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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No.: 2015-000514

Hugh Allen Palmer.....Appellant,

v.

Richland County Assessor .....Respondent.

**PETITION FOR REHEARING**

Hugh Allen Palmer (“Appellant”) hereby petitions this Court pursuant to Rule 221(a), SCACR, for rehearing of the Court’s approval of the Motion to Dismiss of Richland County Assessor (“Respondent”) by Order filed on May 18, 2015. The basis of this Petition is that the Court misconstrued Administrative Law Court (“ALC”) Rule 29(D), concerning any “Motion for Reconsideration” before the ALC, as automatically denying Appellant’s “Motion for Rehearing” before the ALC. However, motions for rehearing are distinct from motions for reconsideration, and are therefore not automatically denied by ALC Rule 29(D). Furthermore, to the extent that ALC Rule 29(D) could arguably be read to encompass motions for rehearing, the Rule as presently written is patently ambiguous and therefore should not be used to deprive Appellant of his right to appeal the present matter.

As a starting point, Appellant filed both a “motion to alter or amend” the underlying ALC decision “or, in the alternative, for a rehearing of the same.” Accordingly, the legal issue raised in the Court’s May 18, 2015 Order is whether ALC Rule 29(D) applies to both of Appellant’s motions, in which case Appellant’s present appeal was untimely, or whether ALC Rule 29(D) only applies to Appellant’s motion to alter or amend, in which case Appellant’s appeal was timely, since the South Carolina Supreme Court has conclusively held that the South Carolina Administrative Procedure Act provides for a right to request a rehearing, *see Rhame v. Charleston County School District*, 2015 WL 1814019, \*3 (April 22, 2015), and Appellant’s motion for rehearing therefore tolled the deadline to appeal until that motion was ruled upon by the ALC, see Rule 203(b), SCACR.

The answer to this legal question is perhaps deceptively clear, since ALC Rule 29(D) specifically states that it applies only to “motions to alter or amend.”

**Motion for Reconsideration.** Any party may move for reconsideration of a final decision of an administrative law judge in a contested case to alter or amend the final decision, subject to the grounds for relief set forth in Rule 59, SCRCP, as follows:

(1) Within ten (10) days after notice of the order concluding the matter before the administrative law judge, a party may move for reconsideration of the decision, provided that a notice of appeal from the decision has not been filed. The opposing party may file a response to the motion within ten (10) days of the filing of the motion.

(2) The administrative law judge shall act on the motion for reconsideration within thirty (30) days after it is filed if an opposing party does not file a response or within thirty (30) days after an opposing party files a response. If no action is taken by the administrative law judge within the applicable period, the inaction shall be deemed a denial of the relief sought in the motion.

(3) The filing of a motion for reconsideration shall not stay the order of the administrative law judge or excuse or delay compliance with the order of the administrative law judge.

(4) The time for appeal for all parties shall be stayed by a timely motion for reconsideration, and shall run from receipt of an order granting or denying such motion. If no order is filed regarding the motion, the time for appeal shall begin to run thirty (30) days from the date the motion is deemed denied pursuant to subsection (D)(2).

The filing of a motion for reconsideration is not a prerequisite to filing a notice of appeal from a final decision of an administrative law judge.

ALC Rule 29(D) (bold in original and underline added for emphasis).

In addition to expressly limiting itself to a request “to alter or amend the final decision,” ALC Rule 29(D) uses the alternate vernacular of “motions for reconsideration.” To that end, “motions for reconsideration” have a long history of being equated specifically with “motions to alter or amend” as provided in Rule 59(e), SCRPC, which in turn are distinct from “motions for rehearing” as provided in Rule 59(a), SCRPC. *See Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004) (“A motion under Rule 59(e) long has been viewed as ‘motion for reconsideration’ despite the absence of those words from the rule.”)

Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical. Neither contains any provision for a motion for “reconsideration.” However, federal courts consider it appropriate for a party to make a “motion for reconsideration” under Rule 59(e) even though the rule mentions only a “motion to alter or amend a judgment.” This view holds true even when a party mislabels a post-trial motion.

