

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph K. Anderson, III
Chief Administrative Law Judge

Trial Court Case No. 2011-AL-11-00168

Vanessa Patrick,

Appellant,

v.

South Carolina Department of
Labor, Licensing and
Regulation, State Real Estate
Commission,

Respondent.

FINAL BRIEF OF APPELLANT

SC Court of Appeals

JUN 21 2012

RECEIVED

Vanessa Patrick
1187 Kiblers Bridge Road
Prosperity, South Carolina 29127
(803) 521-3614
Pro Se Appellant

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	2
Facts	3
Arguments	
I. THE ADMINISTRATIVE LAW JUDGE (“ALJ”) ERRED BY FAILING TO RULE ON ANY PRETRIAL MOTIONS FILED IN THE COURSE OF THE APPEAL PRIOR TO ISSUING HIS ORDER, DEPRIVING <i>PRO SE</i> APPELLANT OF THE OPPORTUNITY TO CONFORM HER BRIEF OR OTHERWISE EXPLORE ALTERNATIVE RULES AND PLEADINGS TO ENSURE A FULL AND FAIR REVIEW OF HER CASE	9
II. THE ALJ ERRED BY FAILING TO INVESTIGATE AND OVERTURN PROCEDURAL IRREGULARITIES ALLEGED BY APPELLANT, DENYING APPELLANT HER DUE PROCESS RIGHTS	11
III. THE ALJ ERRED BY FAILING TO OVERTURN THE AGENCY’S FINAL ORDER FROM THE HEARING IN WHICH IMPROPER ADMISSION OF HEARSAY AND THE PROSECUTOR’S IMPROPER ACTIONS RESULTED IN PREJUDICIAL MISSTATEMENTS OF FACT AND ERRONEOUS CONCLUSIONS OF LAW	20
IV. THE ALJ ERRED BY FAILING TO ADMIT EVIDENCE CLEARLY RELEVANT TO AN UNDERSTANDING OF THE CASE. ABSENT SAID EVIDENCE, THE ALJ DEMONSTRATED AN IMPERFECT UNDERSTANDING OF IMPORTANT ASPECTS OF THE CASE BY MAKING FURTHER MISSTATEMENTS OF FACT LEADING TO ERRONEOUS CONCLUSIONS OF LAW	35
V. THE ALJ ERRED BY FAILING TO OVERTURN THE AGENCY’S FINAL ORDER WHICH ARBITRARILY SINGLED OUT APPELLANT FOR PROSECUTION AND ENACTED A VIRTUALLY UNPRECEDENTED SANCTION, THEREBY DEPRIVING APPELLANT OF HER FUNDAMENTAL CONSTITUTIONAL RIGHTS	44
Conclusion	47

TABLE OF AUTHORITIES

CASES

<u>Anonymous Physician v. LLR Bd. of Medical Exam'rs,</u> No. 08-ALJ-11-0368-AP (2009).....	49
<u>Anton v. SC Coastal Council,</u> 321 S.C. 481, 469 S.E.2d 604 (1996)	12
<u>Arizona v. Fulminante,</u> 111 S.Ct. 1246 (1991).....	19
<u>Board of Regents v. Roth,</u> 408 U.S. 5564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).....	14
<u>Branch Ministries v. Richardson,</u> 970 F. Supp. At 17 (D.C.1997).....	47
<u>Byers v. SC ABC Commission,</u> 305 S.C. 243, 407 S.E.2d 653, 655 (1991)	36
<u>Chastain v. Hiltabidle,</u> 381 S.C. 508, 673 S.E.2d 826 (2009)	10
<u>D. Michael Woodward, M.D. v. SCDLLR,</u> No. 97-ALJ-11-0649-AP (1997).....	37
<u>D. Michael Woodward, M.D. v. SCDLLR,</u> No. 98-ALJ-11-0587-AP (1999).....	12
<u>Dantzler v. Callison,</u> 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956)	46
<u>Darby v. The Furman Company,</u> 513 S.E.2d 848 (1999)	16
<u>Davis v. Traylor,</u> 340 S.C. at 155, 530 S.E.2d at 387 (2000).....	36
<u>Doug Proctor d/b/a Anderson Tire Recycling v. DHEC,</u> 368 S.C 279, 628 S.E.2d 496 (2006)	36, 44
<u>Faith Cathedral Fellowship, Inc. v. SCDHEC,</u> No. 03-ALJ-07-0346-CC (2005).....	46
<u>Felder v. Charleston County School District,</u> Supreme Court Opinion 24642 (1997).....	14
<u>Forner v. Butler,</u> 460 S.E.2d 425 (1995), Footnote 1	11
<u>Gardner v. S.C. Dept. of Revenue,</u> 353 S.C. at 14, 577 S.E.2d at 197 (2003).....	10
<u>Garris v. Governing Body of SC Reinsurance Facility,</u> 333 S.C. 432, 511 S.E.2d 48 (1998)	20, 21
<u>Gause v. Livingston,</u> 251 S.C. 8, 159 S.E.2d 604 (1968)	37

<u>Georgetown County v. SCDHEC,</u> SCALC 01-ALJ-07-0366-CC (2002).....	45
<u>Gulledge v. McLaughlin,</u> 328 S.C. 504, 510 492 S.E.2d 816, 819 (Ct. App. 1997).....	36
<u>Henning v. Kaye,</u> 307 S.C. 436, 415 S.E.2d 794 (1992)	11
<u>Hoeffner v. The Citadel,</u> 311 S.C. at 365, 429 S.E.2d at 192 (1993).....	36
<u>Jolly v. State,</u> 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)	23
<u>Karen M. Zimmerman v. SCDLLR,</u> No. 97-ALJ-11-0427-IJ (1998)	15
<u>McGowan v. Maryland,</u> 366 U.S. 420 (1961).....	46
<u>Orangeburg County DSS v. Schlins,</u> 291 S.C. 477, 354 S.E.2d 388 (1987)	23
<u>Palmetto Alliance v. SC Pub. Svc Comm.,</u> 282 S.C. 430, 436, 319 S.E.2d 695, 698 (1984)	15
<u>Ross v. MUSC,</u> 317 S.C. 377, 453 S.E.2d 880 (1994)	12
<u>Ross v. MUSC,</u> 328 S.C. 51, 492 S.E.2d 62, 72 (1997)	21
<u>SCDHEC v. Armstrong,</u> 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987).....	46
<u>Sloan v. SC Bd. Of Physical Therapy Examiners,</u> 370 S.C. 452, 484, 636 S.E.2d 598, 615(2006)	19, 46
<u>Smith v. State,</u> 386 S.C. 562, 689 S.E.2d 629 (2010)	23
<u>South Carolina Bd. of Exam'rs in Optometry v. Cohen,</u> 256 S.C. 13, 180 S.E.2d 650 (1971)	49
<u>State v. 192 Coin-Op. Video Game Machines,</u> 338 S.C. 176, 525 S.E.2d 872, 885 (2000)	46
<u>State v. Bottoms,</u> 260 S.C. 187, 195 S.E.2d 116 (1973)	26
<u>State v. Craig,</u> 267 S.C. 262, 227 S.E.2d 306 (1976)	22, 24
<u>State v. Gaines,</u> 271 S.C.65, 244 S.E.2d 539 (1978)	26
<u>State v. Huggins,</u> 325 S.C. 103, 481, S.E.2d 114 (1997)	26
<u>State v. McGill,</u> 191 S.C. 1, 3 S.E.2d 257 (1939)	24

<u>State v. Robinson,</u> 235 S.C. 395, 111 S.E.2d 669 (1959)	22
<u>State V. Robinson,</u> 238 S.C.140, 119 S.E.2d 671 (1961)	22
<u>TNS Mills Inc. v. SC Dept. of Revenue,</u> 331 S.C 611, 626, 503 S.E.2d 471, 479 (1998)	46
<u>United States v. Catlett,</u> 584 E.2d 864 (8 th Cir. 1978)	46
<u>Vaught v. A. O. Hardee & Sons, Inc.,</u> 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005)	23
<u>Whaley v. Dorchester County Zoning Bd. of Appeals,</u> 337 S.C. 568, 524 S.E.2d 404 (1999)	46
<u>Wilson v. State Bd Of Medical Exam'rs,</u> 305 S.C. 194, 406 S.E.2d 345 (1991)	15
<u>Withrow v. Larkin,</u> 421 U.S. 35 (1975).....	19

RULES

ALC Rule 21	10
ALC RULE 40, 2009 Revised Note.....	10
Rule 208(b), SCACR	11
Rule 401, SCRE.....	36
Rule 801(c), SCRE.....	22
S.C. Hearsay Rule 3.3	22

STATUTES

S.C. Code Ann. § 1-23-320.....	37, 38
S.C. Code Ann. § 1-23-370.....	14, 45
S.C. Code Ann. § 1-23-380.....	12, 20, 35
S.C. Code Ann. § 40-1-10.....	44
S.C. Code Ann. § 40-1-80.....	13
S.C. Code Ann. § 40-1-110.....	28, 34, 41, 43
S.C. Code Ann. § 40-1-190.....	13
S.C. Code Ann. § 40-57-135.....	16, 17, 18, 19, 34, 40
S.C. Code Ann. § 40-57-137.....	18, 28, 34, 41
S.C. Code Ann. § 40-57-145.....	34, 41, 42, 43, 44
S.C. Code Ann. § 40-57-150.....	14
S.C. Const. Article I, § 3	45
S.C. Const. Article I, § 22	21
U.S. Const. amend. XIV, § 1.....	45

OTHER AUTHORITIES

12 Am. Jur. 2d <u>Brokers</u> p. 120 (1997)	16
24 C.J.S. Criminal Law pp. 1442a (1961)	24

STATEMENT OF ISSUES ON APPEAL

The United States and South Carolina Constitutions protect its citizens from unfair prosecution and unequal treatment under the law. The accused must receive a clear explanation of the charges and the possible consequences against him, an opportunity to examine evidence supporting the charges, may state his case, may present exculpatory evidence, has the right to a fair trial, and the right to appeal if aggrieved by the decision. In this case, however, beginning with the original Complaint and continuing through the appeal to the Administrative Law Court, Appellant has been unfairly prosecuted and has not received due process and equal protection under the law. The cumulative effect of the errors has been disastrous as Appellant has been permanently deprived of her financial livelihood and suffered irreparable harm to her character. Accordingly, Appellant begs this Court for relief: specifically, Appellant requests the Court reverse the Real Estate Commission's decision to permanently revoke her license, thus restoring Appellant's good name and basic right to earn a living, and, if deemed necessary, levy a more appropriate and equitable punishment.

The Issues on Appeal are stated below:

1. The Administrative Law Judge ("ALJ") erred by failing to rule on any pretrial motions filed in the course of the appeal prior to issuing his Order, depriving *pro se* Appellant of the opportunity to conform her brief or otherwise explore alternative rules to ensure a full and fair review of her case.
2. The ALJ erred by failing to investigate procedural irregularities alleged by Appellant, denying Appellant her due process rights.

