THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The Administrative Law Court
Honorable H.W. Funderburk, Jr., III, Administrative Law Judge

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Appellate Case No. 2021-001162

LARRY BLACKWELL, # 176790..... APPELLANT,

V.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICES ..... RESPONDENT.

RETURN TO RESPONDENT'S MOTION TO STRIKE

This Court's rules require that the Record on Appeal (ROA) "include all matter designed to be included by any party" with the sole exception that the Record "shall not . . . include matter which was not *presented* to the lower court or tribunal." Rule 210(c), SCACR (emphasis added); *see also* Rule 209(b), SCACR ("The Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal."). The only question that Respondent's motion presents, therefore, is whether any of the objected-to material "was not presented to the lower court or tribunal." Rule 210(c), SCACR. Because it was, the Court should deny Respondent's Motion to Strike.

Respondent's motion rests on three sequential misapprehensions of the law, all of which this Court must agree with in order to grant the motion. *See* Obj. to the Designation of Matter Submitted by App. & Mot. to Strike (Dec. 29, 2021). Respondent's theory of the case is as

follows: (1) the ALC denied Mr. Blackwell's motion to supplement the ROA before the ALC because SCALC Rule 61 required it to do so, *see id.* at 2; (2) because the ALC denied the motion to supplement, the materials that the ALC did not consider were never made part of the record before the ALC, *id.* at 1; and (3) because the materials were not in the ALC's ROA, Rule 210(c), SCACR prohibits this Court from considering it, *id*. But each of these premises is flawed. First, SCALC Rule 61 does not prohibit the ALC from considering anything; it merely describes what SCDPPPS is required to put into the record. Second, the statute applicable to administrative appeals defines the ROA as including information that was before the agency, and the objected-to materials at issue here were, by any reasonable reading of the statute, before the agency. And third, Rule 210(c), SCACR defines the ROA broadly, as including all materials proposed by any party so long as those materials were "presented to the lower court or tribunal," and the ALC's decision to deny Mr. Blackwell's motion to supplement does not change the fact that the materials at issue were "presented to" the agency and the ALC.

I. SCDPPPS's Interpretation of the SCALC Rule 61 Is Inconsistent with the Language of the Rule and Would Lead to Absurd Results.

SCALC Rule 61 provides, in appeals from the Parole Board, that SCDPPPS "need only provide a copy of the agency decision, and where applicable, the decision following a motion for reconsideration." SCALC Rule 61. By its plain language, the Rule governs what SCDPPPS *must* do, but it does not address what any other party or the ALC may or must do, and it does not define what is included in the ROA to the ALC or from the ALC. Accepting SCDPPP's argument (both before the ALC and before this Court) would lead to absurd results.

First, if SCDPPPS is correct and SCALC Rule 61 *prohibits* the ALC from considering material other than the agency's stock denial letter, then appeals to the ALC from SCDPPPS are functionally pointless, regardless of the legal basis for the appeal. The ALC only has subject-matter

jurisdiction to the extent of the "authority granted to it by the Constitution" or the Legislature. *Howard v. S.C. Dep't of Corr.*, 399 S.C. 618, 626-27, 733 S.E.2d 211, 216 (2012) (quoting *Black v. Town of Springfield*, 217 S.C. 413, 415, 60 S.E.2d 854, 855 (1950)). With respect to SCDPPS, the Legislature has restricted the ALC's appellate jurisdiction to exclude cases "involving the denial of parole to a potentially eligible inmate." S.C. Code Ann. § 1-23-600(D). But in order to determine whether an appeal from SDCPPPS "involv[es] the denial of parole to a potentially eligible inmate," *id.*, the ALC must consider more than just SCDPPPS's purported basis for denying parole. *E.g.*, *Barton v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 404 S.C. 395, 399-401, 745 S.E.2d 110, 112-113 (2014) (considering an appeal from SCDPPPS involving a parole denial that the appellant asserted was based on an improper reading of the statute governing her parole); *Rose v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 429 S.C. 136, 140-41, 838 S.E.2d 505, 507-508 (2020) (granting relief to a parole applicant who "repeatedly attempted to seek administrative and judicial review" but whose statutory and constitutional challenge was always "dismissed on jurisdictional grounds"). Thus, if SCDPPPS is correct, and if SCALC Rule 61 prohibits the ALC from considering materials other than what SCDPPPS is required to put before it, the ALC will be forced to dismiss all appeals from parole denials on a jurisdictional basis because there will never be evidence in the ALC record that the appeal in question is anything other than a routine parole denial.

