THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Deborah Brooks Durden, Administrative Law Judge

Case No. 17-ALJ-17-0466-CC
Appellate Case No. 2018-000848

The Venture Grouping, LLC, d/b/a Zen Ultra Lounge, ... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The South Carolina Department of Revenue (the "Department" or "Respondent") mailed The Venture Grouping, LLC, d/b/a Zen Ultra Lounge (the "Appellant") its Department Determination (the "Determination") on November 6, 2017. (R. pp. 1 – 6; Department Determination.) On December 8, 2017, the Appellant filed its request for a contested case hearing with the Administrative Law Court (the "ALC"). (R. pp. 8 – 10; Req. for Contested Case Hr'g, Notice of Assignment.) The clerk assigned the case to the Honorable Deborah Brooks Durden on January 4, 2018. (R. p. 10; Notice of Assignment.) Thereafter, on January 22, 2018, the Department moved the ALC for an order dismissing the case due to the Appellant's failure to timely request a contested case hearing. (R. pp. 11 – 14; Mot. to Dismiss.) On February 14, 2018, the ALC issued an Order of Dismissal (hereinafter, the "Initial Order") granting the Department's Motion to Dismiss. (R. pp. 19 – 20; Initial Order.) Subsequently, the Appellant filed both a Motion to Reconsider and a memorandum in opposition to the Department's Motion to Dismiss. As a result, the ALC issued an order on February 26, 2018, granting the Appellant's Motion to Reconsider and vacating its Initial Order. (R. p. 22; Order Granting Mot. to Recons. and Vacating Prior Order.) On March 12, 2018, the Department replied to the Appellant's memorandum in opposition to the Department's Motion to Dismiss. (R. pp. 24 – 28; Reply to Pet'r's Resp. to Resp't Mot. to Dismiss.) Finally, on April 4, 2018, the ALC issued its final Order of Dismissal (hereinafter, the "Final Order") granting the Department's Motion to Dismiss. (R. pp. 29 – 33; Final Order.) The Appellant appealed the Final Order on May 4, 2018.

STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. Olson v. S.C. Dep't of Health & Envtl. Control,

379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Envtl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). S.C. Code Ann. § 1-23-610(B) (Supp. 2017) provides the applicable standard:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> > (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.

This Court should not reverse the ALC's decision in this case unless there is an error of law. "Questions of statutory interpretation are questions of law, which [this Court is] free to decide without any deference to the court below." Centex Int'l, Inc. v. S. C. Dep't of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013), *reh'g denied* (Sept. 20, 2013). However, the Department submits that no questions of statutory interpretation exist. The Department maintains that the language of the statutes and court rules at issue in this case is plain and unambiguous. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning." Ward v. West Oil Co., Inc., 387 S.C. 268, 278, 522 S.E.2d 516, 522 (2010). Moreover, the words of the statute "must be given their plain and ordinary meaning without

resort[ing] to subtle or forced construction to limit or expand [the statute's] operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (internal citations omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed.1992)). Accordingly, because the language of the statutes and court rules at issue is plain and unambiguous, no need for employing the rules of statutory interpretation exists. The ALC properly read the plain language of the statutes and court rules at issue and did not err in finding that the Appellant failed to timely request a contested hearing. Therefore, this Court should affirm the ALC's decision.

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT PROPERLY DISMISSED THE CASE AT BAR DUE TO THE APPELLANT'S FAILURE TO TIMELY FILE ITS REQUEST FOR A CONTESTED CASE HEARING, THUS DIVESTING THE ADMINISTRATIVE LAW COURT OF JURISDICTION TO HEAR THE CASE.

The ALC properly dismissed the Appellant's request for a contested case hearing as a result of the Appellant's failure to request said hearing within the thirty-day time period set forth in S.C. Code Ann. § 12-60-1320 (2014). Section 12-60-1320 provides that a person may contest a Department determination by requesting a contested case hearing before the ALC. Said section further provides that "such a request must be made within thirty days after the department's determination was sent by first class mail or delivered to the person." Id. Section 12-60-1320 sets forth a fixed period of time by which an individual can seek contested case review of a final Department determination. As such, § 12-60-1320 operates as a statute of limitations.

> The term "statute of limitations" is the collective term commonly applied to acts or part of acts that prescribe the periods beyond which a plaintiff may not bring a cause of action. A statute of limitations establishes the time period, after a cause of action arises, within which a claim or suit must be filed, to enforce that cause of

> action. A statute of limitations is a declaration that no suit may be maintained on a cause of action unless the suit is brought within a specified period of time after the right has accrued, or in other words, a law that bars claims after a specified period.

