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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM STATE ETHICS COMMISSION

Complaint No. 2021-016

Appellate Case No.: 2025-000875

South Carolina State Ethics Commission…..………………………Respondent.

v.

Kenneth B. Loveless……..………………………………………Appellant.

Initial Brief of Respondent

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[1] All Commission advisory opinions issued after 1991 are available at http://ethics.sc.gov. Opinions issued before this date are available at the South Carolina Department of Archives and History.

RE-STATEMENT OF ISSUES ON APPEAL

I. The Commission correctly held that Appellant violated S.C. Code Ann. § 8-13-700(B) when he inserted himself into the inner workings of a contract between the District and Contract Construction, a business with which he was associated.

II. The Commission did not abuse its discretion in denying Appellant's Motion to Admit Additional Evidence pursuant to S.C. Code Ann. Regs. 52-806.

III. Commissioner Caldwell participated in the Commission's Appeal Order in accordance with S.C. Code Ann. Regs. 52-805(D) and the Commission's instruction during appellate arguments.

STATEMENT OF THE CASE

This is an appeal from the State Ethics Commission's finding that Kenneth B. Loveless (Appellant), former trustee in Lexington-Richland School District Five (District), violated S.C. Code Ann. § 8-13-700(B) of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Ethics Act). The above-referenced Complaint was filed on February 17, 2021, alleging, *inter alia*, that Appellant improperly participated in matters related to a contract between the District and a business with which Appellant was associated. (Compl.). Pursuant to S.C. Code Ann. § 8-13-320(10)(c), the Commission's Executive Director determined that the Complaint alleged facts sufficient to constitute a violation of the Ethics Act and ordered an investigation. (Feb. 23, 2021 ltr). In a certified letter dated February 23, 2021, Appellant was notified of the Complaint. (Feb. 23, 2021 ltr). Following the investigation, the Commission issued a Notice of Hearing alleging Appellant violated the Ethics Act, in relevant part, as follows:

> **COUNT ONE 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).
>
> **COUNT TWO 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).
>
> **COUNT THREE 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).

(NOH).

On September 12, 2022, Appellant filed a Motion to Dismiss. The Motion to Dismiss was heard and denied on October 6, 2022.[2] (MTD; Order Denying MTD). On February 16, 2023, the Commission Hearing Panel conducted an evidentiary hearing with Appellant attending and participating. (Hrg.Tr.). In a Decision and Order dated March 24, 2023, the Hearing Panel found Appellant in violation of the Ethics Act as outlined above. (Panel DO). The Panel assessed a civil penalty of $1,750.00 for each count and an administrative fine of $900.00, for a total of $6,150.00. Appellant appealed on April 3, 2023. (Request for Review of DO). The appellate hearing was originally scheduled for January 18, 2024 and was subsequently re-noticed for March 21, 2024. (Notice of Appellate Hearing; Amended NOAH).

On February 20, 2024, Appellant filed a Motion to Admit Additional Evidence. (Motion to Admit). The Commission heard the Motion to Admit on March 21, 2024. (MTA Hrg.Tr.). Following the submission of competing orders by the parties, the Commission denied the Motion to Admit on June 3, 2024. (MTA Hrg.Tr.p.36; May 15, 2024 email-staff's proposed order; May 20, 2024 email-Appellant's proposed order; MTA Order). The appellate hearing was subsequently re-noticed for January 16, 2025. (Second Amended NOAH). Following the appellate hearing, the parties submitted competing orders for the Commission's consideration. (App.Hr.Tr.pp.41-44;

[2] The hearing and the issuance of the resulting order occurred on October 6, 2022 due to a series of motions to expedite and reschedule filed by Appellant in which he specifically requested a ruling by October 7, 2022 due to S.C. Code Ann. § 8-13-320(9)(b)(2), which prohibits the Commission from taking action on a complaint within thirty days of an election. (Motion to Reschedule; Order Denying MTR; Motions to Expedite; Orders Denying MTE; Order Granting MTE). Given the timeline, the parties agreed to submit competing orders prior to the October 6, 2022 hearing. (Oct. 3, 2022 email from Executive Director to parties regarding submission of MTD orders; Oct. 6, 2022 email submitting staff's proposed MTD order; Oct. 6, 2022 email submitting Appellant's proposed MTD order).

Mar. 3, 2025 email-staff's proposed order; Mar. 3, 2025 email-Appellant's proposed order; Mar. 14, 2025 email-staff's final proposed order). The Commission affirmed the Hearing Panel's Decision and Order on March 31, 2025. (Appeal Order). Appellant filed his Notice of Appeal with this Court on April 30, 2025.

