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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Judge

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Docket No.: 15-ALJ-07-0554-CC

South Carolina Department of Health and Environmental Control,

Appellant,

v.

Kirby Blocker,

Respondent.

MEMORANDUM OF LAW ON APPEALABILITY

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INTRODUCTION

Pursuant to the Court's December 8, 2016 letter, the South Carolina Department of Health and Environmental Control ("Department" or "DHEC") hereby submits that the below decision of the Administrative Law Court ("ALC") is a "final decision" that is immediately appealable as a matter of right. S.C. Code Ann. 1-23-380 (Supp. 2015). In the alternative, the ALC's decision is immediately appealable because deferred review "would not provide an adequate remedy." Id.

PROCEDURAL BACKGROUND

The ALC's decision below concerns an Administrative Order issued by the Department to Respondent due to a series of asbestos violations. See Ex. 1 (Order of Remand, No. 15-ALJ-07-0554-CC (S.C. Admin. Law Ct. Oct. 3, 2016)) at 1. The Administrative Order assessed a civil penalty and also sought to revoke Respondent's asbestos licenses. Id. The Department argued that Respondent did not avail itself of the opportunity for a contested case hearing because Respondent did not file a timely request for review with the DHEC Board, as is required by S.C. Code Section 44-1-60. Id at 2. The ALC held a bifurcated evidentiary hearing to consider whether Respondent's contested case should be allowed to proceed even though Respondent submitted his request for Board review outside of the fifteen-day statutory window. Id. at 2, 5. Judge Durden issued the decision below, which found that Respondent's contested case was properly before the ALC, notwithstanding Respondent's belated request for Board review and the Department's undisputed compliance with Section 44-1-60. Id. at 12. However, rather than schedule a hearing on the merits of the Administrative Order or remand to the DHEC Board so that it could consider the merits, Judge Durden *sua sponte* resolved the merits of the case in full on due process grounds. Id. at 14. Though the remedy was characterized as a "remand," the ALC's action completely and

finally invalidated the Administrative Order and made clear that further proceedings, if any, would occur in the context of new, distinct enforcement action:

> [T]he Court remands this case to the Department for *de novo* review, in order for the procedural defects in this case to be remedied, such that Respondent's statutory and constitutional rights are not infringed. . . . If the Department issues a new final administrative order in this matter, Respondent may file a new Request for Contested Case with the ALC Clerk's Office, upon exhaustion of the procedure contained in Section 44-1-60.

Id. (emphasis added).

The Department filed a motion for reconsideration on October 13, 2016. The ALC issued an order on November 3, 2016 denying the motion. See Ex. 2 (Order Denying Petitioner's Motion for Reconsideration, No. 15-ALJ-07-0554-CC (S.C. Admin. Law Ct. Nov. 3, 2016)).

ARGUMENT

I. THE ALC'S ORDER IS AN IMMEDIATELY APPEALABLE "FINAL DECISION."

S.C. Code Section 1-23-380 provides that a party "aggrieved by a final decision in a contested case is entitled to judicial review" under the Administrative Procedures Act. A final decision "resolves the entire action." See Ex parte S.C. Property and Cas. Ins. Guar. Ass'n, 411 S.C. 501, 504, 768 S.E.2d 670, 672 (Ct. App. 2015); see also Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Envtl. Control, 387 S.C. 265, 267, 692 S.E.2d 894, 894 (2010) ("A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined."). A decision that "does not decide the merits of a contested case ... is not a final agency decision subject to judicial review." Bone v. U.S. Food Serv., 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013) (citation omitted).

Judge Durden's order is a "final decision in a contested case." The ALC's remand below "resolves the entire action" and ends all proceedings before the ALC in this case. Ex parte S.C.

Property and Cas. Ins. Guar., 411 S.C. at 504, 768 S.E.2d at 672. Unlike cases decided differently, "an evidentiary hearing was conducted and a final decision regarding the merits of the case was made." Brown v. James, 389 S.C. 41, 51-52, 697 S.E.2d 604, 610 (Ct. App. 2010). Moreover, Judge Durden's remand to the Department is optional: DHEC may either choose to initiate new enforcement action, or decline further enforcement. Either way, the decision-making and proceedings with respect to *the Administrative Order at issue in this case* are ended. Any new administrative order issued by the Department would stand or fall on its own merits. Thus, Judge Durden's decision is a "final decision in a contested case" warranting immediate appellate review.

II. IMMEDIATE REVIEW IS REQUIRED TO ENSURE AN ADEQUATE REMEDY.

Even if the decision below were not "final," an immediate appeal would be warranted because deferred review "would not provide an adequate remedy." S.C. Code Ann. 1-23-380 (Supp. 2015).

The South Carolina Supreme Court's recent decision in Hilton illustrates the importance of immediate review in cases like this one. Hilton v. Flakeboard Am. Ltd., --- S.C. ----, 791 S.E.2d 719, 721 (2016). In Hilton, the Court held that the appellant would be denied an adequate remedy if unable to immediately appeal a remand order of the S.C. Workers' Compensation Commission that effectively "ordered the relitigation of the entire dispute without regard to the matters raised by the appealing party." Id. at 722. The ALC's remand order does just that and more. In fact, it requires that the parties' dispute be recreated from whole cloth, as if the Department's Administrative Order was never issued in the first place. On remand, the Department must go back to the drawing board and, if it chooses, issue a new Administrative Order, subject to fresh review before the DHEC Board and the ALC. The Department believes that the ALC's decision

below is contrary to precedent[1], and even assuming that the Department would have the eventual opportunity to appeal it, such opportunity is not an adequate remedy. The passage of time prolongs the uncertainty as to Respondent's proper licensure status, results in further expenditures of the government's (and the Respondent's) resources, and creates a procedural quagmire for the Department and this Court, which might at once be faced with two Administrative Orders addressing precisely the same subject matter. Only an immediate appeal of the decision below addresses these concerns and ensures an adequate remedy.