3. The ALJ erred by failing to overturn the Agency's Final Order from the hearing in which improper admission of hearsay and the prosecutor's improper actions resulted in prejudicial misstatements of fact and erroneous conclusions of law.
4. The ALJ erred by failing to admit additional evidence clearly pertinent to an understanding of the case. Absent said evidence, the ALJ demonstrated an imperfect understanding of important aspects of the case by making further misstatements of fact leading to erroneous conclusions of law.
5. The ALJ erred by failing to overturn the Agency's Final Order which arbitrarily singled out Appellant for prosecution and enacted a virtually unprecedented sanction, thereby depriving Appellant of her fundamental constitutional rights.

STATEMENT OF THE CASE

On February 16, 2011, as the result of a complaint letter received by LLR on December 1, 2008, a hearing was held before the Real Estate Commission and Appellant's real estate license was permanently revoked and a Two Thousand, Five Hundred Dollar (\$2,500.00) fine levied. The Final Order was mailed to Appellant on February 24, 2011. Appellant then timely filed a Notice of Appeal with the Administrative Law Court on March 24, 2011. On March 29, 2011, LLR filed with the Administrative Law Court a Motion to Conform and Strike or in the Alternative, Motion to Seal. The ALJ, however, never ruled on this motion.

On May 26, 2011, Appellant timely filed Appellant's Brief. On June 6, 2011, LLR filed a Motion to Conform Brief to Rule 37(B), or in the Alternative, Strike. Thereafter, on June 20, 2011, Appellant filed Appellant's Response to Motion to Conform Appellant's Brief, and

Amended Statement of Issues on Appeal. The ALJ did not comment on either the motion or the response.

On June 24, 2011, LLR requested a thirty (30) day extension to file the Respondent's Brief, pending rulings on the motions. The ALJ did not respond. So on July 18, 2011, LLR filed Brief of Respondent, and on July 28, 2011, Appellant filed Appellant's Response to Respondent's Brief.

On August 1, 2011, LLR sent a letter to the ALJ in lieu of a second Motion to Conform Brief to Rule 37(B), or in the Alternative Strike to Appellant's Response to Respondent's Brief. The ALJ did not rule.

On October 5, 2011, the ALJ issued the Order affirming LLR's decision to revoke Appellant's real estate license and fine her \$2,500.00. Appellant received this Order on October 7, 2011.

Appellant then filed her Notice of Appeal from Administrative Tribunal on November 4, 2011, and on November 30, 2011, requested a thirty (30) day extension for filing her Initial Brief. On December 5, 2011, the Court of Appeals granted an extension until January 4, 2012. This brief follows:

FACTS

Around Spring 2007, Appellant was contacted by a member of Pinner family who owned the subject property and was well-known to Appellant – who inquired whether Appellant as a real estate agent knew anyone who might purchase said property. Appellant located potential buyers and as a buyer's agent, attempted to broker a deal. The family elected, however, to contract with other buyers, but the contract eventually fell through. In February of 2008,

Appellant was contacted to gauge further interest. Appellant, working for *Asset Realty* at the time (and later for *Acquire Real Estate, Inc.*), along with licensees Sally Grooms and Nancy Curtis, located two seasoned real estate investors with the means and financial ability to purchase the land. They began preparations to form *Riverpath Investors LLC* (the private investors were to become partners in *Riverpath*, once formed, as financiers) and secured preliminary financing from South Carolina Bank & Trust (“SCB&T”). In March of 2008, Appellant and her licensee partners drafted an offer on behalf of the planned LLC and presented it to licensee Andy Bowers who also knew Appellant well and who was acting as the seller’s agent in this transaction. It was later discovered that licensee Bowers was only advising the Pinner family and facilitating the process, but had no legal agency agreement with the sellers. Importantly, the transaction was not a typical real estate deal: the tract was never listed by any agent on the MLS as this was essentially a private deal between two private parties. Furthermore, it is equally important to note the Pinner family and Bowers possessed *actual* knowledge that Appellant was a licensed real estate agent via previous interactions. In fact, in another transaction occurring simultaneously between Appellant and a subset of the Pinner family, the family explicitly knew Appellant was a licensee as well as a member of the purchasing entity.

The offer was written on a standard form used by most real estate agents; Asset Realty’s logo was already photocopied on the form. Licensee Grooms signed said offer and wrote an earnest money check for twenty-five thousand dollars (\$25,000.00). A counter-offer called for an additional five thousand dollars (\$5,000.00) in earnest money; Grooms initialed the offer and wrote the check (R. p. 286). The final executed contract provided by Bowers to Appellant and her “partners” was delivered on or about March 29, 2008 (R. p. 290 and R. p.

296 (final “clean copy”). Said contract called for thirty thousand dollars (\$30,000.00) in refundable earnest money as well as a one hundred and twenty (120) day due diligence *contingency* period, among other key terms. *Id.* When Grooms was unable to cover either of the earnest money checks, Appellant secured said sum. This money was not placed in Asset’s escrow account, but placed in the account of a third party for safekeeping.

The contract was unaccompanied by a written disclosure that Appellant was one of the buyers as well as a licensed real estate agent. Unlike form residential contracts, a form land contract does not contain a section specifically providing for said disclosure. Even though Bowers and the Pinner family knew Appellant’s licensee status, Appellant did mistakenly fail to disclose said status in writing.

Between April and June of 2008, due diligence required by the contract as well as other activities (engaging accountants, attorneys, marketing professionals, etc.) commenced. In late July of 2008, Appellant notified Bowers that the required due diligence had been significantly delayed due to factors including, but not limited to, significant changes in the Richland County approval process and the survey taking much longer than normal due to the difficulty of the terrain, weather, and vegetation. As the contract was to expire in a month, Appellant indicated an extension would be needed to complete due diligence and continue with the contract. In the interim, Appellant learned the Pinner family were considering a competing offer and had also approached Richland County about placing their property in a conservation easement. (R. p. 128, line 18 - R. p. 130, line 25; R. p. 152, line 25 – p. 153, line 13).

Appellant contacted BP Barber who estimated due diligence and contingency removal could not be completed until December 31, 2008. Appellant wrote an extension reflecting Barber’s estimate but was advised by Bowers to request an extension through September 30, 2008 and

then take matters a month at a time. Appellant did as asked (R. p. 303) but *never received the extension*, and the contract expired on August 29, 2008. (R. p. 297; R. p 154, line 22 – p. 155, line 25).

Beginning in September and continuing through early October, talks resumed as apparently the competing purchasers were no longer in the picture. *Although the contract was expired*, Appellant tried anew to secure financing but SCB&T withdrew its support due to the economic recession, and the original private investors became unwilling to move forward in the absence of bank leverage.

In mid-October of 2008, Appellant located a new and willing investor to consider renegotiating the expired contract. Said investor was not interested in joining the partially formed *Riverpath*, but planned to use his own development LLC and engage Appellant and Grooms as site agents. To protect their position and obtain time for such negotiations, Appellant asked Bowers if the original sellers would be interested in extending the deal with a new financier. After reporting the sellers were indeed interested and would have their attorney, Henry Bufkin, prepare an extension, Bowers faxed to Grooms the “Pinner Addendum,” which would revive and extend the expired contract through December 31, 2008 (R. p. 304).

Securing a commitment from the new investor to host a meeting with the sellers, Grooms signed the Pinner Addendum. Appellant, without reading the document, signed as a *witness* to Ms. Groom’s signature, then faxed the Addendum to Bowers for the Pinner family’s signatures. Before the Addendum executed by the Sellers was delivered to Appellant or Ms. Grooms, attorney Bufkin began to demand the transfer of one hundred and eighty-five thousand dollars (\$185,000.00) in earnest money deposits to his trust account. Appellant then

read the Addendum, which contained multiple errors from the very first paragraph: it stated a “valid contract” existed between *Riverpath Investors LLC* and the Pinner family, but there was no valid contract because said contract had by its own terms expired on August 29, 2008. Appellant informed Bowers the terms of the Addendum were incorrect and could not in any event be met by the now *former purchasers*, and to withdraw the Addendum. Appellant told Bowers Riverpath could only put up \$30,000, the amount of the original earnest money; Appellant further explained that a deal with additional earnest money required the sellers’ participation with the new investor. The sellers declined to meet with him; thus, Appellant considered the original contract expired and the Pinner Addendum withdrawn. However, on November 24, 2008, Bufkin sent a letter of “demand to close or produce earnest money” and copied the Real Estate Commission (R. p. 306). In order to devote their full attention to resolving this matter, on December 4, 2008, Appellant and Grooms (but not Curtis) voluntarily placed their licenses on inactive status. Subsequently, the Sellers had Bowers contact the new investor directly; the investor declined to deal with the sellers, in part due to their actions with regards to Appellant.

Subsequent to the demand letter, several settlement offers were made but all were rejected. Instead, Bufkin opted for CCRA mediation. Before the mediation could commence, however, he filed a civil lawsuit against Appellant and Grooms, among others.

On March 9, 2009 Appellant received a letter from Real Estate Commission investigator John Sowell asking Appellant to permanently surrender her license in lieu of an investigation. (R. p. 309). Appellant and her attorney Tommy Lydon denied the request (R. p. 310).

For the remainder of 2009 and into early 2010, the civil case grinded along and was remanded to mediation, which proved fruitless. As Appellant was sidelined from her livelihood, she

sought to reinstate her license. Two visits to LLR and multiple calls to Sowell yielded no response. On March 11, 2010, Lydon spoke to Sowell who indicated even if the civil case was settled, a hearing would be needed. To hasten the process, in April 2010 Appellant finally spoke with Sowell but was unable to arrange a meeting to present Sowell with her evidence. Appellant next spoke to the Director of the Real Estate Commission, Jay Pitts, who said Appellant had permanently surrendered her license and the Commission did not wish to revisit the matter. (However, on May 7, 2010, Appellant received a renewal application from LLR indicating her license status as “inactive” – ***not permanently surrendered*** (R. p. 311). Appellant’s attorney wrote Sowell on May 17, 2010 (R. p. 314) and again on May 21, 2010 (R. p. 315), and spoke to Agency counsel Sheridan Spoon on May 20, 2010 to reiterate Appellant had **not** permanently surrendered her license and wished her case to be reopened. Receiving no response from LLR, Appellant, wishing to proffer her evidence and concerned with the lack of due care exhibited with regards to Appellant’s career, wrote Director Adrienne Youmans on September 9, 2010 (R. p. 316). Youmans merely responded that Appellant’s case had been reopened; no meeting was granted (R. p. 325).

Finally, the case was reopened and on October 13, 2010, Appellant received a vague Notice of Charges ***without accompanying evidence*** as well as a Notice of Hearing scheduled for November 16, 2010 (R. p. 326). Appellant’s attorney requested a new hearing date as he would be unavailable. Agency’s attorney interjected by notifying the Board that Appellant had written LLR “outside the knowledge of her attorney,” (R. p. 330) but an extension was granted.