FACTS

Appellant served on the District Board of Trustees (Board) from 2018-2022. (Hrg.Tr.pp.9, 49, 115). Professionally, Appellant has owned and operated Loveless Commercial Contracting (Loveless) for over thirty-five (35) years. (Hrg.Tr.pp.47, 50-51, 75-76, 116-17, 146-48). At all times relevant, Appellant has served as President and has personally carried the line of credit for Loveless. (Hrg.Tr.pp.146-48).

On December 19, 2018, the District entered into a contract (PWES Contract) with Contract Construction, LLC (Contract Construction) to build Piney Woods Elementary School (PWES). (Hrg.Ex.C6; Hrg.Ex.C9; Hrg.Tr.pp.11, 27-29, 45-46, 51, 119). At all times relevant, Greg Hughes (Hughes) was the President of Contract Construction. (Hrg.Tr.pp.52, 64). Thereafter, on or about March 12, 2020, Contract Construction hired Loveless to perform work on a South Carolina Law Enforcement Division (SLED) Forensic Services Laboratory (Lab) being built in Columbia, SC. (Hrg.Tr.pp.96-97, 129; Hrg.Ex.C5). The contract between Loveless and Contract Construction was signed by Appellant. (Hrg.Ex.C5; Hrg.Tr.pp.60-61, 99, 128-29).

On March 24, 2020, while engaged in the aforementioned financial relationship with Contract Construction, Appellant submitted a letter to the District Superintendent raising perceived problems with the construction of PWES and criticizing the terms of the District's contract with Contract Construction. (Hrg.Tr.pp.30-32, 38-41, 52-53, 130-32; Hrg.Ex.C1). Appellant requested "action and a reply on these matters within the next two weeks." (Hrg.Ex.C1; Hrg.Tr.pp.30-31).

During a June 15, 2020, District Board meeting, Hughes appeared before the Board to provide a progress report on the PWES Contract. (Hrg.Ex.C1-C2). Following the report, Appellant questioned Hughes and District consultant Dan Neal (Neal) about contract change orders and owner/contractor contingencies within the PWES Contract. (Hrg.Ex.C1-C2). Another Board member questioned Hughes and Neal about Respondent's March 24, 2020 letter and the issues raised therein. Appellant thereafter continued to engage in discussion on the subject. (Hrg.Ex.C2: 13:03-14:41; 22:50-23:11; 28:15-29:45).

In a subsequent District Board meeting held on September 14, 2020, Contract Construction provided an additional progress report on the PWES Contract to the Board. (Hrg.Ex.C3-C4). Other Board members again questioned Hughes about the issues raised in Appellant's March 24, 2020 letter. (Hrg.Ex.C3-C4). Board member Ed White also addressed Appellant's affiliation with Contract Construction and questioned whether Appellant should be participating in matters related to Contract Construction given that relationship. (Hrg.Ex.C3-C4). Appellant continued to engage in discussion about Contract Construction's performance under the PWES Contract, specifically questioning Hughes and others about the cost of soil and concrete work at PWES. Hughes replied, in relevant part, as follows:

> . . . I don't have any problem with the questions. And we're going to give you the best facility you've had, and it will be under budget. And I do want to speak to Mr. Loveless' abilities as a contractor. He is doing a fantastic job on the project we're working together on. He was selected for his qualifications and doing a fantastic job. And there's similar type issues out there, but they're minor in the scheme of things. And we're pleased with what he's doing for us.

(Hrg.Ex.C4, 0:00-2:00; 7:45-8:50; 15:01-27:06; 53:00-1:01:39; 1:09:00-1:16:31).

Appellant subsequently requested guidance from Commission staff as to whether he should recuse himself from matters associated with Contract Construction. (Hrg.Ex.C5). On September

25, 2020, Commission staff advised that Appellant should recuse himself from any matters related to Contract Construction. (Hrg.Ex.C5). On February 8, 2021, Appellant submitted a letter to the District's Board Chair acknowledging his business relationship with Contract Construction and stating that he would recuse himself from all matters related to Contract Construction. (Hrg.Ex.C7). On February 18, 2021, Appellant sought additional guidance from Commission staff regarding his responsibilities under the Ethics Act. (Feb. 22, 2021 Informal Op.). Additional guidance was provided on February 22, 2021. (Feb. 22, 2021 Informal Op.).

Following the evidentiary hearing, the Hearing Panel found Contract Construction was a "business with which [Appellant was] associated" and that Appellant was therefore required to recuse himself from any matter in which Contract Construction had an economic interest, to include the PWES Contract. (Panel DO). More specifically, the Hearing Panel found that Appellant violated S.C. Code Ann. § 8-13-700(B) of the Ethics Act by (1) writing the March 24, 2020 letter to the District Superintendent in which he demanded action be taken; (2) participating in the June 15, 2020 Board discussion regarding Contract Construction's progress and performance under the PWES contract; and (3) participating in the September 14, 2020 Board discussion regarding Contract Construction's progress and performance under the PWES contract. (Panel DO).