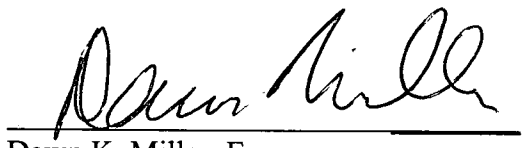
CONCLUSION

For those reasons stated above, the Department respectfully submits that the ALC order below is immediately appealable before this Court.

[signature page to follow]

[1] See, e.g., Aetna Casualty and Surety Co. v. Jenkins, 282 S.C. 107, 113, 317 S.E.2d 460, 464 (Ct. App. 1984) (quoting Mullane v. Ctr. Hanover Bank & Trust Co., 339 U.S. 306 (1950)) ("'The only due process consideration as to manner of service is that the statutory method of service must be 'reasonably calculated to reach interested parties.'"); S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 309 S.C. 418, 426, 702 S.E.2d 246, 251 (2010) ("The clear and unambiguous language in [S.C. Code Section 44-1-60(E)] provides that the staff decision becomes final 'fifteen days after notice of the department decision has been mailed.' Had the legislature intended for the time period to begin running from the date a party receives notice of the decision, the statute would have been drafted accordingly."); Garris v. Governing Bd. of S.C. Reinsurance Facility, 319 S.C. 388, 391-92, 461 S.E.2d 819, 821 (1995) ("declin[ing] to follow" cases from other jurisdictions suggesting that S.C. Code Section 1-23-370(c) entitles licensees to an informal hearing (enforcement conference) before the commencement of a formal hearing to revoke a license).

Respectfully submitted,



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December 19, 2016

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EXHIBIT 1

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of Health and Environmental Control, Petitioner, vs. Kirby Blocker, Respondent.	Docket No. 15-ALJ-07-0554-CC **ORDER OF REMAND**

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC) pursuant to a Request for Contested Case Hearing filed by counsel for Kirby Blocker (Respondent[1] or Blocker) on December 2, 2015. Blocker is licensed by the Department of Health and Environmental Control (Petitioner, Department, or DHEC) as an asbestos supervisor, air sampler, building inspector, and asbestos abatement contractor.

In 2014, the Department issued administrative order 14-027-A to Blocker, concluding that he had committed violations of South Carolina Regulation 61-86.1. Blocker filed a request for a contested case hearing regarding that order on January 21, 2015. Proceedings in that matter, ALC Docket Number 15-ALJ-07-0012-CC or "Blocker I," have been stayed, pending resolution of this case.

In 2015, the Department took further enforcement action against Blocker, culminating in the issuance of administrative order 15-041-A. In that order, the Department found multiple regulatory violations and concluded that Blocker's four professional licenses should be revoked and that he should pay a substantial fine. This second order forms the basis for the case now before the Court, known as "Blocker II." Additionally, on August 29, 2016, Respondent filed a third

[1] Blocker is the Respondent, even though he filed the case with the ALC. In a contested case, party labels are assigned by the ALC Clerk of Court's Office based on the burden of proof in a case. Here, the Department bears the burden of proving the violations and the necessity of enforcement action, and therefore is the Petitioner. See SCALC Rule 29(B); see also Leventis v. S.C. Dept. of Health & Envtl. Control, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) (citation omitted) ("'Generally, the burden of proof is on the party asserting the affirmative issue in an adjudicatory administrative proceeding.'").

case, ALC Docket Number 16-ALJ-07-0296-CC or "Blocker III," contesting the Department's decision to deny the renewal of his licenses on the grounds that the denial violates the order to stay proceedings entered in Blocker I.

Petitioner filed a Motion to Dismiss Blocker II on the grounds that Respondent did not timely file a request for final review before the agency. A motion hearing was held on April 4, 2016 to ascertain the legal posture of the case. After arguments, the Court orally denied the Motion to Dismiss on the grounds that the issues of notice and timelines raised questions of fact.[2] On August 30, 2016, an evidentiary hearing was held to establish the facts upon which a ruling regarding timeliness might be made. This order of remand reflects the Court's consideration of both the facts presented at the evidentiary hearing and the legal arguments made by the parties regarding the motion to dismiss.