*Id.* at 22, 602 S.E.2d 779 (footnote omitted). *See also, e.g., Buist v. Buist*, 410 S.C. 569, 573, 766 S.E.2d 381, 383 (2014) (referring to a motion to reconsider as a Rule 59(e), SCRPC motion to alter or amend); *Town of Hollywood v. Floyd*, 403 S.C. 466, 479, 744 S.E.2d 161, 167 (2013) (referring to Rule 59(e), SCRPC motion as a motion for reconsideration); *Kiawah Prop. Owners Group v. Public Service Comm’n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (differentiating between a “motion to

reconsider, alter or amend a judgment” brought under Rule 59(e), SCRCPP and a motion for a new trial”) (citations omitted); *Calhoun v. Calhoun*, 339 S.C. 96, 101, 529 S.E.2d 14, 17 (2000) (referring to Rule 59(e), SCRCPP motion as a motion for reconsideration); *Rhame v. Charleston County School Dist.*, 399 S.C. 477, 483, 732 S.E.2d 202, 205 (Ct. App. 2012), *rev'd on other grounds* (differentiating between a motion to reconsider and a petition for rehearing); *South Carolina Dept. of Social Services v. Mother*, 396 S.C. 390, 398, 720 S.E.2d 920, 924 (Ct. App. 2011) (differentiating between a motion for new trial and subsequent motions to reconsider); *Logan v. Cherokee Landscaping and Grading Co.*, 389 S.C. 611, 623, 698 S.E.2d 879, 885 (Ct. App. 2010) (referring to Rule 59(e), SCRCPP motion as a motion for reconsideration); *Heins v. Heins*, 344 S.C. 146, 151-53, 543 S.E.2d 224, 226-27 (Ct. App. 2001) (using the term “motion for reconsideration” and Rule 59(e), SCRCPP interchangeably); *Hatfield v. Hatfield*, 327 S.C. 360, 369, 489 S.E.2d 212, 217 (Ct. App. 1997) (referring to “a Rule 59(e), SCRCPP motion for reconsideration”); *Hansel v. National States Ins. Co.*, 313 S.C. 266, 272, 437 S.E.2d 159, 162 (Ct. App. 1993) (referring to a “motion for reconsideration under Rule 59(e), SCRCPP”); *Smith v. Smith*, 308 S.C. 372, 374, 418 S.E.2d 314, 316 (Ct. App. 1991) (referring to a Rule 59(e), SCRCPP motion as a motion to reconsideration).

Based on the forgoing, there is little doubt that the Supreme Court of South Carolina would construe ALC Rule 29(D) as applying only to Appellant’s motion to alter or amend, and leaving his motion for rehearing pending until ruled upon by the ALC. Certainly that is the manner in which the Rule was interpreted and relied on by Appellant’s counsel (see affidavit attached as Exhibit A). In fact, as explained below, Appellant’s counsel is joined

by Respondent's counsel and, evidently, by the ALC in reading ALC Rule 29(D) as not applying to motions for rehearing.

First, Respondent's counsel has argued extensively that ALC Rule 29(D)'s silence as to motions for rehearing precludes the possibility of filing a motion for rehearing whatsoever. Similarly, in cancelling its Notice of Motion Hearing, the presiding ALC Judge has stated that Appellant's motion "was deemed improper by virtue of § 1-23-650(C) [providing that ALC hearings must be conducted exclusively in accordance with the ALC Rules]." (ALC letter dated March 6, 2015.) Accordingly, if the ALC Judge believed that ALC Rule 29(D) also covered motions for rehearing, then he could not have logically concluded that such a request was "improper."

Appellant acknowledges that the ALC Judge also went on to state that Appellant's motion for rehearing was "considered as a motion for reconsideration under ALC Rule 29(D)" and therefore deemed denied after 30 days. (*Id.*) However, Appellant would note the impossibility of a motion being simultaneously excluded under ALC Rule 29(D), by way of section 1-23-650(C), but yet also automatically denied in accordance with the rule that supposedly excluded such motion from the outset. In addition, Appellant would also note that he received no notice that the Court "deemed" his motion for rehearing as a motion for reconsideration (to alter or amend) under ALC Rule 29(D) until reading the ALC's March 6, 2015 letter.

At the very least, position of the parties in this matter and the ALC Judge's comments show palpable confusion regarding the scope of ALC Rule 29(D), and this confusion should not be resolved in such a manner as to deprive Appellant of an important legal right of appeal. If this Court would like to judicially interpret ALC Rule 29(D) as

prospectively applying to motions for rehearing or, better yet, if the ALC itself would like to amend the wording of ALC Rule 29(D) for future application, then at least future litigants would be put on some form of constructive notice that the rule may be so applied. However, to deny Appellant's right of appeal based on the implied meaning of a rule that attorneys from both parties in this matter and a judge of the body that promulgated the rule have failed to understand is tantamount to denying Appellant due process itself.