On appeal, the full Commission affirmed the Hearing Panel's Decision and Order, finding Appellant was prohibited from "insert[ing] himself into the inner workings of the contract between the District and Contract Construction." (Appeal Order). In so finding, the Commission relied on (1) the statutory text of S.C. Code Ann. § 8-13-700(B) and (2) similar interpretations rendered by prior Commissions, the Attorney General's Office, the Senate Ethics Committee, and the House

Ethics Committee.[3] (Appeal Order). The Commission further found Appellant in violation of S.C. Code Ann. § 8-13-700(B) by his own admission because of his repeated insistence that he was obligated to write the letter and engage in the Board discussions pursuant to District policy and Title 59 of the South Carolina Code of Laws, both of which required him to take actions – i.e., "provide schoolhouses" and to "take care of, manage and control the school property of the district." Citing the Preamble to the Ethics Act, the Commission concluded that any other interpretation of S.C. Code Ann. § 8-13-700(B) would lead to the absurd result of allowing public officials "to be involved in literally every aspect of a matter that implicated their own economic interests as long as they recused themselves when it came to a formal vote." (Appeal Order).

STANDARD OF REVIEW

Panel hearings before the Commission are conducted pursuant to the Administrative Procedures Act (APA). See S.C. Code Ann. § 8-13-320(10)(j) ("A panel of three commissioners must conduct a hearing in accordance with [the APA], except as otherwise expressly provided."). Following a Panel Hearing, "a respondent may apply to the [C]ommission for a full [C]ommission review of the decision made by the [C]ommission panel." S.C. Code Ann. § 8-13-320(10)(m). "The review must be made on the record established in the panel hearings." S.C. Code Ann. § 8-13-320(10)(m). A full Commission review is the final disposition of the complaint before the Commission. Id.

Appeals from the Commission are to the South Carolina Court of Appeals. Id. The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5):

> The reviewing court may not substitute its judgment for the

[3] The Commission is statutorily required to "consider its previous opinions as well as relevant opinions issued by either legislative ethics committee in an attempt to create uniformity among the bodies." S.C. Code Ann. § 8-13-320(11)(a).

> judgment of the [Commission] as to the weight of the evidence on questions of fact. The court may affirm the decision of the [Commission] or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. <u>Grant v. Grant Textiles</u>, 372 S.C. 196, 641 S.E.2d 869 (2007). However, when the issue on review raises a question of statutory interpretation, the court may reverse when the Commission's decision is in violation of a statutory provision or is affected by an error of law. <u>Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue</u>, 399 S.C. 313, 731 S.E.2d 869 (2012); <u>Chapman v. S.C. Dep't of Soc. Servs.</u>, 420 S.C. 184, 801 S.E.2d 401 (Ct. App. 2017).

Courts may not automatically give binding deference to agency interpretations. <u>Colonial Pipeline Co. v. S.C. Dep't of Revenue</u>, 443 S.C. 448, 905 S.E.2d 129 (Ct. App. 2024) (citing <u>Loper Bright Enterprises v. Raimondo</u>, 603 U.S. 369. 144 S.Ct. 2244 (2024)). However, courts "may look to agency interpretations for guidance," <u>Chavez v. Bondi</u>, 134 F.4th 207, 213 (4th Cir. 2025), and are encouraged to "exercis[e] independent judgment . . . consistent with the 'respect' historically given to Executive Branch interpretations." <u>Colonial</u>, 443 S.C. at 460, 905 S.E.2d at 134-35).

ARGUMENTS

I. **The Commission correctly held that Appellant violated S.C. Code Ann. § 8-13-700(B) when he inserted himself into the inner workings of a contract between the District and Contract Construction, a business with which he was associated.**

The issue presented to this court is whether S.C. Code Ann. § 8-13-700(B) allows a public official, in the discharge of his official responsibilities, to insert himself into the inner workings of a contract when he has an imputed economic interest in the contract.[4] As discussed herein, such conduct must be prohibited if the Ethics Act, and public confidence in elected officials, are to be preserved.

Section 8-13-700(B) of the Ethics Act 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, a family member, an individual with whom he is associated, 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 which affects an economic interest of himself, a family member, an individual with whom he is associated, or a business with which he is associated shall:
>
> (1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;
>
> . . .
>
> (4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body of an agency, commission, board, or of a county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest

[4] "Section 8-13-700(B) of the Ethics Act imputes to the public [official] the economic interests of a . . . business with which the public [official] is associated." Kelly J. Golden, South Carolina Government Ethics – A Guide to the Ethics Reform Act of 1991, 163 (S.C. Bar 1999)

exists and shall cause the disqualification and the reasons for it
to be noted in the minutes.