Second, to accept this argument is to accept that SCALC Rule 61 overruled the provisions of the APA that guarantee an appeal from an adverse agency decision and that require the ALC to review agency decisions based on "the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. §§ 1-23-600, *id.* § 1-23-380(5)(e).[*] But the Legislature has made no

[*] The timing and focus of an amendment to SCALC Rule 61 are worth noting. The ALC amended SCALC Rule 61 in April 2021, to "clarif[y] that the record on appeal from decisions of the Probation, Pardon and

carveout in the APA for appeals from parole denials except that the ALC lacks jurisdiction over cases involving "denial of parole to a potentially eligible inmate," *id.* § 1-23-600(D), so the provisions of the APA cited above apply to agency appeals—including appeals from SCDPPPS decisions. *E.g.*, *Rose*, 429 S.C. at 142-43, 838 S.E.2d at 509-10 (applying the APA to an appeal from a SCDPPPS decision). Put differently, the fact that the ALC has adopted Rule 61 cannot and does not overrule the procedural rules the Legislature has adopted for appeals to the ALC, regardless of the subject matter of the appeal. And to accept Respondent's position is to accept the absurd position that all appeals from parole denials (including those that raise collateral challenges to the manner in which the hearings are conducted) involve "denial of parole to a potentially eligible inmate." S.C. Code Ann. § 1-23-600(D). Simply put, the Legislature did not intend to divest the ALC of jurisdiction over all appeals from parole denials, and the ALC cannot accomplish that result through a rule change.

Mr. Blackwell's case is a good example of the absurdity of Respondent's argument. His appeal involves a claim that he was denied basic due process protections at his parole hearing when the Solicitor who prosecuted his case injected objectively false information into the Parole Board's

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Parole Board would be limited to the agency decision and any decision on a motion for reconsideration." 2021 Note to SCALC Rule 61. In October 2020, a parole applicant named Joe Kelsey had received a ruling from the ALC on his appeal from repeated parole denials. *See Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 19-ALC-15-0061-AP (Oct. 7, 2020). The ALC's decision was based on a supplemented record to which Respondent's counsel initially consented. *Id.* at *2. After the supplemental record was filed Respondent's counsel moved to strike it, arguing that the supplemental record was "immaterial to the matter at issue" and "outside the scope of the limited authority of the ALC"—effectively the same arguments Respondent makes here. *Id.* Although the ALC ultimately ruled against the appellant in that case on jurisdictional grounds (it held that it lacked the authority to grant the remedy requested, and that decision is pending on appeal, *see* Motion for Certification, *Kelsey v. S.C. Dep't of Prob., Parole & Pardon Servs.*, No. 2020-001473 (S.C. Dec. 21, 2021)), the court considered the appellant's supplemental materials and concluded that they gave rise to cognizable claims that Respondent had violated the appellant's constitutional and statutory rights. *See Kelsey*, No. 19-ALC-15-0061-AP, at *12-13. After *Kelsey* was decided, the ALC appears to have met and amended the rules in response to that decision, presumably in an effort to prevent similar appeals from proceeding. The only amendment the ALC made to its rules in 2021 was to SCALC Rule 61, and it has made no additional amendments since.

decision-making, and when SCDPPPS failed to correct the Solicitor's falsehoods. *See* Initial Br. of App. at 18-25. But under SCDPPPS's interpretation of SCALC Rule 61, applicants like Mr. Blackwell, with valid statutory and constitutional claims, have no means of vindicating their rights before the ALC. So long as the ALC refuses to even consider evidence that SCDPPPS engaged in unlawful procedural error, ALC review is a practical nullity for all appeals from SCDPPPS decisions.