On January 6, 2011, all parties to the civil action executed a *Confidential Settlement Agreement and General Release*, effectively ending litigation. Appellant’s attorney notified

LLR of this development and requested a similar settlement between Appellant and LLR (R. p. 332). Instead, a new Notice of Hearing was issued and set for February 16, 2011. Appellant's attorney again asked that the Notice of Charges be explained and evidence against Appellant be provided. On February 2, 2011, LLR instead issued a *Memorandum of Agreement and Stipulations* which asked Appellant to admit to charges LLR had still not clearly defined or provided evidence in support thereof (R. p. 335). Appellant refused to sign but again offered to meet with LLR officials and present exonerating evidence in hopes of obtaining an equitable resolution. Appellant's offer was refused.

Finally, on February 8, 2011, Appellant received copies of the evidence against her (R. p. 339). A mere nine days later on February 16, 2011, Appellant's hearing was held before the Board of the Real Estate Commission and her real estate license was permanently revoked.

APPELLANT'S ARGUMENT

I. The Administrative Law Judge ("ALJ") erred by failing to rule on any pretrial motions filed in the course of the appeal prior to issuing his Order, depriving *pro se* Appellant of the opportunity to conform her brief or otherwise explore alternative rules and pleadings to ensure a full and fair review of her case.

As stated above, the State filed motions – accompanied by Appellant's response thereto – to prevent Appellant from introducing additional evidence the latter believed relevant and material to a complete understanding of the case at hand. While the specifics of Appellant's argument in this regard are more fully explained below and most specifically in her Response to said motions, what matters here is the ALJ never expressly ruled on the State's motions and instead issued a Final Order that summarily dismissed Appellant's additional evidence with

little or no comment. Thus, the ALJ effectively granted the State's motion but did so in the context of the Final Order, not in a separate ruling directly addressing the issue in dispute. Appellant therefore contends this action substantially prejudiced her case on the following two grounds:

A. Irreparable damage to Appellant's case by foreclosing other avenues of legal recourse.

Pursuant to the "2009 Revised Note" to ALC Rule 40 "[t]he rules for hearing matters on appeal from the final decision of an agency are based on the SC Appellate Court rules as modified for the less complex matters heard by the Court. The SC Appellate Court Rules shall be examined to resolve novel issues of appellate procedure in the Court." If the agency appeal rules were inadequate as to the complexity of this case, and the ALJ had ruled on the Motions to Conform, Appellant could have made motions to admit the evidence and issues based upon the more complex SCAC rules. "To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and advancing his or her case." *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826 (2009) citing *Gardner v. S.C. Dept. of Revenue*, 353 S.C. at 14, 577 S.E.2d at 197 (2003). In the event of adverse ruling, Appellant could have conformed or made motions using other rules, such as ALC Rule 21, to be justly heard.

B. Irreparable damage to Appellant's case because the ALJ unfairly allowed no technical leniency in the filings of a *pro se* Appellant. Such leniency is indeed allowed and even encouraged: "[i]n all cases involving *pro se* litigants or those without substantial knowledge or experience in administrative matters, the administrative law judge may make reasonable efforts to ensure fairness." In the interest of fairness, the State Supreme Court has even

extended latitude to appellants represented by counsel: “[a]lthough this Court would be completely justified in dismissing this appeal based on appellants’ numerous violations of the Rules, we decline to do so...” *Henning v. Kaye*, 307 S.C. 436, 415 S.E.2d 794 (1992)(in which the attorney was given direction and a chance to conform his filings prior to a ruling).

As our entire legal system is based on fairness, it is one thing to deny additional evidence not in the record. But it is quite another to never formally rule on a pretrial motion and not permit a layperson to correct her brief. The State wished to exclude Appellant’s additional evidence – of course. But it defies all tenets of fundamental fairness to not allow a *pro se* Appellant – one completely inexperienced in Appellant procedure and without any professional legal help whatsoever – the opportunity to conform her brief and make her arguments in the technically correct (as the ALJ believed) manner.

Indeed, much of Appellant’s Brief included references to the additional evidence she believed should be included as relevant and material to a complete understanding of her case. “The only matter which should not appear in the record are those items a party believes to be “not relevant to the appeal.” Rule 208(b), SCACR. If the parties in this case considered a fact relevant and worthy of mention in the brief, the parties should have included matter in the record to support that factual assertion.” *Forner v. Butler*, 460 S.E.2d 425 (1995) Footnote 1. Had the ALJ actually ruled on the motions and granted the State’s wish for Appellant to conform, then the latter could have done so thereby ensuring Appellant received a fair and equitable review of her case.

II. The ALJ erred by failing to investigate and overturn procedural irregularities alleged by Appellant denying Appellant her due process rights.

Judge Stevens, in *D. Michael Woodward, M.D. v. SCDLLR*, No. 98-ALJ-11-0587-AP(1999) states “[w]hen the procedure employed at the contested case level is challenged, the appellate body has the duty to ensure that the hearing below was accompanied by a fair and impartial procedure,” citing *Ross v. MUSC*, 317 S.C. 377, 453 S.E.2d 880 (1994). “Determining whether a fair and impartial procedure occurred requires the appellate body, not the contested case body, to act as the fact-finder on issues related to the disputed procedural irregularity” citing SC Code Ann. 1-23-380(A)(5) (Supp. 1997). “Thus the ALJ as the fact-finder is required to establish the methodology for determining whether irregularities occurred. The methodology... is neither fixed by statute nor predetermined by and regulation. Rather, the Appellate body in an exercise of discretion considers the unique circumstances of a case and determines the most appropriate means for allowing proof.” Citing *Ross*.

Further, “failure of the reviewing court to examine the asserted irregularities **is a basis for a reversal** accompanied by a remand directing the judge to accomplish the task.” *Anton v. SC Coastal Council*, 321 S.C. 481, 469 S.E.2d 604 (1996)(emphasis added). “[W]hile certainly the reviewing judge must probe alleged procedural irregularities, discretion resides in the judge in deciding the most appropriate means to accomplish the evidentiary inquiry.” Citing *Ross*.

From beginning to end, the manner in which LLR handled Appellant’s case was infected with errors in procedure, law and fact, yet the ALJ committed reversible error by failing to probe the alleged procedural irregularities, accomplish the evidentiary inquiry, or to overturn even a single portion of the Agency’s case against Appellant.

A. Pre-Hearing Procedural Irregularities

Appellant's rights to due process were compromised each step of the way prior to the hearing:

1. The Agency failed to timely provide Appellant a copy of the Complaint or evidence against her, and failed to corroborate or otherwise obtain evidentiary support for the allegations before prosecuting Appellant. LLR did not provide Appellant with the complaint letter (dated November 2008) or the "evidence" collected in her case until nine (9) days prior to the hearing (February 2010), despite multiple requests. Section 40-1-190(B) states a party may not be prohibited "from exercising the respondent's constitutional right of due process under the law or... from normal access to the charges and evidence filed against the respondent as part of due process under the law." Curiously, LLR's website states "[t]he Commission is not empowered to assist with the following types of complaints: Contract matters such as questions about ...sales contracts...for which you need to contact an attorney; earnest money or security deposit disputes that must be heard by a magistrate" - matters that were the crux of the complaint.

By failing to obtain all available evidence, LLR made little or no attempt to corroborate the Complaint's allegations, assuredly not what was intended by Section 40-1-80: "In conducting the investigation the director may... take evidence, and require the production of any matter which is relevant to the investigation including, but not limited to, the existence, description, nature, custody, condition, and location of books, documents, or other tangible items and the identity and location of persons having knowledge of relevant facts or any other matter reasonably calculated to lead to the discovery of material evidence." The LLR Investigator, when asked if he had ever even spoken to Appellant, admitted "[n]o, I've never --- I spoke to her on the telephone after the investigation had been concluded and gone to the IRC." When asked "the main course of your investigation consisted of collecting all these documents, is

that correct?” he responded, “Yes.” (R. p. 76, line 18 – R. p. 77, line 15). The evidence accumulated by LLR consisted of the complaint letter and a few documents provided by Asset Realty. Given the wealth of available information and Appellant’s strong willingness to share, apparently the entire proceeding as based on the most cursory of investigations although Appellant’s entire livelihood and reputation was at stake.

2. Proceedings were not conducted promptly, preventing Appellant from earning a living.

SC Code Section 40-57-150(C)(1) states in part “[w]hen the department has reason... an investigation must be initiated within 30 days.” Appellant first requested license reactivation **March 2010**, yet, due to her file being improperly marked, staff reorganization and confusion as to how to handle Appellant’s case (discussed in Appellant’s Brief), LLR did not issue the Notice of Charges until **November 2010** (R. p. 218).

3. Appellant was not given an opportunity to show compliance, present evidence, or relate her side of the story at any time prior to the institution of agency proceedings: LLR’s failure to do so during the investigation, or indeed at any time prior to the hearing, violated Appellant’s right to due process. Section 1-23-370(C)(emphasis added) provides: “No revocation, suspension, annulment, or withdrawal of any license is lawful unless, **prior to the institution of agency proceedings**, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended sanction, **and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.**” Judge Toal, in *Felder v. Charleston County School District*, Supreme Court Opinion 24642 (1997), stated “[t]he 14th Amendment requires procedural due process be afforded an individual deprived of a property or liberty interest by the State” citing *Board of Regents v. Roth*, 408 U.S. 556, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

In *Karen M. Zimmerman v. SCDLLR*, No. 97-ALJ-11-0427-IJ (1998), Judge Bates stated, “Prehearing discovery is a useful tool which allows a party to review the evidence expected to be presented by an opposing party and to intelligently prepare for the contested case hearing. It prevents “trial by ambush.” Pre-hearing discovery in administrative cases is not a constitutional right per se...[r]ather, the granting of discovery is within the sound discretion of the agency being confronted with the discovery request” citing *Palmetto Alliance, Inc. v. SC Public Service Commission*, 282 S.C. 430, 436, 319 S.E.2d 695, 698 (1984). In this case, LLR’s failure to provide a copy of the complaint, to allow Appellant to see evidence against her, to review her evidence, to explain more fully the vague charges in the Notice of Charges, to respond to Appellant’s response to the failed Consent Order, and more, created substantial prejudice. Judge Bates continues; if prehearing discovery is denied, “[a]ppellate review of the Board’s final decision provides an adequate remedy for Petitioner” and “Petitioner is not prevented from having a fair hearing before the Board given the fact that she will have a right to appellate review.” But the ALJ failed to consider the evidence and conduct a truly meaningful appellate review thereby denying Appellant “an adequate remedy.”

4. Appellant was prosecuted on violations not included in the original Complaint.

It is generally impermissible for a citizen to be prosecuted for additional violations found in the course of an investigation into other violations, a concept upheld in case law: “The Board improperly found the doctor guilty of obtaining incomplete surgical consent forms from patients where the complaint only charged misconduct connected with the improper filing of insurance claims.” *Wilson v. State Bd Of Medical Exam’rs*, 305 S.C. 194, 406 S.E.2d 345 (1991). In this case, Appellant was prosecuted with and found guilty of violations outside and incidental to the Complaint. **The Complaint did not take issue with nor cite damages from**

Appellant's failure to notify her BIC about the transaction, yet the Final Order lists this charge as evidence of multiple violations of license law. The Complaint did not claim damages from Appellant failing to disclose her status as a buyer and licensee; in fact, it is not mentioned at all. Yet LLR lists such as "evidence" in multiple charges.