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). However, courts will reject a statutory interpretation which would lead to a result so plainly absurd that it would defeat the legislative intention. Jones v. State Farm Mut. Auto Ins. Co., 364 S.C. 222, 612 S.E.2d 719 (Ct. App. 2005); see also Stone Mfg. Co. v. S.C. Empl. Sec. Comm'n, 219 S.C. 239, 64 S.E.2d 644 (1951) ("Statutes must be so construed, if possible, that absurdity and mischief may be avoided."). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Jones, 364 S.C. at 230, 612 S.E.2d at 723.

"The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Id. at 230; 612 S.E.2d at 722. A court should not consider a particular clause in a statute in isolation but should read it in conjunction with the purpose of the entire statute and the policy of the law. See S.E. Toyota Distrib., LLC v. Jim Hudson Superstore, Inc., 387 S.C. 508, 693 S.E.2d 33 (Ct. App. 2010); S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc, 397 S.C. 256, 725 S.E.2d 480 (2012) (finding a "regulation must be construed as a whole rather than read in its component parts in isolation"); Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 626 S.E.2d 6 (2005) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose.").

Appellant argues that S.C. Code Ann. § 8-13-700(B) only prohibits public officials from

taking votes or making decisions. (App.Br.). Appellant maintains that he has not violated S.C. Code Ann. § 8-13-700(B) because he simply "wrote a letter" and "participated in discussions" related to Contract Construction's progress and performance under the PWES Contract. (App.Br.). Appellant further argues the Commission has improperly interchanged the words "deliberations" and "discussions," and that discussions which "do not lead to an action or decision" are not prohibited.[5] (App.Br.). As explained herein, the Commission properly interpreted S.C. Code Ann. § 8-13-700(B) in accordance with the plain language of the statute. Furthermore, Appellant's interpretation cannot prevail because it would eviscerate the Ethics Act and lead to an absurd result not intended by the General Assembly.

As the Commission has correctly noted, S.C. Code Ann. § 8-13-700(B) provides that if there is a "governmental decision" in which a public official has an imputed economic interest, then he is obligated to recuse himself from any "votes, deliberations, and other actions *on the matter*," i.e., the governmental decision at issue.[6] (emphasis added). Here, the governmental

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[5] Appellant also argues that S.C. Code Ann. § 8-13-700(B)(4) applies "only to the *presiding officer* and not to the supposedly-conflicted public official." (emphasis in original). (App.Br.p.9). Initially, this argument is not preserved for review because it was not raised to or ruled upon by the Commission. See Carson v. S.C. Dep't of Nat. Resources, 371 S.C. 114, 638 S.E.2d 45 (2002) (issues not raised to and ruled on by agency are not preserved for review). Moreover, to the extent another person can physically force a public official to recuse himself, the plain language of the statute provides that such a requirement only comes into effect *after* the public official identifies the nature of his conflict of interest, which should have, but did not, occur in this case. See Hodges, supra.

[6] Appellant's brief references SEC AO2000-011 numerous times, arguing it should not have been relied on by the Commission because it was subsequently withdrawn via SEC AO2020-002. (App.Br.pp.5, 12-13). SEC AO2000-011 is just one of multiple advisory opinions cited for the same holding. See SEC AO92-072; SEC AO2000-004; footnote 7, infra. Thus, to the extent there was an error in citing to SEC AO2000-011, it was harmless. See State v. Miller, 367 S.C. 329, 626 S.C. 329 (2006)("Error is harmless when it could not have reasonably affected the result…"). Appellant also misconstrues two (2) other Commission advisory opinions, SEC AO2003-002 and SEC AO2020-002, that are rooted in the "large class" exception to the recusal requirement which is inapplicable to the case at bar. (App.Br.p.13). In any event, in accordance with Loper Bright, this court is not required to give any particular opinion weight and can affirm the Commission's decision based on its own reading of the statute.

decision at issue was the District's decision to contract with Contract Construction. (Appeal Order, p.8). Under S.C. Code Ann. § 8-13-700(B), Appellant was therefore prohibited from participating in any "votes, deliberations, and other actions" with regard to the PWES Contract. When Appellant inserted himself into the inner workings of the contract by demanding action from the Superintendent and engaging in the aforementioned Board discussions, he participated in "votes, deliberations, [or] other actions." Such conduct is prohibited under the plain statutory language, clear legislative intent, and longstanding interpretations[7] of S.C. Code Ann. § 8-13-700(B).