FINDINGS OF FACT

The following facts have been stipulated to by the parties:

1. 124 Little Hampton Drive, Irmo, South Carolina, 29063 is the residence of Kirby Blocker, his sister, Marie Blocker, and his mother, JoAnne Blocker and has been their residence and mailing address at all times relevant to 15-ALJ-07-0554-CC and AO 15-041-A.
2. 124 Little Hampton Drive, Irmo, South Carolina, 29063 was the address given by Kirby Blocker to DHEC for all matters relevant to asbestos licensing and permitting and has been so at all times relevant to 15-ALJ-07-0554-CC and AO 15-041-A. Respondent has never provided Petitioner (the "Department") with any other personal or business address.
3. JoAnne Blocker is retired, and in October of 2015 was 77 years old.
4. Parcels requiring signatures and certified letters have in the past been sent to the Blocker residence addressed to Kirby Blocker, and members of the Blocker residence other than Kirby Blocker have routinely signed for them. Kirby Blocker has previously responded to certified mailings from the Department received in this manner.
5. JoAnne Blocker has no specific disability other than her advanced age and frailty, and that she has frequent doctor's appointments.
6. The Department executed and mailed AO 15-041-A by Certified Mail to Kirby Blocker at 124 Little Hampton Drive, Irmo, South Carolina, 29063, on September 30, 2015.
7. The certified mailing containing AO 15-041-A also contained a "Notice of Appeal Procedure" stating that "[i]n order to be timely, a request for final review

[2] See S.C. Dept. of Health & Envtl. Control v. Bellwood Manor, 12-ALJ-07-0569-CC, at 7 n.6 (S.C. Admin. Law Ct., July 19, 2013) (also adjudicating issue of notice as question of fact not resolvable under a motion to dismiss standard) (available at www.scalc.net > Decisions) (note that the July 2, 2013 order available on Westlaw is not the final order) [hereinafter Bellwood].

must be received by the Clerk of the Board within 15 calendar days after notice of the decision has been mailed or otherwise sent to persons entitled to receive notice."

8. Someone signed for the envelope containing AO 15-041-A at the Blocker residence on October 2, 2015.

9. James E. Smith, Jr., PA was engaged by Kirby Blocker to defend him following issuance of a Notice of Alleged Violation issued in 2014 that resulted in the issuance of AO 14-027-A, which is under appeal in 15-ALJ-07-0012-CC (Blocker I). James E. Smith, Jr. represented Blocker at an enforcement conference prior to the issuance of AO 14-027-A.

10. Upon the issuance of AO 14-027-A (Blocker I) James E. Smith, Jr., PA arranged for The Shissias Law Firm, LLC to act as co-counsel in Blocker I.

11. As of October 2, 2015, neither James E. Smith, Jr., PA nor The Shissias Law Firm were engaged to represent Blocker for any matter other than AO 14-027-A (Blocker I).

12. James E. Smith, Jr., PA and The Shissias Law Firm received a courtesy copy of AO 15-041-A via First Class Mail from the Department on or about October 2, 2015.

13. Neither James E. Smith, Jr., PA nor The Shissias Law Firm had requested to be notified of final Department decisions in any action other than Blocker I.

14. On Tuesday, November 3, 2015, Respondent Blocker, through counsel, filed a Request for a Final Review Conference in Blocker II.

15. On November 4, 2015, the Clerk of the DHEC Board returned the Request without filing it on the grounds of untimeliness.

In addition to the above stipulated facts, the Court finds the following by a preponderance of the evidence:

Respondent Kirby Blocker works as an asbestos supervisor, air sampler, building inspector, and asbestos abatement contractor. The Court finds that Blocker's testimony regarding the facts in this case was credible. Blocker has been in this business for approximately thirty years. Until recently, Blocker has had no enforcement action taken against his licenses.

Blocker regularly stays away from home for work. He sometimes does not return home to see his family for weeks at a time. During late September and early October, he was working in the Charleston area and staying at InTown Suites on Mazyck Road in North Charleston. Blocker checked into Room 125 in February 2015. He was billed weekly and paid approximately monthly for his room from February until mid-November 2015. He did not go home to Irmo during the end of September or the beginning of October. On Friday, October 23rd, 2015, at approximately 6:00 PM, Blocker returned to his house for his grandmother's one hundredth birthday. That evening was the first time Blocker became aware of Administrative Order 15-041-A. For this reason, the Court finds that Blocker did not receive notice of the administrative order until

October 23, 2015, eight days after the deadline for requesting a final review conference. He then immediately contacted his attorney and hired him to take the case the next business day.

Blocker persuasively testified that he was blindsided by the administrative order revoking his licenses because he had no reason to expect it or know of the pending action against him. He stated that communication between himself and the Department occurred frequently via email and phone. He testified that even when mail was sent to him by the Department, he would receive an email or phone call as well because the Department knew that these forms of communication were the best way to reach him. For example, when the Department rescheduled an enforcement conference via mail, they called to let him know.

Four separate work sites are referenced in the administrative order issued by the Department. Blocker knew of the Department's concerns related to the PruittHealth site in Richland County, but was completely unaware about proceedings for the other three sites listed in the administrative order. For the PruittHealth site, the Department issued a Notice of Alleged Violation and Notice of Enforcement Conference on May 27, 2015. Additionally, Blocker attended an enforcement conference, on June 23, 2015, to discuss the site. However, no Notice of Alleged Violation or Notice of Enforcement Conference was issued to Blocker, nor enforcement conference held, for Shaw Air Force Base in Sumter County, Four Way Liquor Store in Orangeburg County, or Rebellion Farms Place in Berkeley County. Furthermore, Blocker believed that the issues regarding the PruittHealth site had been explained or resolved at the enforcement conference he attended. He was not anticipating the Department's revocation of his licenses—especially without other previously taken intermediate steps, such as negotiation of a proposed consent order.