51 Am. Jur. 2d Limitations of Actions § 2 (May 2018). Since § 12-60-1320 operates as a statute of limitations, the failure of a person to file and serve the request for a contested case hearing within the statutory thirty-day period divests the ALC of jurisdiction to hear the contested case. See Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985). When the ALC does not have jurisdiction to hear a case it should dismiss the case. See, e.g., State v. Johnston, 327 S.C. 435, 438, 489 S.E.2d 228, 230 (Ct. App. 1997), rev'd on other grounds, 333 S.C. 459, 510 S.E.2d 423 (1999) (holding that "it is the duty of the court to assure that it renders no decision in a matter when it has no authority to act"). As will be discussed below, the ALC did not have jurisdiction to hear this case due to the Appellant's untimely request for a contested case hearing. Therefore, the ALC properly dismissed the Appellant's case.

A. The Appellant did not serve and file its request for a contested case hearing by December 6, 2017, and thus, the ALC properly dismissed the case.

The Appellant failed to timely serve and file its request for a contested case hearing, and thus, the ALC properly dismissed the case. As required by S.C. Code Ann. § 12-60-1310(D)(2)(a) (2014), the Department mailed the Appellant the written Determination on November 6, 2017, via first class mail. (R. pp. 1 – 6; Department Determination.) Accordingly, pursuant to § 12-60-1320 the ALC properly found that the Appellant's deadline to file a request for a contested case hearing with the ALC and serve the Department was December 6, 2017—thirty days after the Department mailed the Determination to the Appellant. (R. p. 31; Final Order 3.) Despite the December 6, 2017 deadline, the Appellant did not serve the Department with its request for a contested case

hearing until December 7, 2017.[1] (R. pp. 8 – 9; Req. for Contested Case Hr'g.) Additionally, the Appellant did not file its request for a contested case hearing with the ALC until December 8, 2017. (R. pp. 10, 31; Notice of Assignment, Final Order 3.) As such, the Appellant failed to serve and file its request for a contested case hearing within thirty days from the date the Department mailed the Determination. As a result of the Appellant's failure to timely serve and file its request for a contested case hearing, the ALC properly dismissed the case.

B. Rule 3(C), SCALCR does not extend the time to request a contested case hearing.

Rule 3(C), SCALCR, did not extend the Appellant's time to request a contested case hearing. As such, the Appellant only had until December 6, 2017, to request a contested case hearing, not December 11, 2017. Rule 3(C), SCALCR provides:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the **service** of a notice or other paper upon him and the notice or paper is **served** upon him by mail, by e-mail, or upon a person designated by statute to accept **service**, five days shall be added to the prescribed period.

(Emphasis added). Said differently, Rule 3(C), SCALCR allows a party to add five days to the prescribed response period if the party was served with a notice or other paper by mail, by e-mail, or upon a person designated by statute to accept service. Thus, in order for Rule 3(C), SCALCR to be triggered, a party must first be *served* a notice or other paper by mail, by e-mail, or upon a person designated by statute to accept service. Accordingly, Rule 3(C), SCALCR could only apply in this case if the Department served the Determination on the Appellant, which it did not.

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[1]The Department did not receive the Appellant's request for a contested case hearing until December 11, 2017, and said request was postmarked December 8, 2017. However, the date on the cover letter and the date on the proof of service was December 7, 2017. Thus, for purposes of the Department's Motion to Dismiss, the Department used December 7, 2017, as the date of service because such date was the most favorable to the Appellant.

As explained above, the Department sent the Determination to the Appellant on November 6, 2017, via first class mail as required by § 12-60-1310(D)(2)(a). Section 12-60-1310(D)(2)(a) states that a Department determination must "be **sent** by first class mail or **delivered** to the person." (emphasis added). Accordingly, the Department did not have to serve the Determination on the Appellant. Additionally, the Appellant's time to request a contested case hearing began on the date the Department's Determination "was **sent** by first class mail or **delivered** to the [Appellant]." Section 12-60-1320 (emphasis added). As such, the statute prescribes a period after *mailing* in which the person must request a hearing. The statute does not prescribe a period after *service*—the mechanism that triggers Rule 3(C), SCALCR. Because § 12-60-1320 does not prescribe a period after service, Rule 3(C), SCALCR will never be triggered. Accordingly, Rule 3(C), SCALCR does not apply when requesting a contested case hearing. Thus, the Appellant only had thirty days, as opposed to thirty-five days, from the date the Department mailed the Determination to request a contested case hearing. Despite the statutory thirty-day period, the Appellant did not serve and file its request for a contested case hearing until the thirty-first and thirty-second days, respectively. Therefore, the ALC properly dismissed the Appellant's request for a contested case hearing because the Appellant failed to serve and file its request for a contested case hearing within thirty days after the Department mailed the Determination.