Although Appellant urges this court to separate the two sentences that comprise subsection (B), the "court should not consider a particular clause in a statute in isolation." Toyota, 387 S.C. at 514, 693 S.E.2d at 36. Rather, the court must consider "the language of the statute as a whole . . ." Floyd, 367 S.C. at 260, 626 S.E.2d at 10. Reading subsection (B) as a whole, the only reasonable conclusion is that public officials are prohibited from participating in "governmental decisions" when they have an imputed economic interest. In such instances, public officials must recuse themselves from any "votes, deliberations, and other actions on the matter." Thus, the plain

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[7] While the court is not required to give agency interpretation deference, it may use such interpretations as guidance. Chavez, supra. In that regard, it seems telling that all entities tasked with interpreting the Ethics Act have issued similar findings: See e.g. SEC AO77-020 ("[i]f, in the discharge of your duties as President, a matter comes before you which would substantially affect directly the Bank, you would be required by the Act to prepare a written disclosure of this potential conflict of interest and submit same to the College Board. You would also be required to remove yourself from any control or influence over the matter."); Op. S.C. Atty. Gen., 1983 WL 142684 (April 28, 1983) (advising a public official to abstain from discussion and voting on matters affecting his institution); SEC AO83-054 ("any matters coming before the county commissioners which would affect directly and substantially the financial interests of that person as a school employee, he would be required to follow those procedures."); Op. S.C. Atty. Gen., 1984 WL 249858 (April 12, 1984) (prohibiting public officials from taking action "either indirectly or directly" which would involve "both taking part in any votes dealing with such practices *or any discussions and deliberations concerning such practices*.") (emphasis added); SEC AO90-016 (advising a public official whose spouse is a subcontractor for a business which contracts with the official's agency against participating in deliberations or votes on matters affecting such contract); Senate Ethics Committee, AO92-11 (finding it "clear that the restrictions on the activities of a member are much broader than merely prohibiting a vote on a matter"); House Ethics Committee, AO2018-12 (prohibiting a member from "advocating" for the legislative agenda of a business with which the member was associated).

language of S.C. Code Ann. § 8-13-700(B) prohibited Appellant from participating in any "votes, deliberations, and other actions" with regard to the PWES Contract.

Appellant also urges the court to find that he only engaged in "discussions," which are distinct from "deliberations." (App.Br.). Appellant contends that in order for "discussions" to be prohibited under S.C. Code Ann. § 8-13-700(B), they must be attendant to, or in anticipation of, a vote or decision.[8] (App.Br.). As an initial matter, Black's Law Dictionary (12th ed. 2024) defines "deliberate," in relevant part, as "to weigh, ponder, *discuss*, regard upon, consider." (emphasis added). Merriam-Webster defines "discussion," in relevant part, as "consideration of a question in open and usually informal debate." Merriam-Webster.com Dictionary, https://www.merriam-webster.com/discussion (last accessed Sept. 23, 2025). Both terms denote consideration and conversation about a specific topic, regardless of whether a vote or decision is imminent.

Under Appellant's interpretation, he could have routinely used Board meetings and the trappings of his office (as when he demanded action from the Superintendent citing specific Board policies authorizing him to do so) to encourage his fellow Board members to amend the PWES Contract to terms more favorable to Contract Construction. Then, once the remaining Board members were persuaded by his reasoning, the matter could be placed on the agenda and, as long as Appellant recused himself from the formal vote, there could be no violation. This is an absurd and disturbing interpretation.

Appellant's interpretation also overlooks the definition of "action," which encompasses all manner of activities. See Black's Law Dictionary (12th ed. 2024) (defining "action," in relevant

[8] Appellant does not articulate how close in time the vote or decision must be to the discussion for S.C. Code Ann. § 8-13-700(B) to apply. Is the discussion permitted as long as a vote does not occur within an hour? By the end of the meeting? By the end of a series of meetings? Although unclear, the remainder of this response rests on the assumption that Appellant is suggesting that the vote or decision must occur by the end of a meeting.

part, as "the process of doing something; conduct or behavior"). Throughout these proceedings, Appellant has maintained that he was duty-bound to demand action from the Superintendent and engage in the aforementioned discussions. (MTD Hrg.Tr.pp.16-17; Hrg.Tr.pp.122-23; Bowers Answer; Appellant's full Comm'n Brief,p.9; MTD Reply, p.8). As noted by the Commission, "it is difficult to imagine how [Appellant] can argue that he was engaged in these legal and policy mandated *actions* (ensuring, caring for, managing, and controlling) while also somehow arguing he was not engaged in any 'action' in his official capacity under Section 8-13-700(B)." (emphasis in original). (Appeal Order, p.10).

Appellant's interpretation reduces the Ethics Act to an empty formality, allowing open advocacy of (and interference in) a contract in which he has an economic interest as long as the public official's actions are not accompanied by an official vote or decision. This reading also undermines the General Assembly's intent to ensure public officials are removed from any "decision, vote, or process" in which they have an imputed economic interest, as described in the Preamble to the Ethics Act:

> Whereas, one of the most important functions of any law aimed at making public servants more accountable is that of complete and effective disclosure. Since many public officials serve on a part-time basis, it is inevitable that the conflicts of interest and appearances of impropriety will occur. Often these conflicts are unintentional and slight, but at every turn those who represent the people of this State must be certain that it is the interests of the people, and not their own, that are being served. Officials should be prepared to remove themselves immediately from a decision, vote, or process that even appears to be a conflict of interest

<u>See</u> <u>Bunch v. Cobb</u>, 273 S.C. 445, 257 S.E.2d 225 (1979) (relying on preamble to discern legislative intent).