CONCLUSIONS OF LAW

Statutory Procedure for a Contested Case Arising from a DHEC Licensing Decision

The first and most fundamental issue presented by this case is whether the case is properly before this Court. In order to address this issue it is necessary to outline the posture of this type of case and the current status of related case law. Because this case arises from a license revocation action by DHEC, South Carolina Code Section 44-1-60 governs the procedure by which a Request for Contested case may be filed at the ALC. Under this statute, an initial department decision regarding the revocation of a license is known as a "staff decision." S.C. Code Ann. § 44-1-60(C) (Supp. 2015). Once a staff decision is issued, it must be sent "by certified mail, return receipt

requested" to the licensee. § 44-1-60(E)(1). The statute does not require delivery restriction. See id. The staff decision then "becomes the final agency decision fifteen calendar days after notice of the staff decision has been **mailed**" to the licensee, "unless a written request for final review accompanied by a filing fee is filed with the department" by the licensee. § 44-1-60(E)(2) (emphasis added); S.C. Coastal Conservation League v. S.C. Dept. of Health & Envtl. Control, 390 S.C. 418, 426, 702 S.E.2d 246, 250–51 (2010) [hereinafter Coastal].

Once the Department receives a request for final review, the Department's Board has sixty calendar days to decide whether to hold a conference and issue its own final agency decision or let the staff decision stand as final. S.C. Code Ann. § 44-1-60(F)–(G) (Supp. 2015). After the agency decision is finalized, a licensee may file a request for contested case with the ALC. § 44-1-60(G). In this case, it is undisputed that Respondent did not file his request for a final review conference within the statutory fifteen-day deadline. Thus, the question presented is whether failure to timely complete this prerequisite step bars Respondent from having his case heard before the ALC.

Subject-Matter Jurisdiction

The Department has taken the position that the Court lacks jurisdiction in this case, referencing both subject-matter and appellate jurisdiction. Subject-matter jurisdiction is "'the power to hear and determine cases of the general class to which the proceedings in question belong.'" See Dove v. Gold Kist, Inc., 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994) (citations omitted). Applying this definition, there is no question that the ALC has subject-matter jurisdiction to decide this type of case. The procedural statute at issue in this case is specifically designed to bring a DHEC revocation case before the ALC. See S.C. Code Ann. § 44-1-60(F)(2), (G) (Supp. 2015). Moreover, the ALC was created specifically for the purpose of hearing cases arising out of agency decisions. See S.C. Code Ann. § 1-23-600(A) (Supp. 2015). The more difficult question revolves around the issue of appellate or procedural jurisdiction.

Procedural Posture of Contested Cases and Appeals at the ALC

A primary purpose of the ALC is to ensure that citizens of this state receive due process when affected by the action of state agencies, pursuant to the mandate of the South Carolina Constitution. See Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S.C. Dept. of Health & Envtl. Control, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014) [hereinafter EAGLE]; see also S.C. Code Ann. § 1-23-600 (Supp. 2015). To that end, the ALC hears or reviews cases in two main forms: contested cases and appeals. Compare § 1-23-600(A) (providing that administrative

law judges (ALJs) hear contested cases) with § 1-23-600(D) (providing that ALJs also review appeals from final decisions). Each type of case has its own rules of procedure and standard of review. In an appeal, the Court reviews an agency decision under the appellate standard of the Administrative Procedures Act. § 1-23-600(E) and § 1-23-380(5). This standard allows the Court to modify or reverse an agency decision only under certain circumstances, such as an error of law or a constitutional violation. However, in a contested case, the ALJ stands in the discretionary shoes of the agency, holding a *de novo* bench trial. See EAGLE, 407 S.C. at 344, 755 S.E.2d at 449 (2014); Brown v. S.C. Dept. of Health & Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); Marlboro Park Hosp. v. S.C. Dept of Health & Envtl. Control, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). In a contested case, the Court sits in a trial capacity as the ultimate fact-finder. Savannah Riverkeeper v. S.C. Dept. of Health & Envtl. Control, 400 S.C. 196, 205, 733 S.E.2d 903, 907 (2012) (C.J. Toal, concurring in part and dissenting in part) (citing Risher v. S.C. Dept. of Health & Envtl. Control, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011)).

The duality of appellate and contested cases has caused some confusion regarding which procedural doctrines are applicable in a given case. Administrative Law Court rules provide that civil procedure applies to contested cases, while appellate procedure applies to appeals. See SCALC Rule 68. However, some confusion remains in regards to the procedural prerequisites for filing a contested case at the ALC, because contested cases, while bench trials, arrive at the ALC in a posture similar to that of an appeal. See Amisub of S.C., Inc. v. S.C. Dept. of Health & Envtl. Control, 403 S.C. 576, 590, 743 S.E.2d 786, 794 (2013) (referring to a contested case arising under Section 44-1-60 as an "appeal" when determining jurisdiction).[3]

It is without doubt that the procedural requirements for this case are set forth by Section 44-1-60. However, in determining how to apply the statute to the facts in this case there is a question as to whether the applicable procedural doctrine is that of appellate jurisdiction or

[3] Notably, some of the procedure cited in Amisub no longer applies in contested cases. See Amisub, 403 S.C. at 576, 743 S.E.2d at 793 (reciting an older version of Section 44-7-220, which provided for review by the Circuit Court in Certificate of Need cases); see also Travelscape, LLC v. S.C. Dept. of Revenue, 391 S.C. 89, 109, 705 S.E.2d 28, 38 (2011) (citing S.C. Code Ann. § 1-23-610(A) (Supp. 2009)) (The "legislature . . . amended the process for appeals from the ALC, providing for a direct appeal to the court of appeals instead of the circuit court.").

statutory failure to exhaust administrative remedies.[4] Most importantly, there is question of whether strictly applying the statute in this case, under either of these doctrines, would violate Blocker's due process rights. After extensive research, the Court concludes that the due process problem and statutory procedural requirements in this case are best analyzed as an exhaustion of administrative remedies problem, not one of appellate jurisdiction.