5. The Notice of Charges failed to explain how Appellant's actions constituted violations of the statutes cited within. This prevented Appellant from mounting an adequate defense. Appellant allegedly violated:

"No licensee either directly or indirectly may buy for his own account or for a corporation or any other business in which he holds an interest or for a close relative, real estate **listed with him** or real estate for which he has been approached by the seller or prospective buyer to act as agent, without first making his true position clearly known in writing to all parties involved." Section 40-57-135(D)(emphasis added).

Appellant emphatically denies this charge as inapplicable, as she never listed the property in question, and was never approached by the sellers to do so. The SC Supreme Court discusses this statute in *Darby v. The Furman Company*, 513 S.E.2d 848 (1999): "[t]his disclosure requirement is intended to satisfy the strict fiduciary requirements placed on an agent when the agent becomes the purchaser of the principal's property." Citing 12 Am. Jur. 2d *Brokers* p.120 (1997), "Generally, a broker can neither purchase from, not sell to, his or her principal, unless the later expressly consent or acquiesces to the transactions with full knowledge of all the facts and circumstances." And in Footnote 2, "For real estate brokers, this duty is codified... "[n]o broker or salesman shall either directly or indirectly buy for himself...property listed with him or property for which he has been approached by the seller...to act as broker, without first making his true position known to all parties involved."

The Court interprets Section 40-57-135(D) as referring to a broker who secretly changes his true position in a transaction with his own clients; clearly not the case in Appellant's matter. In the hearing, Appellant admitted only to failing to notify the sellers **in writing** (they were verbally notified) she was one of the purchasers, a unintentional technical violation of Section 40-57-135(c)(6). The Notice of Charges did not mention Section 57-135(c)(6); it was not lawful to prosecute Appellant with matters not "properly noticed" – fully discussed in Appellant's Brief and Appellant's Response to Respondent's Brief. However, the Final Order erroneously concluded Appellant violated Section 40-57-135(D).

The ALJ also confused the statutes: "[a]ppellant acknowledged at the hearing, and admits again in her brief, that she failed to disclose her **licensee status** in writing to the sellers (also equating Appellant's actual admission to an admission to violating Section 40-57-135(D)). First, Appellant acknowledged her **licensee status** in writing by signing the contract at issue as "selling agent," and had been long known to the sellers as a licensee, having acted as an agent in other transactions concerning their properties, with all applicable disclosures properly executed. Even the LLR prosecutor concurred: "of course they knew she was an agent." (R. p. 212, lines 8-9).

Second, Appellant's failure to state **in writing** that she was one of the buyers in this particular transaction was a common oversight as the Land Contract, unlike the Residential Contract, has no preprinted block for such disclosure. Concurrently with this transaction, Appellant was licensee (not representing the sellers) and purchaser on another tract owned by a subset of the same sellers. Had Appellant been able to infer she would be sanctioned for violating Section 40-57-135(D) which describes fraudulent failure to disclose "true position," Appellant could have produced exculpatory evidence, depositions wherein the sellers admitted they

Appellant told them of her “true position” in the concurrent transaction, and acknowledged the only difference was in **this** case they relied on second-hand information from Bowers. This dovetails with statements by Pinner and West in the Hearing that they were unaware of Appellant’s position in this transaction but information came second-hand (and in Pinner’s case, third-hand) from their agent, Bowers.

The ALJ further erred by concluding Appellant was not harmed by LLR’s failure to clearly indicate its basis for charging Appellant with violating Section 40-57-137(K), stating “[b]ecause Appellant freely admitted in the hearing that she failed to make those disclosures, it does not violate procedural due process for a tribunal to base its decision on that failure.” (R. p. 9, Footnote 9, lines 3-4). Yet LLR interrogated Appellant on her compliance with the requirements of a regulation (Section 40-57-135(c)(6)) that was not properly noticed, **yet made an unsubstantiated leap in concluding Appellant’s testimony somehow corroborated the regulation that was cited.**

The ALJ states “there is substantial evidence in the record showing that Appellant acted as both the selling agent and a prospective buyer for the transaction at issue” but this in itself is not a violation of Section 40-57-135(D). Adding to the confusion, he continues “[s]ubstantial evidence also demonstrates that Appellant failed to make her “true position” clearly known in writing to all parties involved. I find that Asset Realty was a “part[y] involved” in the transaction and thus should have been informed of it pursuant to Section 40-57-135(D)” but does not find this action violated other statutes. Curiously, LLR took the opposite view: they did not find “failure to notify her BIC” indicative of a violation of Section 40-57-135(D), but as evidence of violations of eight (8) other statutes. As licensee training defines “parties to a transaction” as the principals – buyer and seller - neither Appellant nor partners/licensees

Grooms and Curtis understood Section 40-57-135(D) required them to notify Asset. The ALJ supports his conclusion solely by Georgia and Florida case law.

Accordingly, it is abundantly clear that Appellant was inhibited in her ability to present an adequate defense due to the vagueness of the Notice of Charges and LLR's refusal to make clarifications. And although Appellant's attorney was able to cross-examine witnesses, the Final Order perpetuated "facts" not borne out (and at times even contradicted) by testimony.

B. Irregularities During and After the Hearing

"A fair trial in a fair tribunal is a basic requirement of due process." *Withrow v. Larkin*, 421 U.S. 35 (1975). "The requirements of procedural due process generally include adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review." *Sloan v. S.C. Bd. Of Physical Therapy Exam'rs*, 370 S.C. 452, 484-85, 636 S.E.2d 598, 615 (2006). "[W]here the entire conduct of the hearing from beginning to end is affected by the alleged error, such as the presence of an adjudicator who is not impartial, does a "structural defect" occur which affects the framework in which the hearing proceeds and renders the entire process fundamentally unfair." citing *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991). As supported by case law, Appellant was subjected to inherently unfair and prejudicial procedures; the results should have been reversed by the ALJ.

1. Ex parte information. Prior to the hearing, the LLR prosecutor sent the Commission Chairman, through LLR advising attorney James Saxon, Appellant's letter to the Director of LLR alleging improper handling of her case. "In determining the existence of partiality, the

court may ask whether “an adjudicator has ex parte information as a result of prior investigation or has developed, by prior involvement in the case, a ‘will to win.’ Thus, “the board member was placed in a situation where he had the opportunity to form a premature opinion.” *Garris v. Governing Body of SC Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998). In this case, like in *Garris*, it is reasonable to conclude the Chairman had formed an opinion prior to the hearing based upon the letter.

2. After the Hearing, LLR failed to post the videotape of the proceedings. Believing the ALJ would “probe alleged procedural irregularities,” Appellant informed him that the videotape of Appellant’s hearing was never posted, as is LLR’s practice, to the website and was not made part of the Record. The Transcript of Hearing could not capture the disruptive behavior emanating from the LLR side while Appellant was testifying, including the prosecutor’s exclamations and *sotto voce* comments. Had the ALJ obtained the “missing” video, it would confirm the prosecutor’s disruptive behavior, sarcasm and inappropriate demeanor which did not allow Appellant to be meaningfully heard.

Section 1-23-380(4) states “[t]he review must be conducted by the court and must be confined to the record. In cases of alleged irregularities in procedures before the agency, not shown in the record, and establishing proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate.” Appellant indeed alleged irregularities in proceedings before the agency, not shown in the record; however, the ALJ committed reversible error in failing to address these irregularities.

III. The ALJ erred by failing to overturn the Agency’s Final Order from the hearing in which improper admission of hearsay and the prosecutor’s improper actions resulted in prejudicial misstatements of fact and erroneous conclusions of law.

A. The ALJ failed to find Appellant was significantly prejudiced by the improper admission of hearsay.

1. An LLR attorney improperly advised the Commission to admit hearsay. The ALJ incredibly found no prejudice, apparently because an LLR attorney said the hearsay would not be considered: “[a]t the hearing, the Commission’s advising attorney, James Saxon, stated with regard to the letter that “to the extent it contains hearsay, and I think it’s uncontested that it does, no hearsay from this document or anything else will be used in the making of any decision by the board.” Accordingly, because the Commission did not consider the hearsay contained in the letter, Appellant was not prejudiced by the letter’s admission and was therefore no [sic] reversible.” However, “[t]he purpose of Article I, Section 22 is to ensure adjudications are conducted by impartial administrative bodies.” *Ross v. MUSC*, 328 S.C. 51, 492 S.E.2d 62, 72 (1997). “Allowing an agency official or board member to sidestep Article I, Section 22 merely by stating, in rote fashion, that he or she based a decision only on evidence presented at the hearing would render the constitutional prohibition a nullity.” *Garris*. By advising the Board to admit hearsay evidence, listen to lengthy hearsay testimony, but then ignore it, Saxon set the Board up to invalidate the protection intended by Article I, § 22. For this compelling reason alone the ALJ should have overturned the case. Since LLR, pre-trial, had already relied exclusively upon the hearsay letter in charging Appellant, how could the ALJ then logically or fairly conclude the Commission did not consider the hearsay contained in the letter?

2. Inadmissibility of inflammatory letter. “The statements in Mrs. Cooper’s letter which portrayed Craig as a sick and mean person, capable of committing a dreadful act, were clearly inadmissible under this rule. However, to warrant a new trial, Craig must have been

prejudiced by the initial erroneous reception of the letter.” *State v. Craig*, 267 S.C. 262, 227 S.E.2d 306 (1976), citing *State v. Robinson*, 238 S.C. 140, 119 S.E.2d 671 (1961). “An instruction to disregard incompetent evidence... usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instructions the accused was prejudiced.” *Craig*, citing *State v. Robinson*, 235 S.C. 395, 111 S.E.2d 669 (1959). Bufkin stated in his letter “facts as they were portrayed to me by the various parties.” (R. p. 58, lines 23-25). “But I never had any contact with Ms. Patrick.” (R. p. 60, line 11). Regardless, he testified: “there was some **major fraud** that was being perpetrated and they wanted to walk away” (R. p. 64, line 23 – 24 (emphasis added)) and he was “attempting to make them whole for the **fraud** that had been perpetrated against them.” (R. p. 67, lines 3-4). Appellant’s attorney more than once expressed concern: “I don’t dispute that any of these documents are part of the LLR file and Mr. Sowell’s investigation --- and that he can authenticate them. But as far as what the board does in terms of credibility, veracity and all that... I definitely do not want the board to be considering hearsay.” (R. p. 75, lines 11-19). SC Hearsay Rule 3.3 dictates hearsay statements must be clearly identified as such and not presented as fact. However, the letter, with its allegations of fraud and other unfounded statements, prejudiced Appellant as many of the statements from the letter found their way, almost verbatim, into LLR documentation, including the Final Order.