The plain language of S.C. Code Ann. § 8-13-700(B) is clear and unambiguous, yielding only one possible interpretation: when a conflict of interest exists due to an imputed economic

interest, a public official discharging his official responsibilities is required to recuse himself from "votes, deliberations, and other actions on the matter." Here, Contract Construction, a business with which Appellant was associated, had an economic interest in the PWES Contract.[9] Thus, Appellant was prohibited from inserting himself into the contract's inner workings by demanding action from the Superintendent and engaging in the aforementioned Board discussions. The Commission has correctly interpreted S.C. Code Ann. § 8-13-700(B) throughout these proceedings. Accordingly, the court should affirm the Commission's decision because it was not made in violation of any statutory provision, nor was it affected by an error of law. Alltel, supra; Chapman, supra.

II. The Commission did not abuse its discretion in denying Appellant's Motion to Admit Additional Evidence pursuant to S.C. Code of Regs. 52-806.

In August 2023, prior to appellate arguments, the Office of the Inspector General (OIG) issued a report related to the District's procurement processes during the construction of PWES. (MTA Ex.A). According to the report, it covered activities occurring from November 2016 through November 2022. (MTA Ex.A). On January 23, 2024, Appellant submitted a Freedom of Information Act (FOIA) request to the Commission seeking any documents exchanged between the OIG and the Commission "relating to [Appellant] and/or his matter pending before the [Commission]." (Appellant's FOIA request). In response, the Commission's Executive Director provided Appellant with emails dated February 17, 2023 and February 21, 2023. (FOIA Response to Appellant). Within this short exchange, an OIG employee sought an audio recording of

[9] Appellant has not appealed the Commission's finding that Contract Construction is a business with which he is associated pursuant to S.C. Code Ann. § 8-13-100(4), nor has he appealed the Commission's finding that Contract Construction had an economic interest in the PWES Contract pursuant to S.C. Code Ann. § 8-13-100(11). Accordingly, these findings are the law of the case. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

Appellant's February 16, 2023 public hearing, as well as any available exhibits. (FOIA Response to OIG). The Executive Director responded by advising the OIG employee how to retrieve the audio recording. (FOIA Response to OIG). This is the extent of the "collaboration" of which Appellant complains.

On February 20, 2024, Appellant filed a Motion to Admit Additional Evidence (Motion to Admit), seeking to add the OIG report to the record established before the Hearing Panel and further seeking to engage in additional discovery by issuing the following subpoenas: (1) to the OIG, for any and all documents transmitted to Representative Jay Kilmartin on October 19, 2023; (2) to the OIG, for the deposition of Inspector General Brian D. Lamkin; (3) to the Commission's Executive Director, for any and all documents sent to or received from the OIG and a list of Commission employees allegedly interviewed by the OIG; and (4) to Thomas William McGee, III, attorney for Contract Construction, for all documents provided by Greg Hughes to the OIG. (MTA).

In his motion, Appellant argued that the OIG report and the additional discovery sought could be relevant because it involved the construction of PWES. (MTA). In support of his argument, Appellant relied on S.C. Code Ann. § 1-23-320(G)(1)-(2), which provides that the "record in a contested case must include all pleadings, motions, intermediate rulings, and depositions; and evidence received or considered." (Reply—MTA). Appellant contended the information sought could constitute "evidence received or considered by the Commission." (Reply—MTA).

The Commission, adopting the standard set forth in Brown v. Peopleplease Corp., 402 S.C. 476, 741 S.E.2d 761 (Ct. App. 2013), denied Appellant's Motion to Admit, finding the proposed additional evidence was not material because it did not present a reasonable probability of a

different outcome. (Order Denying MTA). Specifically, the Commission found that there was nothing in the proposed evidence indicating that Appellant did not violate the Ethics Act. (Order Denying MTA). The Commission further found that any fact relied upon by the OIG could have been uncovered by Appellant because he had the opportunity to engage in discovery and, in fact, had availed himself of that opportunity by issuing numerous subpoenas and conducting several depositions. (Order Denying MTA). Finally, the Commission found Appellant's reliance on S.C. Code Ann. § 1-23-320(G) was misplaced because it applied only to the fact-finder, which was the Hearing Panel.[10] (Order Denying MTA).

Appellant now argues the Commission erred in denying his Motion to Admit. (App.Br.pp.17-20). In support of this argument, Appellant attacks the authority of the OIG, criticizes the way the OIG handles FOIA requests, and appears to accuse the OIG of illegally conducting interviews and destroying records in its possession. (App.Br.pp.17-20). Appellant concludes that he should have been permitted to explore whether there was "inappropriate communication between agents of the [Commission] and the OIG such that [Appellant's] procedural due process rights may have been infringed by flaws in these proceedings." (App.Br.p.20). As explained herein, the court should disregard Appellant's argument and find the Commission did not abuse its discretion in denying his Motion to Admit.