Application of Appellate Jurisdiction Rules to a Contested Case

Under appellate jurisdiction rules, which have been applied to statutory deadlines in administrative cases, a party may not be "rescued" by the presiding body. See Allison v. W.L. Gore & Assocs., 394 S.C. 185, 189, 714 S.E.2d 547, 549–50 (2011) (holding that a statutory workers' compensation deadline was a matter of appellate, not subject-matter, jurisdiction); Elam v. S.C. Dept. of Transp., 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) (appellate court lacks authority to rescue a party that failed to timely file a notice of appeal). However, appellate rules typically presuppose that notice is received before the time begins to run for the filing deadline, while the statute at issue here does not. Compare SCACR 203(b)(1) ("A notice of appeal shall be served on all respondents within thirty (30) days after **receipt** of written notice of entry of the order or judgment." (emphasis added)) with S.C. Code Ann. § 44-1-60(E)(2) (Supp. 2015) ("The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been **mailed** to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person." (emphasis added)). There is no requirement in Section 44-1-60(E)(2) that a licensee actually receive notice of the Department's decision before the decision becomes final and is binding on the party. Under the circumstances in this case, where the decision to revoke the licenses that form the basis of Respondent's livelihood became final before he was even aware of it, applying the appellate jurisdiction doctrine would violate Blocker's rights under the South Carolina Constitution. See S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be

[4] Other ALC case orders have employed the term "procedural jurisdiction" to bridge the conceptual gap between the quasi-appellate posture of a contested case and the *de novo* trial-level nature of a contested case, as well as to distinguish the issues of timeliness from those of subject-matter jurisdiction, when determining whether the ALC had the authority to hear the matter. See, e.g., Keyserling, et al. v. S.C. Dept. of Health & Envtl. Control & GX Technology, Corp., 15-ALJ-07-0380-CC, 2016 WL 1627206 at *1 n.6 (S.C. Admin. Law Ct., April 19, 2016); Tract 7, LLC v. S.C. Dept. of Health & Envtl. Control & BP Amoco Chem. Co., Cooper River Plant, 15-ALJ-07-0258-CC, 2015 WL 4716701, at *1 (S.C. Admin. Law Ct., July 28, 2015).

heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review."); see also Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998) (applying procedural due process under Section 22 to revocation of insurance agent's license).

Application of Failure to Exhaust Rules to a Contested Case

Because there is no question that Blocker timely filed for a contested case with the ALC, but only whether he timely exhausted the opportunities for administrative remedy available under Section 44-1-60, the Court concludes that the correct doctrine to apply in this case is failure to exhaust, rather than appellate jurisdiction. The requirement that a party exhaust all remedies available at the agency level before applying to a court for relief is generally considered a rule of policy concerning the prematurity of a case, rather than one of law, and is not jurisdictional. Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trustees, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012) (quoting Ward v. State, 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000)). "'Whether administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse thereof.'" Id. (quoting Hyde v. S.C. Dept. of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 582–83 (1994)). This discretion disappears, however, where the administrative remedies are prescribed by statute, as in this case. In almost all circumstances, both this Court and DHEC are bound by the law as written. See Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). However, an exception to that principle occurs when the statute in question violates a party's constitutional rights to due process as it is applied in his or her case. Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000).

Constitutional Challenges before the ALC

The Department argues that a due process argument regarding notice would constitute a facial challenge to Section 44-1-60. The ALC cannot adjudicate facial challenges to statutes on constitutional grounds. See Video Gaming Consultants, Inc., 342 S.C. at 38, 535 S.E.2d at 645. However, the footnote cited by the Department in support of its argument addressed a challenge to a notice regulation on its face. See Bellwood, 12-ALJ-07-0569-CC, at 5 n.3 (S.C. Admin. Law Ct., July 19, 2013). Here, there is no challenge to the statute as a whole, only to its strict application in this case. An ALJ can rule on whether a law violates constitutional rights as applied in a

particular case. Travelscape, LLC v. S.C. Dept. of Revenue, 391 S.C. 89, 109, 705 S.E.2d 28, 38–39 (2011). The distinction between facial and as-applied challenges to a law, as it relates to the subject matter jurisdiction of this Court, lies in the legal versus factual nature of the challenges. Cf. id. As-applied challenges are largely based upon the facts of a given case and do not challenge the validity of the statute as it relates to other factual scenarios. See id.