3. Cumulative harm of improper evidence and hearsay testimony. The ALJ quoted the testimony of two of the sellers as “proof” of Appellant’s violations, although both parties admitted to absolutely no first-hand knowledge of the events. Rule 801(c) SCRE states “[a]dmission of improper evidence is harmless where the evidence is merely cumulative to other evidence.” Yet case law shows that improper evidence that is merely cumulative to

testimony, rather than evidence, “cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.” *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). *See also Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010)(wherein hearsay testimony impermissibly corroborated the victim’s testimony because the outcome of the case hinged on the victim’s credibility). **If all hearsay evidence and testimony is removed from the Hearing, the case boils down to discourse between Appellant and Bowers, the ONLY first-hand participants; all others had no first-hand knowledge of the events. Bowers’ testimony, viewed in context, actually corroborates most of Appellant’s testimony.** Yet one could reasonably and easily conclude that hearsay and even double and triple hearsay was the primary basis for the Commission’s Statements of Fact and Conclusions of Law, with little or no credence given to Appellant’s testimony. Notwithstanding Appellant’s honesty and cooperative attitude in the hearing, the “piling-on” of hearsay testimony by the State obviously destroyed Appellant’s credibility: Appellant was charged with a litany of violations and her license was revoked.

4. Severity of sanction was exacerbated by hearsay. **Without the admission of hearsay, it is reasonable to conclude a lesser, more appropriate sanction would have been handed down, as opposed to the career “death penalty” received by Appellant.** “Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury’s verdict.” *Vaught v. A. O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). “Whenever hearsay which has some probative value to a material fact is erroneously admitted into evidence, prejudice is presumed.” *Orangeburg County DSS v. Schlins*, 291 S.C. 477, 354 S.E.2d 388 (1987).

The ALJ dismissed Appellant's claim to damage by hearsay in less than a page, based primarily upon an LLR attorney's reassurance that the Board wouldn't be prejudiced. Yet, aside from the hearsay, what evidence did the State offer to support most Findings of Fact and Conclusions of Law? Fairness dictates the ALJ should have considered actual evidence, rather than hearsay, in deciding Appellant's case. The State failed to prove Appellant acted with harmful intent; never even speculated as to a possible motive; and failed to identify any actual damages to the sellers. According to LLR, Appellant violated certain statutes, the meaning of which Appellant, based upon her training, experience, and knowledge of common industry practice, had an entirely different interpretation. But since both the Commission and the ALJ gave credence to a hearsay letter and hearsay testimony over the testimony of Appellant, it is inconceivable they were not swayed by the admission of said hearsay.

B. The ALJ failed to overturn the Commission's Final Order, although Appellant was unfairly prejudiced by the prosecutor's improper behavior in the hearing. In her closing argument, the LLR prosecutor unfairly attacked Appellant's character as well as made numerous statements and accusations clearly outside what the evidence confirmed, thus improperly influencing the Commission's decision.

1. Prejudicial and disruptive prosecutorial behavior. "As a general rule, conduct of the prosecutor calculated to arouse prejudice against the accused, and to prevent him from having a fair trial will not be tolerated." *State v. McGill*, 191 S.C. 1, 3 S.E.2d 257 (1939); 24 C.J.S. Criminal Law PP. 1442a (1961). "Under our rules of evidence in criminal cases, the State is forbidden from attacking the character of the accused unless the accused chooses to make it an issue." *See Craig* (wherein the prosecutor's conduct at trial allegedly was calculated to arouse unfair prejudice against defendant). The prosecutor on more than one occasion tainted

Appellant's character by making untrue comments, such as indicating Appellant was not paying the engineers.

The prosecutor delayed the proceedings due to a personal matter. Scheduled for 10:00 a.m., the prosecutor's tardiness delayed the hearing until 10:47 a.m. Appellant was concerned the prosecutor's situation would affect the proceedings and unsuccessfully attempted to postpone. A "20 minute break for lunch" was delayed twenty-five (25) minutes with the prosecutor's whereabouts unknown. And when she received tragic news near the end of the hearing, her obvious distress, as evidenced by her closing arguments, erased Appellant's chances for a fair and thoughtful conclusion to her tribunal. The missing video, if ever produced, will confirm this.

2. Unfair attacks on Appellant's character. The prosecutor's attacks in the closing arguments improperly influenced the Commission just prior to their decision: "[r]espondent doesn't even answer half the questions" and "[s]he never even asked or answered the question that ya'll asked her, if I'm not mistaken, two if not three or more times" (R. p. 211, lines 17-23). "She never answered that question." (R. p. 212, lines 6-7). Yet when the Commission questioned Appellant, they made no such complaint. The prosecutor indicated Appellant was a liar: "[o]ne minute she's talking out of one side of her mouth and the other minute she's talking out of the other side of her mouth." (R. p. 211, lines 18-21). She further implied Appellant is incompetent: "[a]pparently she doesn't understand what she's supposed to do with a contract when she gets it." (R. p. 215, lines 1-3). Referring to an Addendum actually drafted by the sellers: "[s]he drafted it. How can she not know her own dates? How did she not know when it was going to close? But in her own contract that she drafted, in the addendum, it specifically states about the earnest money." (R. p. 213, lines 15-20).

3. “Facts” not supported by evidence. Just as damaging to Appellant’s case were the prosecutor’s statements of allegations as “fact”, obviously originating from the hearsay letter, clearly not borne out by evidence or first-hand testimony, which swayed the Commission. “A solicitor may not rely on statements not in evidence during closing argument.” *State v. Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997), citing *State v. Gaines*, 271 S.C.65, 244 S.E.2d 539 (1978) and *State v. Bottoms*, 260 S.C. 187, 195 S.E.2d 116 (1973).

a) False assurances regarding earnest money. The prosecutor, in closing, stated **as fact** that Appellant “assures Mr. Bowers, who in turn assures the Pinner family, that there is \$185,000 sitting in a trust account somewhere. But in reality she knows all along that there’s not a penny sitting in any trust account anywhere.” (R. p. 213, lines 2-6). Not only does the prosecutor fail to concede that Appellant did indeed deposit \$30,000 in safekeeping for the deal, and offered it to the sellers on multiple occasions in settlement of the earnest money dispute, she stated as fact that Appellant lied to Bowers. **Yet Bowers’ first hand testimony supported Appellant’s account.** The prosecutor opens with an accusation clearly based upon the complaint letter, without evidentiary support: Appellant “was unable to produce the money despite...the constant reassurance on her part that the money was in the trust account.” (R. p. 42, line 11-15). Yet Bowers did not go along with the prosecutor’s leading questions:

Prosecutor: “So did you have conversations with her [Appellant] about not just the \$30,000 but all total, the \$185,000 in regards to this contract?”

Bowers: “The \$30,000 initially put up by the contract was these two checks here.” (R. p. 86, lines 10-11). Cross-examined by Appellant’s attorney, Bowers’ testimony **continues** to confirm Appellant’s testimony:

Lydon: "Was there ever any indication of any additional earnest money being put up?"

Bowers: "Not in the form of checks, no. Other than assurances by phone, that was it."

Lydon: "And assurance by phone was she was going to pick up a \$350,000 check?"

Bowers: "Right." (R. p. 100, lines 4-10). (Appellant actually spoke of picking up the \$30,000 check to pay the engineers, after discussing the expiration of due diligence (R. p. 86, line 21 – p. 87, line 24 and p. 100, lines 4-13)). And upon cross-examination by Appellant's attorney, Bowers confirms that, absent earnest money deposits, and absent completion of Due Diligence, the original contract was dead:

Lydon: "Do you know whether that financing was ever obtained?"

Bowers: "To my knowledge, no."

Lydon: "...are these contingencies that had to be met?"

Bowers: "Right. Yes, sir."

Lydon: "Do you know whether they ever got subdivision approval?"

Bowers: "To my knowledge, they did not." (R. p. 92, line 24 – p. 93, line 25). And later:

Lydon: "And if, in fact, the \$50,000 was not put in escrow, then the contract was just terminated, right?"

Bowers: "Right." (R. p. 98, lines 18-21).

Bowers' entire testimony indicates he was hopelessly confused about the terms of the contract, which would lead a reasonable person to conclude that he was also confused about

the earnest money deposits. In turn, the sellers to whom he provided information indicated their confusion in testimony. Yet the prosecutor's erroneous opening statements, notwithstanding they were never confirmed in the hearing, not only reappear in her closing argument but also the Commission's Final Order: "Throughout the entire process, the Respondent led the sellers to believe that the money was in the trust account." Prejudice is further confirmed in the ALJ's Order: "Here I find that there is substantial evidence in the record demonstrating Appellant violated Section 40-57-137(K). Bowers testified that Appellant assured him that all of the earnest money required under the contract was "sitting in an escrow account" at Asset Realty. That assurance was false, as Appellant admittedly did not place the original \$30,000 in earnest money in an Asset Realty escrow account as mandated by the contract." Also, "with regard to subsections (f) and (g) of Section 40-1-110(1), as noted above, Bowers testified that he was falsely assured by Appellant that all of the earnest money was in an escrow account at Asset Realty." By failing to closely compare, in proper context, the testimony of Bowers and Appellant --- the only first-hand testimony --- the ALJ erred in failing to overturn the Final Order.

b) Amount of earnest money; contract contingencies; extensions. The prosecutor never fully understood the complexities of the contract, but nevertheless begged the Commission to revoke Appellant's license. The crux of the facts is this: the original contract expired and was voidable, with due diligence incomplete and financing unavailable. The "Pinner family extension" was an **offer**, withdrawn prior to it becoming an executed, delivered **contract** under S.C. law; therefore, never binding on Riverpath. **All evidence supports this fact.** Yet the two documents are constantly confused.

The prosecutor avers “[n]owhere in there [contract] says that none of this --- you have to wait for the Due Diligence period. It says after 120 days, period.” (R. p. 214, lines 3-6). Lack of comprehension was evident from her opening remarks: “the contract was extended numerous times which led to more earnest money being placed in the trust account based on the contract” and “all total there was supposed to be about \$185,000 that was supposed to be held in the trust account at Asset Realty.” (R. p. 42, lines 1-7). Appellant’s attorney countered: “[t]here was never to have been \$185,000...The suggestion that [Appellant] led the sellers to believe that there was \$185,000 in a trust account, I don’t think there’s any evidence of that. In fact, I think the evidence will be just the opposite of that. There was never any representation or evidence or documentation, anything made, other than the initial \$30,000.” (R. p. 48, lines 6-17). Yet the testimony, even comments by the Commission, indicates the earnest money amount and timing, not to mention performance of the contract itself, **was** contingent upon Due Diligence. The prosecutor ignored those terms, cherry-picking in questioning Bowers: “[n]ot on the first page of that addendum but on the second page, is there information in regards to the earnest money?” (R. p. 83, lines 16-18). Appellant’s attorney rebuts in cross-examination: “Somehow or other this thing got up to \$185,000.” (R. p. 98, lines 22-23). “So just to be clear... [checks totaling \$30,000] is the only documentation that was ever presented to you during the course of this entire deal with respect to an earnest money deposit?” Bowers answers, “Right.” (R. p. 101, lines 3-8).

The prosecutor also erroneously stated the contract was extended numerous times. Yet, the extension dated 8/29/08 was never delivered to Appellant, was backdated and therefore invalid (see R. p. 252-253 where a seller who purportedly signed on 8/31/08 did not know about the extension days later). The prosecutor again coaxed Bowers to confirm Appellant

assured him of \$185,000, but in context Bowers spoke of a conversation held with Appellant about the “Pinner extension,” before it was drafted by the Sellers’ attorney, to be enacted if **the sellers were interested in resuming the deal with a new financier:**

Bowers: “There was an extension written... [s]he and the lady that had signed the original contract signed the extension and faxed it back to us. I got everybody in the family’s signatures on it and we thought we had a deal to go to December 31st with \$185,000 in escrow.”