S.C. Code Ann. Regs. 52-802(D) provides:

> A. When additional evidence is necessary for the completion of the record in a case on review, the Commission may, in its discretion, order such evidence taken before a single commissioner or panel.
>
> B. A party seeking to admit additional evidence into the record shall file a motion and affidavit with the Commission.

[10] Notably, Appellant has never alleged that any Commissioner had contact with the OIG. To the contrary, Appellant has stated that the alleged "tomfoolery" involved Commission staff and not the Commissioners. (MTA Hrg.Tr.p.34 "I don't mean you guys, I mean the staff handling this thing.").

Two factors should be considered when ruling on an application for additional evidence: (1) the materiality of the proposed additional evidence; and (2) the existence of a good reason for the failure to introduce such evidence at the original hearing. See Brown, supra; see also Wright v. Strickland, 306 S.C. 187, 410 S.E.2d 596 (Ct. App. 1991) (denying motion where moving party did not proffer any testimony or show that the evidence could make any difference to the outcome of the case and sought only to "embark on a fishing expedition."). Where the application concerns factors which are not "necessary and material" to the determination, the application should be denied. Byers v. S.C. Alcoholic Beverage Control Comm'n, 305 S.C. 243, 407 S.E. 653 (1991). Material evidence is that which would present a reasonable possibility of a different outcome. See DeHart v. SCDHHS, No. 98-ALJ-08-0096-AP, 1998 WL 682496 (S.C. Admin. L. Ct. Sept. 14, 1998). The party challenging a discretionary ruling has the burden of showing a clear abuse of discretion, which arises when a ruling is controlled by an error of law or, when based upon factual conclusions, is without evidentiary support. Cloyd v. Mabry, 295 S.C. 86, 367 S.E.2d 171 (Ct. App. 1988); State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006).

As an initial matter, Appellant cites no authority for his due process claim aside from a passing reference to a lone case involving civil asset forfeiture, and he makes no attempt to apply that case to the matter at hand. (App.Br.p.20). Thus, his argument is deemed abandoned and is not preserved for this court's review. In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (finding issue not preserved for appellate review where there was only a single conclusory reference to a due process claim); First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (considering an issue abandoned because the appellant failed to provide pertinent argument or supporting authority); State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999) (finding a single reference to cases without discussion of the decisions or the applicability to the case was

conclusory and constituted an abandonment of appellant's reliance on those cases). Furthermore, Appellant's due process argument was not raised to and ruled upon by the Commission, similarly making the argument unpreserved for appellate review. See Carson, supra (issues not raised to and ruled on by agency are not preserved for review) (emphasis added); Kiawah Resort Assoc. v. S.C Tax Comm'n, 318 S.C. 502, 458 S.E.2d 542 (1995) (appellant should seek reconsideration or request a rehearing when agency fails to rule on an issue); Rhame v. Charleston County Sch. Dist., 412 S.C. 273, 772 S.E.2d 159 (2015) (finding the APA allows motions for rehearing in all administrative agencies).

Moreover, the Commission did not abuse its discretion in denying the Motion to Admit because Appellant failed to demonstrate how the information sought was "necessary and material" to the Commission's determination that he violated the Ethics Act.[11] Byers, supra; Brown, supra. There was no indication in the proposed evidence that Appellant did not violate the Ethics Act, nor has Appellant alleged that any of the information sought would have led to such a determination. (MTA; MTA Reply). To the contrary, Appellant has acknowledged that the OIG report was unrelated to him. See MTA Hrg. Tr.p.13 ("the interesting thing about it is, the report of the OIG has nothing to do with [Appellant]. It's a recommendation as to what [the District] should do with its procurement code going forward."). Accordingly, the court should find the

[11] It is difficult to argue against Appellant's due process claim because it lacks both specific legal authority and legal analysis. To the extent Appellant is arguing his due process rights were violated because of an alleged bias on the part of the Hearing Panel as a result of the alleged interactions between the OIG and the Commission, the argument must fail because he has failed to show actual bias, rather than mere potential for bias. See Felder v. Charleston County School Dist., 327 S.C. 21, 489 S.E.2d 191 (1997) (finding where judge's impartiality is challenged because of ex parte communication, reversal is mandated only where there is evidence of judicial prejudice). In addition, even if Appellant's due process rights were somehow violated, the full Commission's review of the matter cured any alleged violation. See Ross v. Med. Univ. of S.C., 328 S.C. 51, 492 S.E.2d 62 (1997) (finding harmless error where another body independently reviewed the record of the committee hearing, heard oral arguments from both parties, and conducted its own deliberations").