Due Process under the State and Federal Constitutions

In addition to the requirements of Article I, Section 22 of the South Carolina Constitution, both the federal and state constitutions require that parties receive due process when a liberty or property interest is implicated, such as would be at stake when someone's livelihood and reputation are at stake in a licensing case. U.S. Const. amend. XIV, § 1 (no state may "deprive any person of life, liberty, or property, without due process of law"); S.C. Const. art. I, § 3 (no person may be "deprived of life, liberty, or property without due process of law"); Bundy v. Shirley, 412 S.C. 292, 303, 772 S.E.2d 163, 169 (2015) (quoting Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("'The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.'"); Richard H. Seamon, Paige J. Gossett & John D. Geathers, Administrative Agencies—General Concepts and Principles, in South Carolina Administrative Practice and Procedure 44 (Randolph R. Lowell, 3d ed. 2013) (noting that a "reputational injury coupled with a more tangible change, such as in legal status or ability to pursue a livelihood, can constitute a deprivation of liberty"). In this case, Blocker would lose the ability to practice the occupation he has had for the past thirty years, thus effectively losing his ability to earn a living in his chosen profession. The Court finds this a sufficient liberty or property interest to trigger due process protection.

The Department's Position on Due Process

The Department takes the position that the requirements of due process have been satisfied in this case by the Department's compliance with Section 44-1-60(E)(1). In support, the Department cites Dusenbery v. United States, a federal case addressing the due process notice requirements in administrative forfeiture cases. In that case, the Supreme Court adopted the

Mullane[5] test, rather than the balancing test of Matthews v. Eldridge,[6] for the purposes of notice in a forfeiture case. See Dusenbery v. United States, 535 U.S. 161, 167–68, 122 S. Ct. 694, 699–700 (2002). The Mullane test states that a method of notice is not unconstitutional where it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id., 535 U.S. at 168, 122 S. Ct. at 700 (quoting Mullane, 339 U.S. at 314, 319, 70 S. Ct. at 652 and 339 U.S. at 315, 70 S. Ct. at 652 ("The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.")). For purposes of administrative forfeiture, the Court declined to adopt the three-factor balancing test from Matthews v. Eldridge: "(1) the private interest that will be affected by the official action, (2) a cost-benefit analysis of the risks of an erroneous deprivation versus the probable value of additional safeguards, and (3) the Government's interest, including the function involved and any fiscal and administrative burdens associated with using different procedural safeguards." Id., 535 U.S. at 167, 122 S. Ct. at 699 (citing Matthews v. Eldridge, 424 U.S. at 335, 96 S. Ct. at 893).

The standards adopted by the U.S. Supreme Court in these cases are for the purposes of analyzing notice procedures or methods on their face. The question before this Court lies in application alone, as discussed above. Nonetheless, it appears that Section 44-1-60 prescribes a method reasonably calculated to give notice. Further, the Department complied with the requirements of the statute by mailing the staff decision. However, the standard adopted by the Court in Dusenbery is not necessarily the appropriate one to apply in this case. Dusenbery is confined by its holding to the facts and law at issue in the case, which concern notification of a federal inmate of an administrative forfeiture proceeding involving his property. Dusenbery, 534 U.S. at 166–67, 122 S. Ct. at 699. Additionally, Dusenbery construes only the federal due process clause as it concerns federal government. Id. The South Carolina Constitution provides protection for citizens subject to administrative proceedings that are not included in the federal constitution. See S.C. Const. art. I, § 22. Moreover, South Carolina courts have ruled on issues similar to those in this case, which makes it unnecessary to consult additional authority for guidance. See, e.g.,

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[5] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652 (1950). This case addressed "the constitutional sufficiency of notice to beneficiaries on judicial settlement of account by the trustee of a common trust fund." Id., 339 U.S. at 307, 70 S. Ct. at 654.

[6] Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976). This case addressed whether an evidentiary hearing is required by due process prior to the termination of Social Security disability benefit payments.

Coastal; Hamm v. S.C. Pub. Servs. Comm'n, 287 S.C. 180, 336 S.E.2d 470 (1985). Furthermore, while the Mullane test is certainly one possible standard, the U.S. Supreme Court has made clear that the due process test or standard applied will differ based on the circumstances. See Bell v. Burson, 402 U.S. 535, 540, 91 S. Ct. 1586, 1590 (1971) ("A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case.").

Judicial Construction of Administrative Procedure Statutes

In this case, the Department asks the Court to conclude that Blocker is bound by an agency decision stripping him of four licenses necessary to his occupation when Blocker received no notice of that decision in the time frame during which he could file a request for review with the Department's Board. The South Carolina Supreme Court has previously held that the deadline in Section 44-1-60 is not triggered by notice, but by mailing, as stated in the statute. See Coastal, 390 S.C. at 426–27, 702 S.E.2d at 251. In that case, which concerned a party other than the licensee, the issue of lack of notice was resolved by interpreting the statute as requiring simultaneous notice to all interested parties. Id., 390 S.C. at 429, 702 S.E.2d at 252. On the facts and result in that case, there was no issue of the licensee not receiving any notice whatsoever during the time frame for a request for review to be submitted, as there is here. However, in an earlier South Carolina Supreme Court case, the possibility of no notice was addressed. See generally Hamm. That case concerned a statute where the deadline for filing for judicial review ran from the time a decision was made. Id., 287 S.C. at 181–82, 336 S.E.2d at 471. The Court found that a plain reading of the statute would allow an agency to "preclude judicial review in all cases simply by concealing its decision until the thirty days had run." Id. The Court held that no matter how clear the language of a statute may be, the Court will "reject that meaning when it leads to an absurd result not possibly intended by the legislature." Id. (citing State, ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964)). Thus, the Court interpreted the statutory deadline to run from the receipt of written notice of the agency decision. Id. Like in Hamm, the statute in this case clearly intends that a licensee receive notice of the agency decision, even though the deadline to request a review of that decision runs from date of mailing. Unlike in Coastal, there is a problem of complete lack of notice within that time frame.