Prosecutor: “[Y]ou went through that extension... you went through that with her **before you even sent it to her** and explained to her what you were sending her?”

Bowers: “Yes.”

Prosecutor: “And she said --- she again assured you that all this money **is going to be** sitting in an escrow account?”

Bowers: “Yes, ma’am.” (R. p. 88, line 8 – p. 89, line 1 (emphasis added)).

Yet the “Pinner extension”(signed by Appellant not as maker but as witness) was withdrawn before receipt of the signed extension from the sellers, voiding it. The prosecutor mistakenly equated **conversations about** the “Pinner” extension with the extension itself, and a theoretical discussion was somehow transformed into “fact”. Although the earnest money terms were unquestionably tied to the incomplete due diligence, and \$185,000 **would have been** payable with the “Pinner extension” had it not been withdrawn, the prosecutor insisted the entire amount was due: “\$30,000, which is non-refundable after 120 days and then after that \$50,000 is supposed to go down. That’s as plain as day. There’s 80 right there. And then you get into the fact that they asked for 75 to extend it even beyond on the second

contract. It's all in writing." (R. p. 213, line 20 - p. 214, line 1). Questions posed to Bowers about the contingencies at first implied the Commission understood ("So if they didn't accomplish what was spelled out in paragraph one, what would have occurred?" "And making sure we understand, did you testify earlier that they did not get subdivision approval?" "Were these some of the conditions in this contract that had to be taken care of in order to move forward?" "Were these conditions on the planning and development, both for Richland County, the planning board, to approve the subdivision, was that a condition?" (R. p. 111, lines 8-10 and lines 20-22; R. p. 112, lines 20-22; and R. p. 112, line 24 – p. 113, line 2), but the prosecutor's erroneous closing arguments apparently confused them, as evidenced by the Final Order: "[a]ll total, by December 2008, there was supposed to be approximately \$185,000 in the trust account," an error the ALJ failed to overturn.

c) Appellant was indeed able to produce \$30,000, the original earnest money amount. "When asked to produce the trust money, the Respondent was unable to do so." (R. p. 16, lines 16-17). This is patently untrue: Bufkin refused Appellant's offers to remit the amount of original earnest money. Appellant "never informed her new broker-in-charge that she this (sic) contract was pending" and "nor did she place any money into Acquire's trust account." (R. p. 16, lines 24-26). The contract was expired when Appellant transferred to Acquire: licensees are not required to notify new BIC's of expired business. Still, when Appellant became aware of the earnest money dispute, she did deliver funds to the Acquire BIC who refused to deposit them.

d) Checks payable to Asset Realty were not shown to the sellers with malicious intent. The prosecutor, in opening, stated Appellant "presented copies of two checks totaling the \$30,000 made out to Asset to give the appearance that the money was in the trust account." (R. p. 41,

lines 19-22). Appellant's attorney rebutted: "We don't entirely agree with that." (R. p. 46, lines 10-11). Appellant denies this charge: "I disagree with the intent." (R. p. 202, line 10). Neither evidence nor testimony confirms the prosecutor's speculation as to Appellant's intent, yet it appears in the Final Order: "Respondent presented copies of two (2) checks, totaling \$30,000, made out to Asset Realty, to give the appearance that the money **had been placed** into the appropriate trust account." This statement is also illogical: checks are deposited only after final ratification, yet in practice **copies of checks are submitted with an offer**. The ALJ does not speculate as to Appellant's intent, but errs by not overturning the LLR Final Order since unfounded statements of "fact" prejudiced Appellant.

e) License law does not state a licensee must inform his broker when he purchases or sells unlisted property on his own behalf. No evidence was presented in the Hearing to confirm a licensee must inform his BIC when he purchases or sells a property for his own behalf, yet the prosecutor prejudices Appellant: "Asset Realty doesn't even have a clue that any of this is going on, and this is October." (R. p. 213, lines 7-9). First, by October, not only had the deal been void for many months, Appellant had already transferred her license to another brokerage. Second, this statement clearly influenced the Commission as this accusation, **unsupported by statutory authority or evidence, appears in eight (8) of the Conclusions of Law in LLR's Final Order.**

f) The lines of questioning regarding disclosure were confusing to all parties involved, and ultimately inconclusive; yet Appellant was sanctioned for violations. The prosecutor accused Appellant of failing to answer if she told the sellers she was a buyer. (R. p. 212, lines 4-7). Yet when questioned: "Now at what point in time did you ever inform anyone that you were also one of the buyers/purchasers?" Appellant had answered the prosecutor herself: "I don't

think I ever formally informed anyone.” (R. p. 194, lines 12-15). Appellant also answered the Commission’s questions as posed:

Mr. Edwards: “[T]here were 3 licensed real estate people that were the buyers and none of the 3 licensed real estate people who were the buyers **felt any need to inform the seller that they were real estate people?**”

Appellant: “I knew they knew **I was an agent.**” (R. p. 198, lines 3-13).

Ms. Takacs: “Did you sign an agency disclosure form telling the sellers that you were representing yourselves?”

Appellant: “No, no I didn’t, huh-uh.” (R. p. 197, line 24 – p. 198, line 2). This question confused Appellant, as the form in question had been discontinued from real estate practice many years prior. It apparently confused others, as well, as the Chairman asked Saxon to look it up:

Chairman: “Mr. Saxon, do you have that section of the law, that agency disclosure?”

Ms. Young: “While they’re looking that up...”

Chairman: “So let me make sure I understand what I’ve heard and it’s – the more I’ve heard the less I’m sure of what I’ve heard.” (R. p. 201, lines 4-13).

The hearing, as discussed more fully in Appellant’s Brief, indicates a great deal of confusion existed about which disclosure statutes governed this specific case. The Commission never returned to the subject - never discussed Saxon’s findings as to “that agency disclosure” - yet the prosecutor’s closing arguments berate Appellant although she truthfully answered all questions. This tirade, unsupported by clear evidence, obviously prejudiced Appellant.

Although LLR's Findings of Fact fail to mention and describe Appellant's "failure to disclose," it appears as the basis of Appellant's purported violations of Sections 40-1-110(c), (f), (g), and (k); 40-57-135(D); 40-57-137(K); and 40-57-145(A)(1), (4) and (20).

Bowers, the only other first-hand player, contradicts himself in testimony about his knowledge of Appellant as one of the buyers:

Prosecutor: "What was your understanding in regards to what Ms. Patrick's role was in this contract?"

Bowers: "She was a real estate agent for putting together investors to buy the property."

Prosecutor: "Did she ever tell you or were you ever informed or do you have any knowledge of whether or not she was involved as an investor in this project?"

Bowers: "In this contract, no." (R. p. 80, lines 7-17).

However, upon cross-examination, Bowers indicates he **did** have actual knowledge of her status as early as August; prior to that, he was "only working with her as an agent... wasn't working with her as one of the investors." (R. p. 100, line 22 – p. 101, line 2). Yet both sellers who testified stated they were unaware of her role:

Prosecutor: "[W]hen this contract was going on, what was your understanding of what her [Appellant's] role was?"

Dr. West: "I thought she was representing the purchaser."

Prosecutor: "Okay. Did you have any knowledge that she was also involved in purchasing the property?"

Dr. West: “No.” (R. p. 117, lines 1-7).

Bowers stated he knew as early as August that Appellant was one of the buyers, yet the sellers’ “point person,” Dr. West, had no such knowledge, apparently **Bowers** failed to convey a crucial piece of information to the sellers: it is also possible he failed to convey other key information.

4. Final prejudicial charge to Commission. Although evidence and testimony had clearly failed to support her case, the prosecutor made a last-gasp attempt to sway the Commission: “[t]his is not an individual that needs a license. Ya’ll need to take her license. Ya’ll need to revoke it and let her know that she cannot have her license back. The State is requesting that you not let her have her license back and that you revoke it.” (R. p. 214, lines 16-21). The prosecutor’s unfair and unlawful tactics worked, as the Commission, absent substantial evidence, and admittedly unsure of the governing statutes and what they had heard, nevertheless voted to permanently revoke Appellant’s license.

IV. The ALJ erred by failing to admit evidence clearly relevant to an understanding of the case. Absent said evidence, the ALJ demonstrated an imperfect understanding of important aspects of the case by making further misstatements of fact leading to erroneous conclusions of law.

In a single footnote, the Administrative Law Judge summarily dismissed **all** additional evidence raised by Appellant – “found them to be either unpreserved for appellate review, manifestly without merit, or, in some cases, both.” The Court ignored statutes allowing additional evidence to be considered if proven essential to understanding of the case; for example, Section 1-23-380(3) wherein if it is “shown to the satisfaction of the court that the

additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court.”

A. The evidence was relevant; clearly the lack of evidence led LLR to erroneous conclusions.

Appellant overwhelmingly proved relevance; however, the Court dismissed all additional evidence without explaining why it was deemed irrelevant, and fell into the same prejudicial pattern as LLR. In *Doug Proctor d/b/a Anderson Tire Recycling v. DHEC*, 368 S.C. 279, 628 S.E.2d 496 (2006) the Court states “all that is required for evidence to be relevant is that it have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” citing Rule 401, SCRE; *Hoeffner v. The Citadel*, 311 S.C. at 365, 429 S.E.2d at 192 (1993); *Davis v. Traylor*, 340 S.C. at 155, 530 S.E.2d at 387 (2000); and *Gulledge v. McLaughlin*, 328 S.C. 504, 510 S.E.2d 816, 819 (Ct. App. 1997).

B. Appellant had good reason for not providing evidence earlier. Appellant’s Brief, Appellant’s Response to Motion to Conform Appellant’s Brief, and Appellant’s Response to Respondent’s Brief address why the additional evidence was crucial to a clear understanding of the events surrounding the case, supported by statutory authority and case precedent. When she explained why it was not presented earlier, case law led her to expect it would be admitted: “[t]he judge must evaluate whether the additional evidence is material and then decide whether good reasons exist for the party’s failure to present the evidence in the proceeding below.” *Byers v. SC ABC Commission*, 305 S.C. 243, 407 S.E.2d 653, 655 (1991). “Generally, evidence is material when a rational connection exists between a fact sought to be

presented and a fact which is an issue in the case.” *Gause v. Livingston*, 251 S.C. 8, 159 S.E.2d 604 (1968).

Appellant unsuccessfully attempted to meet with LLR prior to the Hearing to confidentially disclose the rationale behind the placement of the earnest money; circumstances of the pending lawsuit prohibited airing these facts publicly. Her attorney instructed her not to present evidence at the hearing of the Asset BIC’s misconduct, fearing doing so might jeopardize Appellant’s compliance with lawsuit settlement terms. It is unfair for the Commission, without knowing the reason, to conclude that Appellant’s failure to notify her BIC or place the earnest money funds in her BIC’s account were evidence of incompetence and lack of ethics. And as the ALJ declined to give any credence to this information once disclosed, it is unfair for him to state [with regards to the location of the funds] “there is simply no justification for Appellant’s failure to do so.” (R. p. 8, lines 10-11).