Commission did not abuse its discretion in denying the Motion to Admit.

III. Commissioner Caldwell participated in the Commission's Appeal Order in accordance with S.C. Code Ann. Regs. 52-805(D) and the Commission's instruction during appellate arguments.

Appellant argues Commissioner Bryant S. Caldwell was prohibited from participating in the Appeal Order because he was not present during appellate arguments. (App.Br.pp.20-27). Appellant further argues that the undersigned must be privy to "insider knowledge" because Commissioner Caldwell's participation was included in Commission staff's proposed Appeal Order. (App.Br.pp.20-27). Appellant goes on to make several unsubstantiated accusations about the undersigned and lodges numerous baseless condemnations at the Commission without even attempting to weave them into a legal analysis.[12] (App.Br.pp.20-27).

As an initial matter, none of the issues raised in this portion of Appellant's brief are preserved for appellate review because they were not ruled upon by the Commission and he failed to file a petition for rehearing. See Carson, supra; Kiawah, supra; Rhame, supra; Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) (finding if an issue is raised, but not ruled upon, the party who raised the issue must file the appropriate post-trial motion to preserve the issue for appellate review); Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) (same).

Moreover, the Chairman explicitly advised the parties during appellate arguments that the Commission would "take arguments under advisement and issue an order in accordance with Sections 52-805 and 52-806 of the South Carolina Code of Regulations." (App.Hrg.Tr.p.4). Section 52-805(D) provides that if a Commissioner is unable to appear for an appellate argument, he "may cast his vote on the record." In accordance with the Chairman's announcement and the

[12] One of Appellant's more misleading arguments is that the Commission somehow "laid a trap" for Appellant. (App.Br.p.26). This is a factual impossibility given that all of Appellant's improper conduct occurred prior to his first contact with the Commission.

applicable regulation, staff's proposed order noted the absent Commissioner's participation. (Mar. 14, 2025 staff's final proposed appellate order). Based on the Appeal Order subsequently signed by the Chairman, Commissioner Caldwell ultimately participated in the decision. (Appeal Order).

In sum, Appellant's argument is replete with factual misrepresentations and speculative narratives that more closely resemble conspiracy theories than legal arguments.[13] Speculation is not a substitute for legal analysis, nor does the repetition of unfounded accusations turn them into actual fact. Appellant's argument here is another attempt to distract and deflect from his own conduct. Respectfully, this court should view it as such and find that Commissioner Caldwell participated in accordance with the S.C. Code Ann. Regs. 52-805(D) and the Chairman's announcement during appellate arguments.

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[13] For example, Appellant devotes several paragraphs to the Commission's probable cause finding, incorrectly stating that Respondent was advised in a February 23, 2021 letter that the Commission had found "probable cause" to believe he had violated the Ethics Act. This is wrong. The Commission's February 23, 2021 letter advised Respondent that a "*facts sufficient*" determination had been made. (Feb. 23, 2021 ltr.). "Probable cause" and "facts sufficient" are distinctly defined terms and there was no mention of probable cause in the letter referenced by Appellant. <u>See</u> S.C. Code Ann. Regs. 52-203(B)(6) and (12).

In another example, Appellant quotes the undersigned as stating "recusal is a matter of personal perspective" in a February 21, 2021 informal opinion. A simple reading of that letter reveals no such thing. Rather, the correspondence states, "[Y]ou are correct that the ultimate decision to recuse belongs to the public official. If a public servant fails to properly recuse himself from circumstances that require recusal, that public servant subjects himself to a possible enforcement action by the Commission." (Feb. 21, 2021 Informal Op.).

In yet another example, Appellant accuses the undersigned of having *ex parte* communications with the Commission because "there had been several occasions when it appeared that the orders signed by the Commission appeared to be drafted by Commission Counsel." (App.Br.p.21). The record reflects that Appellant suggested the parties submit competing proposed orders at every stage of these proceedings. (Hrg.Tr.p.149-150; MTA Hrg. Tr., 36:20-23; App.Hrg.Tr.pp.41-44). It is disingenuous to feign outrage when the resulting order is the same or similar to one of the proposals. Appellant also states, "the Chairman signed the proposed order submitted by Commission counsel without edits" and claims the Commission "completely ignored" <u>Loper Bright</u>. (App.Br.p.14, 21). A simple comparison of the two documents shows this to be false, as staff's proposed Appeal Order contained no mention of <u>Loper Bright</u>, but the final Appeal Order dis. (Appeal Order). For additional discussion regarding competing orders, see footnote 2, <u>supra</u>.

CONCLUSION

For all the reasons outlined herein, the decision of the Commission should be affirmed. In addition, the undersigned respectfully asks that the Court affirm for any reason appearing in the record pursuant to Rule 220(c), SCACR.

Respectfully submitted,

s/Courtney M. Laster________________
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