On the facts and issues at stake in Coastal, the Court declined to apply Hamm in a way that would rewrite the procedural requirements of Section 44-1-60. Coastal, 390 S.C. at 429, 702 S.E.2d at 252. The Court held that the last date of mailing to any of the parties controls the filing

deadline out of concern for the continued uniformity of administrative procedure. Id. Consistent with that concern, this order relies on Hamm only insofar as it is necessary to remedy the as-applied due process problem in this case.

Application of Due Process and Statutory Construction Principles to this Case

Based upon the principles enunciated in Coastal and Hamm and the protections of due process,[7] the Court concludes that Blocker's case is properly before the ALC, despite the fact that the request for review filed by Respondent with DHEC came later than the deadline imposed by Section 44-1-60. Blocker did not receive notice of the Department's decision until after the deadline for filing for review ran, but he exercised diligence in filing as soon as he was aware of the decision. A very similar set of circumstances existed in the Hamm case. In that case, an agency decision was sent certified mail, return receipt requested to the correct address, but wrong person. The letter was signed for by a mailroom employee and presumably lost. Id. The Court found the attempt at service invalid based on grounds that following the notice statute led to the clearly unintended and absurd result of no notice being effected. Id. Instead of strictly applying the statute, the Court affirmed the trial court's decision to run the statutory filing deadline from the date of written notice. Id., 287 S.C. at 181–82, 336 S.E.2d at 471. Citing Hamm, the Court in Coastal also expressed concern about the time period for seeking review expiring before all affected persons were notified of the Department's decision under the statute at issue here. Coastal, 390 S.C. at 428–29, 702 S.E.2d at 252 (due to a potential ambiguity in the statute, the time period for appealing the decision could end before an affected person receives notice, which would preclude them from judicial review).

Under Section 44-1-60, it is clear that the exhaustion of administrative remedies is mandated. In such an instance, legislative intent prevails, but a court will not construe a statute to do that which is unconstitutional. See Ward v. State, 343 S.C. 14, 16–19, 538 S.E.2d 245, 247 (2000). Under the plain language of Section 44-1-60, it is clear that the legislature intended that the deadline for review before the Department's Board expire fifteen calendar days after mailing of the staff decision. It is also equally clear however, that the purpose of the plain language is to

[7] During the arguments and evidentiary hearing, the doctrine of constructive notice was discussed. After careful research, the Court finds no South Carolina cases applying the doctrine of constructive notice under circumstances or law similar to that in this case. The case cited by Respondent for the definition of constructive notice addresses notice in the context of the Tort Claims Act. See generally Strother v. Lexington Cnty. Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998). Therefore, this Court finds it to be appropriate to analyze the notice issue relying on Coastal and Hamm.

achieve notice so that a party may proceed with obtaining review of their case.[8] Therefore, like the Court in Hamm, I conclude that where no notice is received as contemplated by the statute, the statutory deadline runs from the date of written notice. To hold otherwise would reach the "absurd result....[which] could not have been intended by the legislature" rejected by our Supreme Court in Hamm. Hamm, 287 S.C. at 181, 336 S.E.2d at 471. This result avoids an unconstitutional due process problem in applying Section 44-1-60 to the facts in this case.

In determining whether to afford relief to a party where the demands of due process are not met, substantial prejudice must be shown in addition to the failure of due process. See Tall Tower, Inc. v. S.C. Procurement Review Panel, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1987) (citing Palmetto Alliance v. S.C. Pub. Serv. Auth., 282 S.C. 430, 319 S.E.2d 695 (1984)). Here, there is no doubt that the strict application of Section 44-1-60 to the facts in this case would substantially prejudice Blocker's constitutional rights, because it would make final the revocation of the four professional licenses he needs to earn his living without giving Blocker any opportunity to be heard or judicial review.

Blocker received notice of the decision on October 23, 2015. Calculating the deadline to file with the Board from that date results in a deadline of November 9, 2015.[9] Blocker filed his request well within that timeframe, on November 3, 2015. The Board issued its decision on November 4, 2015 and Blocker filed his Request for Contested Case Hearing with the ALC on December 2, 2015. Thus, the Court concludes that Blocker has not failed to exhaust his statutory administrative remedies and this matter is properly before the ALC.

Additional Statutory and Due Process Problems Presented in this Case

In support of his position that he would be denied due process were the Court to dismiss his case, Respondent also argues that the Department has failed to comply with the requirements of South Carolina Code Section 1-23-370(c). That subsection of the Administrative Procedures Act requires, "prior to the institution of agency proceedings," that the licensee be given notice of the "facts or conduct which warrant the intended action" so that he is "given an opportunity to show compliance with all lawful requirements for the retention of the license." S.C. Code Ann.

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[8] In Bellwood, an ALC case also concerning Section 44-1-60 and a notice issue, the Court concluded that applying the statutory fifteen-day deadline where notice was ineffective worked an absurdity not intended by the legislature, since the statute is written with the assumption that notice will be received. Bellwood, 12-ALJ-07-0569-CC, at 7 n.7 (S.C. Admin. Law Ct., July 19, 2013)

[9] The deadline is extended to the following Monday in compliance with Section 44-1-60(J).