In conclusion, Appellant respectfully requests that the Court withdraw its Order in this matter dated May 18, 2015 and issue an order denying Respondent's motion to dismiss the appeal. In addition, Appellant respectfully requests the Court to consider sanctions against Respondent, under Rule 267, SCACR, since the basis of Respondent's motion to dismiss – that ALC Rule 29(D) precludes motions for rehearing – remains patently flawed and wasteful of judicial and taxpayer resources.

Respectfully submitted,



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Kenneth B. Wingate, S.C. Bar No. 8004  
Matthew J. Myers, S.C. Bar No. 74664  
Sweeny, Wingate & Barrow, P.A.  
PO Box 12129, Columbia, SC 29211  
Telephone: (803) 256-2233  
Attorneys for Appellant

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

AFFIDAVIT

Personally appeared before me, Matthew J. Myers, who first being duly sworn deposes and says that:

1. I am an attorney and have been licensed to practice in the state of South Carolina since November 13, 2006.

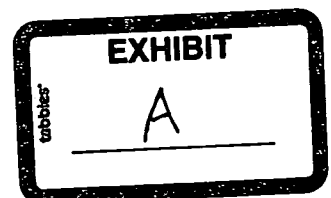
2. I represented Hugh Allen Palmer before the South Carolina Administrative Law Court (ALC) and on appeal therefrom.

3. My recollection is that I filed a motion for rehearing of the ALC's ruling specifically because it was not subject to automatic denial by ALC Rule 29(D) and because I legitimately wanted the ALC to have the opportunity to review several decisions not provided to the ALC that were contrary to the decision relied on by the ALC in this matter, which in turn had been provided to the ALC at the hearing despite a standing order to provide all authority to be relied on by each party, including case law, prior to the hearing.

4. Had I thought that ALC Rule 29(D) may apply to my client's motion for rehearing then I could have, and would have, easily filed my client's appeal before the expiration of the 30 day period in ALC Rule 29(D).

5. In contrast, however, I intentionally waited for a decision from the ALC on the motion for rehearing out of respect for the judiciary and their extensive case loads.

6. Meanwhile, I received no notice from opposing counsel or the ALC that either might construe ALC Rule 29(D) as automatically denying my client's motion for rehearing.

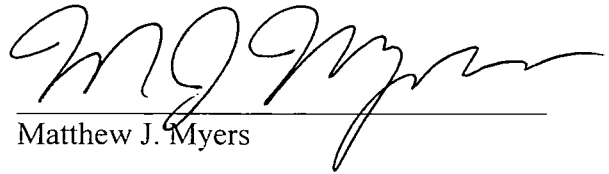


7. In fact, opposing counsel and the ALC have each since taken the position that motions for rehearing are not even allowed under the ALC Rules.

8. Accordingly, no attorney or judge involved in this matter prior to the Court of Appeals has construed ALC Rule 29(D) as applying to motions for rehearing.

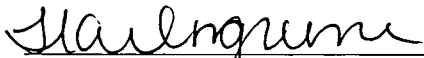
9. To rule that ALC Rule 29(D) does apply to motions for rehearing would be in conflict with its express language.

FURTHER THE AFFIANT SAYETH NOT.

  
Matthew J. Myers

SWORN to before me this

2 day of June, 2015.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: 2/19/23

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**PROOF OF SERVICE**

I certify that I have served the Appellant's Petition for Rehearing on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on June 2, 2015, addressed to its attorney of record, Malane S. Pike, Esquire, P.O. Box 729, White Rock, S.C. 2917.

June 2, 2015



Kenneth B. Wingate, S.C. Bar No. 8004  
Matthew J. Myers, S.C. Bar No. 74464  
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Attorneys for Appellant



SWEENEY WINGATE & BARROW P.A.

June 2, 2015

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SC Court of Appeals

Reply to: Main Office

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(803) 256-2233 x7118  
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**SENT VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South

RE: Hugh Allen Palmer, Appellant v. Richland County Assessor, Respondent  
Appellate Case No.: 2015-000514  
Our File: 2393-4791

Dear Ms. Kitchings:

Please find enclosed an original and seven copies of Appellant's Petition for Rehearing of the Order in this matter filed on May 18, 2015, an original and one copy of a Proof of Service of the same, and the applicable \$25 filing fee.

Please return one stamped copy of each in the envelope provided, and file the remainder. By copy hereof, Respondent's counsel is being served with a copy of the same.

Thank you for your assistance, and please do not hesitate to contact me if you have any questions. With warm regards, I remain,

Yours truly,

**SWEENEY, WINGATE & BARROW, P.A.**

Matthew J. Myers

Enclosures

cc: Malane S. Pike, Esquire  
Hugh Allen Palmer