C. The Notice of Charges was unclear; therefore, Appellant could not predict certain evidence was needed at the hearing. Precedent exists to admit such evidence on the basis that Appellant could not foresee certain lines of questioning in the Hearing. See *D. Michael Woodward, M.D. v. SCDLLR*, No.97-ALJ-11-0649-AP (1997), in which Judge Stevens admitted testimony of a neighbor that had not been presented in the hearing as material evidence, because it was not until the hearing that the issue came to light.

D. LLR omitted evidence that should have been in the record. Certain evidence showed LLR’s failure to provide Appellant with an opportunity to be heard prior to the agency proceedings. Section 1-23-320(G) holds that “[t]he record in a contested case must include: (1) all pleadings, motions, intermediate rulings, and depositions; (2) evidence received or considered; (3) a statement of matters officially noticed; (4) questions and offers of proof,

objections, and rulings in the contested case; (5) proposed findings and objections; and (6) any decision, opinion, or report by the officer presiding at the hearing.” Since LLR omitted a multitude of written communications between Appellant and itself prior to the actual hearing, the Record was incomplete. LLR failed to include a letter from Appellant to the Director of LLR voicing procedural concerns, and the Director’s dismissive response. And the ALJ erred in not exploring why the hearing videotape was not made part of the Record or ever – even to this day - posted to the website.

E. The ALJ made errors in his statement of the case. The ALJ’s failure to admit evidence crucial to understanding the complicated development contract, key to Appellant’s case, showed his unwillingness to delve into the true facts of the case. Absent that evidence, LLR and the ALJ failed to correctly interpret the contract terms and made erroneous statements of “fact.” Section 1-23-320(I) states “[f]indings of fact must be based exclusively on the evidence and on matters officially noticed.” However, both LLR’s Findings of Fact and the ALJ’s Statement of the Case include matter not substantiated by fact and regarding matters not officially noticed. Several are listed below:

1. A single paragraph, “[t]he addendum to the contract contained a paragraph entitled “Earnest Money” (R. p. 1, line 33) and “the “Earnest Money” paragraph of the March 8th contract addendum” (R. p. 12, Footnote 11, line 1)) is quoted by the ALJ as the governing clause, yet, as detailed in Appellant’s Brief, this was not the ONLY clause referring to earnest money. When viewed as a cohesive whole, other clauses also apply by providing that certain contingencies be met before the earnest money became non-refundable. In ignoring the wealth of documentation provided in Appellant’s Brief, the ALJ, like LLR, cherry-picked from the pertinent phrases in the contract to support his theory.

2. Appellant “testified she borrowed \$25,000 from a friend to cover the remaining \$25,000.” (R. p. 2, line 13). On the contrary, Grooms refused to allow Appellant to deposit **either** earnest money check; therefore, Appellant secured \$30,000 to cover the **entire** amount.

3. The ALJ states “the parties entered into a contract extension in October 2008” and relates the terms of the extension (R. p. 2, line 27) but failed to recognize that, although Grooms signed the extension, Appellant called Bowers in Grooms’ presence and withdrew the extension prior to receiving the final executed document signed by the sellers; thus, the extension was void. **In terms of license law, the actions of licensee Grooms in signing the extension are not binding upon Appellant and must be separated from the actions of Appellant.**

4. The ALJ notes that Bufkin complained “several real estate agents have breached their fiduciary responsibility” (R. p. 3, line 10). However, Appellant did not represent the Sellers and therefore had **no fiduciary relationship** to them. This statement is inappropriate and clearly prejudicial.

5. Most damaging by the dismissal of evidence, the ALJ allows the Commission’s error: “all total, by December of 2008, there was supposed to be approximately \$185,000 in the trust account.” (R. p. 16, lines 14-16). In stating “[w]hile the Court is skeptical of Appellant’s claim, resolution of this issue is not necessary for the purposes of this appeal,” the ALJ casts aspersion on Appellant’s reputation with this off-hand comment (R. p. 12, Footnote 11, lines 4-5). **If the Court is unwilling to delve into the complexities of the underlying contract, it should not comment on the facts of the contract.** Without resolution of this issue, LLR’s Final Order incorrectly states as Finding of Fact that a much larger amount was involved and

implies Appellant cheated the Sellers out of that amount – totally unproven and without substantial evidence.

F. The ALJ's misstatements of fact led to erroneous conclusions of law.

1. The ALJ failed to consider mitigating circumstances surrounding Appellant's alleged violation of: "All cash monies or certified funds received by a licensee in connection with a real estate transaction **in which the licensee is engaged for his broker-in-charge...** immediately must be delivered to the broker-in-charge... except for checks received as escrow... which must be delivered to the broker-in-charge... as soon as the sales... agreement is ratified by both parties." Section 40-57-135(B)(8), in pertinent part.

Without considering mitigating evidence, Appellant's intent to safeguard the earnest money (her own funds) from mishandling by her BIC is grossly misconstrued. When Appellant covered the \$30,000 that Grooms failed to honor, all three licensees agreed to place the funds in an account controlled by Appellant's friend, a senior bank officer. Consulting Section 40-57-135(B)(8), the licensees concluded as they at the time had no agency relationship with others, they were not engaged for the BIC. However, the ALJ dismissed the new evidence as "either unpreserved for Appellate review, manifestly without merit, or, in some case, both" yet then unfairly states "there is simply no justification for Appellant's failure to do so."

2. The ALJ errs in concluding Appellant violated Section 40-57-135(D), discussed earlier in this Brief.

3. The ALJ errs in concluding substantial evidence supports Appellant's violation of: "A licensee who represents a buyer shall treat all prospective sellers honestly and may not knowingly give them false or misleading information about the buyer's ability to perform the

terms of transaction.” Section 40-57-137(K); “A board may cancel, fine, suspend, revoke, or restrict the authorization to practice of an individual who...(c) has intentionally or knowingly, directly or indirectly, violated or has aided and abetted in the violation or conspiracy to violate this article or a regulation promulgated under this article; (f)has committed a dishonorable, unethical , or unprofessional act that is likely to deceive, defraud or harm the public; and (g) lacks the professional or ethical competence to practice the profession or occupation.” Section 40-1-110(c), (f), and (g); and “[T]he commission may... take disciplinary action against a licensee who (4) in the practice of real estate demonstrates bad faith, dishonesty, untrustworthiness, or incompetency in a manner as to endanger the interest of the public.” Section 40-57-145(A)(4).

Both LLR and the ALJ have drawn an erroneous and speculative correlation between three facts (Appellant’s role as one of the purchasers, the location of the earnest money, and Asset’s ignorance of the transaction) and Riverpath’s ability to perform the terms of the transaction. No proof exists that, under different economic circumstances as those arising in the fall of 2008, Appellant and her partners could not consummate the purchase. Further, LLR and the ALJ have only assumed that the sellers were “deceived, defrauded or harmed” as to the availability of the earnest money. The **sole** first-hand player on the sellers’ side, Bowers, offers no evidence to support “[t]hroughout the entire process, [Appellant] led the sellers to believe that the money was in the trust account.” (R. p. 16, lines 21-22). Although Appellant should have informed Bowers that the funds were housed in a different account, she never lied by stating the funds were **at Asset**, and never assured Bowers of funds on deposit other than \$30,000. The ALJ states: “the record clearly shows that Riverpath never complied with the contract’s earnest money provision and that Appellant led the sellers to

believe that it had. **For these reasons**, I conclude that the Commission's finding is supported by substantial evidence." The ALJ also speculates in Footnote 10 "[f]or instance, had they known that Appellant was one of the purchasers, the sellers may have demanded that the earnest money be deposited with another real estate agency." (R. p. 11). Had such occurred, Appellant could have simply transferred the \$30,000 into the designated account, disproving a claim of harm to the sellers.

LLR and the ALJ further failed to prove how Appellant's technical violations indicate she lacks professional or ethical competence. No proof (or even speculation) has been offered as to what Appellant could have possibly stood to gain by protecting the earnest money from mishandling by the Asset BIC, and how said action was intended to harm the public. How Appellant chose to deal with her BIC has no bearing on the performance of the contract, nor in Appellant's ability to remit the earnest money funds had they been unquestionably and contractually entitled to the sellers. In light of Appellant's long and distinguished practice in which she was recognized for exceptional competence, a single error of judgment cannot and should not be construed as characteristic of Appellant's competence with regards to her entire career.

4. The ALJ erroneously claims the following statute applies: "[T]he commission may... take disciplinary action against a licensee who... fails, within a reasonable time, to account for or to remit any monies coming into his possession **which belong to others.**" Section 40-57-145(A)(10)(emphasis added), in pertinent part. The above refers to funds "which belong to others." The funds were Appellant's, but the ALJ contends the earnest money **did** "belong to others." Although in a fictitious default the sellers may have had a contingent contractual right to the funds, the State failed to prove that the location of the funds

would have prohibited the buyers from remitting said funds to the sellers. Thus, the ALJ erred in speculating “by failing to timely deposit the earnest money in an escrow account, Appellant endangered the sellers’ ability to collect the earnest money under the terms of the sales contract.” LLR’s Conclusions of Law in part states Appellant violated Section 40-57-145(A)(10) “as evidenced by her failure to...return such monies.” If Appellant owned the funds, to whom were the monies to be returned, if not Appellant? The ALJ erred in concluding “[t]he record demonstrates that \$5,000 of the original earnest money came from Grooms. Thus, by failing to deposit Grooms’ \$5,000 check...Appellant violated Section 40-57-145(A)(10).” On the contrary, Grooms refused to allow deposit of the \$5,000 check, nor, as a licensee, did she choose to deposit her own check into Asset’s trust account.

5. The ALJ errs in stating Appellant **did not** contest violations of three statutes and therefore her guilt is upheld: Appellant **did indeed** contest them. “Appellant does not challenge the Commission’s findings that she violated Sections 40-1-110(k), 40-57-145(A)(1), and 40-57-145(A)(20). (R. p. 4, Footnote 5). “Furthermore, Appellant has not contested the Commission’s finding that she violated Section 40-57-145(A)(1)...[n]or has Appellant contested the Commission’s finding that she violated Section 40-1-110(1)(k).... Because Appellant has not contested those findings, they are the law of the case.” (R. p. 10, lines 28-33). The ALJ contends “[m]oreover, Appellant does not contest the Commission’s determination that she violated Section 40-57-145(A)(1).” (R. p. 13, lines 28-29). “As noted herein, Appellant has not contested the Commission’s findings that she violated Sections 40-1-110(1)(k), 40-57-145(A)(1), and 40-57-145(A)(20). Importantly, a violation of any of these three statutory sections constitutes grounds for disciplinary action.” (R. p. 13, Footnote 12). The error is compounded when the ALJ uses Appellant’s purported failure to deny the

charges as ammunition against Appellant: “[m]oreover, Appellant does not contest the Commission’s determination that she violated Section 40-57-145(A)(1)” and “[b]ecause the foregoing demonstrates that Appellant engaged in serious unethical and dishonest conduct, I find the Commission did not abuse its discretion in revoking Appellant’s license.” (R. p. 13, line 28 – p. 14, line 4). However, Appellant’s Response to Respondent’s Brief (on p. 7) challenges each charge with regards to Appellant’s “failure to notify her BIC” (R. p. 424). Obviously, the ALJ committed an error of law by failing to even consider overturning Appellant’s sanction based upon her purported failure to contest those issues and in finding “[b]ecause Appellant has not contested those findings, they are the law of the case.”