§ 1-23-370(c) (2005); see also Garris v. Governing Bd. of S.C. Reinsurance Facility, 319 S.C. 388, 391, 461 S.E.2d 819, 821 (1995) (construing this subsection as "providing an opportunity to show that no violations occurred instead of providing an opportunity to correct deficiencies"). Blocker asserts that he was given no notice of, nor opportunity to be heard on, the majority of the alleged violations found by the Department in the administrative order. Blocker's assertions are supported by the Department's order, which does not recite the issuance of Notice of Alleged Violation or Notice of Enforcement Conference for three of the four worksites ruled upon. This clearly violates the protections of Section 1-23-370, as well as due process. See S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review."); see also Bundy v. Shirley, 412 S.C. 292, 303, 772 S.E.2d 163, 169 (2015) (quoting Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.").

Order of Remand

The Department has requested that, upon a finding of timeliness, the Court remand this matter to the Department, so that the Board may have an opportunity to review the case. However, review by the Board would not be sufficient to remedy the procedural and due process problems presented by this case. Therefore, the Court remands this case to the Department for *de novo* review, in order for the procedural defects in this case to be remedied, such that Respondent's statutory and constitutional rights are not infringed. Specifically, in order for the Department's final administrative order to contain findings of violations, Blocker must be given notice and an opportunity to explain any alleged violations, in compliance with Section 1-23-370(c). If the Department issues a new final administrative order in this matter, Respondent may file a new Request for Contested Case with the ALC Clerk's Office, upon exhaustion of the procedure contained in Section 44-1-60.

ORDER

IT IS THEREFORE ORDERED that this matter is **REMANDED** to the Department for additional proceedings consistent with this order.

AND IT IS SO ORDERED.

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

October 3, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin E. Coleman

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden

October 3, 2016
Columbia, South Carolina

EXHIBIT 2

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of Health and Environmental Control, Petitioner, vs. Kirby Blocker, Respondent.	Docket No. 15-ALJ-07-0554-CC **ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION**

This matter is before the Administrative Law Court (ALC or Court) pursuant to the Petitioner's motion seeking reconsideration of the Court's Order of Remand filed on October 3, 2016. The arguments in the motion reiterate the arguments made in Petitioner's Motion to Dismiss, at the April 4, 2016 motions hearing, and at the August 30, 2016 evidentiary hearing. The Court carefully considered all the arguments, testimony, and exhibits of the parties before ruling upon this matter.

However, in order to avoid any possible ambiguity, footnote one of the October 3, 2016 order regarding the burden of proof should be clarified. In order to explain the potentially confusing party designations in the case the Court stated:

> Blocker is the Respondent, even though he filed the case with the ALC. In a contested case, party labels are assigned by the ALC Clerk of Court's Office based on the burden of proof in a case. Here, the Department bears the burden of proving **the violations and the necessity of enforcement action**, and therefore is the Petitioner. See SCALC Rule 29(B); see also Leventis v. S.C. Dept. of Health & Envtl. Control, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) (citation omitted) ("'Generally, the burden of proof is on the party asserting the affirmative issue in an adjudicatory administrative proceeding.'"). (emphasis added)

This footnote merely indicated that the Department would bear the burden of proof in a hearing on the merits of the case, not that the Department bore the burden of proof on the preliminary issue of timeliness addressed in the order. Because the Department presented a *prima facie* case on the issue adjudicated in the preliminary evidentiary hearing, the burden was on Respondent to rebut the presumption of proper service. See Fassett v. Evans, 364 S.C. 42, 47, 610 S.E.2d 841, 843 (Ct. App. 2005) (citation omitted) ("There is a presumption of proper service when the civil rules on service are followed."). The Court concluded that the burden was met.

In other regards, the Petitioner's motion does not seek to correct manifest errors of law or fact or to present newly discovered evidence.

Therefore, **IT IS HEREBY ORDERED** that Petitioner's Motion for Reconsideration is **DENIED.**

AND IT IS SO ORDERED.

Deborah Brooks Durden

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

November 3, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

November 3, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Judge

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Appellate Case No.: 2016-002438

South Carolina Department of Health and Environmental Control,

Appellant,

v.

Kirby Blocker,

Respondent.

CERTIFICATE OF SERVICE

I, Sandra R. Wessinger, Legal Assistant with the S.C. Department of Health and Environmental Control, hereby certify that I have this 19th day of December, 2016, served the foregoing ***Appellant South Carolina Department of Health and Environmental Control's*** **Memorandum of Law on Appealability** upon counsel of record by placing a copy of same in an envelope and depositing it for delivery in the United States Mail with sufficient postage prepaid, at the address indicated below:

James E. Smith, Jr., Esquire
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Sandra R. Wessinger

Sandra R. Wessinger

December 19, 2016
Columbia, South Carolina

dhec
Healthy People. Healthy Communities.

December 19, 2016

HAND DELIVERY

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: South Carolina Department of Health and Environmental Control v. Kirby Blocker
Docket No. 15-ALJ-07-0554-CC; OGC# 22597

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of **Appellant South Carolina Department of Health and Environmental Control's *Memorandum of Law on Appealability*** (with attachments), for filing in connection with the above-referenced case. I would appreciate your office returning a stamped copy to our office in the self-addressed interagency envelope I have enclosed.

Thank you for your assistance in this matter. Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely yours,

Dawn K. Miller
Assistant General Counsel

Enclosure as stated
cc: James E. Smith, Jr., Esq.
Alexander G. Shissias, Esq.