Despite the plain, unambiguous language in the statutes and court rules cited above, the Appellant maintains that it had an extra five days (thirty-five days instead of thirty days) from the date the Determination was mailed to request a contested case hearing. Specifically, the Appellant claims:

> It is clear that § 12-60-1324 that notice is being provided to the Appellant and the Rule contemplates that notice is being served upon the Appellant by first class mail. The legislature clearly

> intended for it to be an actual thirty (30) day notice period to the Appellant to file any type of appropriate response.

Initial Brief of Appellant 3. As a threshold matter, "§ 12-60-1324" does not exist in the current South Carolina Code of Laws. Moreover, the Appellant fails to specify "the Rule" it is referring to. In light of being unable to determine which statute and rule the Appellant is referring to, the Department is unable to fully understand or respond to the Appellant's argument.

Nevertheless, to the extent the Appellant is arguing that Rule 3(C), SCALCR permitted the Appellant to add five days to the thirty-day period set forth in § 12-36-1320 because that statute contemplates service, the Department submits such argument runs contrary to the plain language of the statute. "What a legislature says **in the text** of a statute is considered the best evidence of the legislative intent or will." Scott, 351 S.C. at 588, 571 S.E.2d at 702 (emphasis added). The Legislature said "sent" not "served" in the text of § 12-60-1320. If the Legislature intended for the Department to serve its determinations as opposed to merely send them, then the Legislature would have expressly stated such. For example, in S.C. Code Ann. § 12-60-3310 (2014) the Legislature specifically stated in the text of the statute that "[a] party permitted to request a contested case hearing with the [ALC] shall make his request and **serve** it on opposing parties . . . ." As such, the text of § 12-60-3310 demonstrates that the Legislature clearly intended for a party requesting a contested case hearing to serve its request on opposing parties. To the contrary, the text of §§ 12-60-1310(D)(2)(a) and 12-60-1320 demonstrates that the Legislature did not intend for the Department to serve its determinations.[2] One could only conclude that the legislature

[2]The Legislature's distinction between sending and serving makes sense here. Typically, a document is served when initiating a legal proceeding or during the course of a legal proceeding. See, e.g., § 12-60-3310; Rule 5, SCALCR; Rule 5, SCRCP. Prior to the initiation of a legal proceeding, such as when a taxpayer is in the process of exhausting his prehearing remedies, documents are not required to be served. Instead the exchange of documents takes place via regular mail or other forms of delivery. See, e.g., S.C. Code Ann. § 12-60-420(A) (2014); § 12-60-1310. For example, the Department only has to send by first class mail notice to a license

contemplated service when it chose to use the text "sent by first class mail" by resorting to subtle or forced construction to limit or expand § 12-60-1320's operation. Because the words of a statute must be given their plain and ordinary meaning, the word "sent" in § 12-60-1320 must mean "sent" and not "served." See Hitachi Data Sys. Corp., 309 S.C. at 178, 420 S.E.2d at 846. Accordingly, because the plain language of § 12-60-1320 does not say "thirty days after the date the department's determination was served," Rule 3(C), SCALCR was not triggered, and the Appellant did not get an additional five days to serve and file its request for a contested case hearing. Therefore, the ALC properly dismissed this case as a result of the Appellant's failure to request a contested case hearing within the prescribed thirty-day period.

CONCLUSION

As explained more fully above, this Court should affirm the ALC's decision as the decision was based on a plain reading of the language in the statutes and court rules at issue and the ALC did not make any errors of law that affected the decision.

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holder that its application is denied, not serve the notice on the license holder. If the Legislature truly intended for the word "sent" to mean "serve," then all documents the Department sends while a taxpayer is exhausting his prehearing remedies, not just the Department's determination, would have to be served on the taxpayer. Such a requirement would be cost prohibitive and inefficient as the Department sends numerous notices to taxpayers on a daily basis. As such, the Legislature could not have intended to place such a burden on the Department by requiring service. Moreover, as previously explained, if the Legislature intended for the Department to serve its determinations it would have expressly stated such.

Respectfully Submitted,

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September 21, 2018

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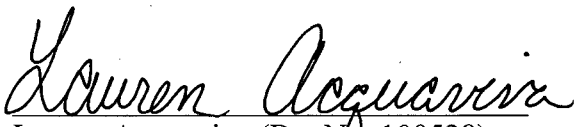
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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