decision maker on recusal. We now know, of course, that the complaint was already in the Commission's hands as of February 17, 2021, prior to the February 22, 2021, letter sent to Loveless by Commission Counsel.

It is almost inescapable that the Commission laid a trap for Loveless. On September 25, 2020, Commission Counsel answered Loveless' direct question. Subsequently, however, after having received the complaint from the parent on February 17, 2021, Commission Counsel stated that "recusal is a matter of personal perspective" and did not tell Loveless that the Commission had already received a complaint regarding his conduct. That did not occur until the next day.

[31] This is also contradicted by the Commission's prior issuance of *sua sponte* advisory opinions when no one had asked for the opinion.

## CONCLUSION

The issues discussed in Issue Three will become moot, of course, if the Court agrees with Loveless that the Motion to Dismiss should have been dismissed, and recognizes the *Loper* decision as mandating dismissal of the charges brought against Loveless. The misconduct of the Commission as outlined here is troublesome, to be sure, but the law requires reversal on the law. How the Commission deals with its inability to follow its own mandated procedure or the law need not be answered by this Court once the legal issues raised in Issue One and Issue Two are properly addressed.

Loveless respectfully seeks an order of the appellate court vacating the proceedings before the Commission, which will conclude this matter in its entirety.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON
226 State Street
West Columbia, SC 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

ATTORNEYS FOR APPELLANT

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