V. The ALJ erred by failing to overturn the Agency’s Final Order which arbitrarily singled out Appellant for prosecution and enacted a virtually unprecedented sanction, thereby depriving Appellant of her fundamental constitutional rights.

A. Appellant was singled out for prosecution, despite the fact that another licensee was named in the complaint and a yet a third licensee was involved in the transaction. Permanent license revocation in light of the complexity, circumstances and confusion was fundamentally unfair, unduly harsh, and lacked precedential support. Revoking Appellant’s real estate effectively barred her for life from practicing a broad spectrum of other occupations licensed by LLR, and from similar careers in other states – a grossly unfair penalty for a first offense. Section 40-1-10 avows the “[s]tate cannot abridge this right [to engage in an occupation] except as a reasonable exercise of its police powers when it is clearly found that abridgement is necessary for the preservation of the health, safety, and welfare of the public.” In *Doug Proctor*, the Court of Appeals upheld the Circuit Court’s decision to award Proctor \$688,503

because the State failed to exercise due care and exhibited gross negligence in dealing with his licensure, thus depriving him of his means to make a living.

In keeping with a basic tenet of our legal system, it seems LLR and the ALJ would have stated case law to justify the sanctions they respectively enacted and upheld. When a citizen's livelihood is at stake, it should not be enough to merely hide behind their broad powers to arbitrarily mete out sanctions. It is fundamentally unfair that an administrative agency enact sanctions without specific guidelines as to what violations may result in what penalties. More specific guidelines certainly exist elsewhere in the law. In *Georgetown County v. SCDHEC*, No. 01-ALJ-07-0366-CC (2002), Judge Geathers states "Section 1-23-370(c) clearly contemplates that an agency intending to revoke a permit it issued would first send notice to the permittee of its intention and then give the permittee an opportunity to respond before the actual revocation occurs" and concludes it is unlawful for an agency to fail to give "notice of its intent to revoke the permit" and "an opportunity to respond to the proposed revocation before it revoked the permit." Based upon overwhelming case law to the contrary, Appellant had no idea that her actual violations would result in the "death penalty," particularly in light of Appellant's clean record and cooperative attitude. Appellant was also unaware time that, as pointed out in Appellant's Brief, a clear correlation exists between licensees who fight for their license and the severity of sanctions.

B. Appellant was denied equal protection under the law. The United States Constitution provides "[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Equal protection is fundamental in the state Constitution as well. See S.C. Const. Article 1, § 3. Numerous cases address this concept: the "Equal Protection Clause" is not violated if citizens "are treated alike under similar

circumstances and conditions.” *Whaley v. Dorchester County Zoning Board of Appeals* 337 S.C. 568, 524 S.E.2d 404 (1999). “In order to establish an equal protection violation, a party must show that similarly situated persons received disparate treatment.” *TNS Mills Inc. v. SC Department of Revenue* 331 S.C. 611, 626, 503 S.E.2d 471, 479 (1998). “A crucial step in the analysis of any Equal Protection issue is the identification of ... exactly who is included in the group of persons allegedly being treated differently under similar circumstances without any rational basis.” *Sloan*. “Substantive due process requires that State action which deprives a person of life, liberty, or property must have a rational basis; that is, the reason for the deprivation must not be so inadequate that the judiciary will characterize it as arbitrary.” *SCDHEC v. Armstrong*, 293 S.C. 209, 359 S.E.2d 302 (Ct. of App. 1987). In *Dantzler v. Callison*, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956), “there is no reasonable doubt that the rights of those who have been duly licensed to practice medicine or other professions are property rights of value which are entitled to protection.” In *Faith Cathedral Fellowship, Inc. v. SCDHEC*, SCALC 03-ALJ-07-0346-CC (2005), Judge Matthews states “[a] party may state a claim of denial if its equal protection by the exercise of regulatory authority by administrative agencies based on selective enforcement in an intentionally discriminatory unconstitutional manner” citing, generally, *McGowan v. Maryland*, 366 U.S. 420 (1961). “The equal protection clause requires that all persons similarly situated be treated alike” citing *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872, 885 (2000). “[T]o establish a claim of selective prosecution... a defendant must show “he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted” citing *United States v. Catlett* 584 E.2d 864 (8th Cir. 1978). “Although the plaintiff bears a heavy burden of proving discrimination, it is not required to produce direct evidence of intent. Indeed, direct evidence of motive or

intent is rarely available. As in any other equal protection case, evidence concerning the unequal application of law, statistical disparities and other indirect evidence may be used to show bias or discriminatory motive” citing *Branch Ministries v. Richardson*, 970 F. Supp. at 17 (D.C.1997).

In this case, three licensees participated in the drafting of a contract of sale; all were members of the purchasing entity; all made joint decisions regarding the handling of the contract. Two licensees were specifically named in the original complaint to LLR; two licensees were also specifically named as parties to the related civil action. Yet only Appellant was chosen for prosecution and censure by LLR. The second licensee, who also placed her license on inactive status pending resolution of the lawsuit, applied for reinstatement; her license was issued without hesitation. Further, the broker that held himself forth as the Seller’s agent admittedly failed to obtain a written agency agreement with the Sellers, a clear violation of license law. Yet, once again, LLR only prosecuted Appellant. (*See also* the litany of cases cited in Appellant’s Brief to the ALJ where similar and/or far more egregious behavior resulted in relatively minor punishment but not permanent revocation).

CONCLUSION

LLR failed to review any part of Appellant’s file or evidence prior to the hearing and thus had a very limited understanding of the facts surrounding the case at hand, particularly with regards to the contract. Lack of due care in the investigation led to almost exclusive reliance upon hearsay evidence. Not only was the hearing infected by the improper admission of hearsay and numerous statements of conjecture as fact, Appellant was prejudiced by unfounded attacks on her actions and character thereby depriving her of the right to a fair tribunal.

Although its charges were largely uncorroborated by substantial evidence or testimony in the hearing, the Real Estate Commission nonetheless issued its Final Order, with numerous misstatements of fact and, as a result, erroneous conclusions of law. This document also served to levy a Two Thousand, Five Hundred Dollar (\$2,500.00) fine, and to permanently revoke the license of Appellant; an almost unprecedented penalty for a first offense and a complex, contested issue.

Appellant, pre-hearing, made numerous attempts to secure a meeting with the Agency to ensure they considered all evidence, particularly due to the sensitive nature of certain mitigating evidence. Appellant also expressed to LLR officials, even to the Director, a deep concern that her case was not being handled with due care. When the Final Order revoked her right to earn a living, Appellant sought to have her rights restored through appellate review. But LLR omitted from the Record on Appeal all evidence of pre-hearing communications between LLR and Appellant and/or her attorney. Not only did Appellant attempt to admit the evidence of the Agency's procedural irregularities, she sought to admit a small (but key) portion of the volumes of pertinent evidence that had been disregarded by LLR. Yet the ALJ dismissed every shred of this evidence without explaining why it was deemed immaterial; this dismissal surprisingly came in the final Order, although interim motions regarding said evidence had not yet been ruled on.

Because the ALJ failed to consider all evidence, failed to attain mastery of underlying contract, failed to investigate and overturn the Agency's prejudicial procedural irregularities, failed to rule on interim motions, and failed to consider the wealth of precedent indicating the Agency sanction was unduly harsh, he affirmed the Agency's Final Order, failing to restore Appellant's fundamental rights.

Underscoring the incongruity of the sanction in light of Appellant's actual conduct, the most egregious of the Commission's flawed Conclusions of Law is: "[t]he sanction imposed is not intended to punish the Respondent, but to protect her clients and other members of the public from harm." The sellers were not Appellant's clients; in a long career, Appellant has never harmed her clients. LLR failed to prove harmful intent toward the sellers, nor actual damages suffered by the sellers; therefore, how can imposition of such a sanction be justified and credibly intended only to "protect her clients and other members of the public from harm"? Case law holds forth, in *Anonymous Physician v. Department of LLR, Board of Medical Examiners*, No. 08-ALJ-11-0368-AP (2009): "[m]ere statutory authority to impose sanctions is not enough to justify a particular decision. It must also meet a standard of reasonableness" citing *South Carolina Bd. of Exam'rs in Optometry v. Cohen*, 256 S.C. 13, 180 S.E.2d 650 (1971). Thus, Appellant prays that the Court will overturn the rulings of the Agency and the Administrative Law Court.

Respectfully submitted,

June 22, 2012

Vanessa Patrick

1187 Kiblers Bridge Road

Prosperity, South Carolina 29127

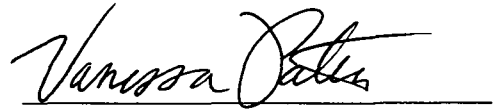
(803) 521-3614

Pro Se Appellant

CERTIFICATE OF APPELLANT

Pursuant to Rule 210(g) of the South Carolina Appellate Court Rules, appellant certifies that this Final Brief of Appellant contains all material proposed to be included by any of the parties and not any other material.

Appellant further certifies that this Final Brief of Appellant complies with the Order of the Supreme Court of South Carolina entitled *Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings*, 375 S.C. 56, 650 S.E.2d 462 (August 13, 2007).

A handwritten signature in cursive script, reading "Vanessa Patrick", is written over a horizontal line.

Vanessa Patrick

1187 Kiblers Bridge Road

Prosperity, South Carolina 29127

(803)521-3614

Pro Se Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 11-ALJ-11-0168-AP

Vanessa Patrick,

Appellant,

v.

South Carolina Department of Labor,
Licensing and Regulation, State Real Estate
Commission,

Respondent.

RECEIVED

JUN 21 2012

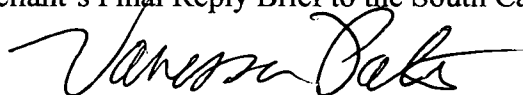
SC Court of Appeals

PROOF OF SERVICE

I certify that I have served Appellant's Final Brief and Appellant's Final Reply Brief on the South Carolina Department of Labor, Licensing and Regulation, Real Estate Commission by depositing a copy of it in the United States Mail, postage prepaid, on January 4, 2012, addressed to Melina Mann, South Carolina Department of Labor, Licensing and Regulation, PO Box 11329, Columbia, South Carolina 29211.

I further certify that I have delivered 15 copies of the Record on Appeal, 15 copies of Appellant's Final Brief and 15 copies of Appellant's Final Reply Brief to the South Carolina Court of Appeals.

June 21, 2012


Vanessa Patrick
1187 Kiblers Bridge Road
Prosperity, South Carolina 29127
(803) 521-3614
Pro Se Appellant