Second, if SCDPPS is correct that SCALC Rule 61 limits what the ALC may consider in a parole case to the denial letter, then as a practical matter, the burden for evaluating the materials that were presented to the agency falls to this Court. *Cf. State v. Bonilla*, 429 S.C. 253, 274, 838 S.E.2d 1, 11 ("This court does not sit as a trial court to receive evidence on disputed issues of fact; our function is to review the judgment of the [lower] court for reversible error based on the issues and evidence presented to that court." (cleaned up)). This outcome is inconsistent with the Legislature's objectives in creating the ALC: increasing judicial efficiency and uniformity in agency appeals. *See* Randolph R. Lowell, *The Contested Case Before the ALC*, in South Carolina Administrative Practice and Procedure 148 (Randolph R. Lowell ed. 2008) (noting that the General Assembly created the ALC to provide a "neutral forum for fair, prompt, and objective administrative hearings" and to improve the efficiency, consistency, and objectivity of administrative adjudications). Again, Mr. Blackwell's case offers a good example. Because the ALC refused to consider the materials that were before the agency in assessing its own jurisdiction, the burden for doing so now falls to this Court, as does the unusual task of resolving a dispute over the Designation of Matter.

II. The Materials Included in Mr. Blackwell's Designation of Matter Are Part of the ROA as a Matter of Law.

In cases like Mr. Blackwell's that are "heard in the appellate jurisdiction of the [ALC]," the South Carolina Administrative Procedures Act (APA) requires the ALC to review the agency decision "in the same manner as prescribed in Section 1-23-380 for judicial review of final agency decision with the presiding administrative law judge exercising the same authority as [this Court]." S.C. Code Ann. § 1-23-600(D). Section 1-23-380, in turn, provides that review must be "confined to the record" and that the ALC may reverse when, *inter alia*, the agency decision under review is arbitrary and capricious or "clearly erroneous in view of the reliable, probative, and substantial evidence on the *whole record*." *Id.* § 1-23-380(5)(e)-(f) (emphasis added); *see also id.* § 1-23-320(G) ("The record in a contested case must include: . . . all pleadings, motions, intermediate rulings, and depositions; evidence received or considered; . . . [and] any decision, opinion, or report by the officer presiding at the hearing."). The "whole record" before SCDPPPS in Mr. Blackwell's case included more than just a copy of the agency decision. *See id.*; *DuRant v. S.C. Dep't of Health & Envt'l Control*, 361 S.C. 416, 419-20, 604 S.E.2d 704, 706 (Ct. App. 2004) (reviewing an agency decision "based upon the record presented to the [ALC]," including evidence the administrative judge ultimately did not consider); *Sierra Club v. S.C. Dep't of Health & Envt'l Control*, 426 S.C. 236, 259-60, 826 S.E.2d 595, 608 (2019) (in an appeal from an administrative agency, noting that the appellant had "attempted—to no avail—to supplement the record on appeal" to include a document that "may have been helpful" to the appellant and emphasizing that on remand, that party would "be able to present evidence [related to the contested document]").

Specifically, the materials that were "before the agency" included: (1) "documents received" by SCDPPPS, including Mr. Blackwell's parole package and letters the Solicitor's office sent to SCDPPPS prior to the hearing; (2) a transcript of Mr. Blackwell's most recent parole

hearing; (3) a copy of the SLED report (another "document received" by SCDPPPS); and (4) a series of written communications between Mr. Blackwell's parole attorney and SCDPPPS (also "document[s] received" by SCDPPPS). Mot. to Supp. the ROA at 1, *Blackwell*, No. 21-ALJ-15-0011-AP. These are the materials Mr. Blackwell sought to include in the ROA to the ALC and were therefore "presented to the lower court or tribunal." Rule 210(c), SCACR. Thus, although Respondent is correct that the ALC declined to *consider* Mr. Blackwell's proposed supplemental materials, that does not mean the materials were not "presented to" it and therefore part of the record that was "before the agency." Reading the Rules of Appellate Procedure and the Administrative Law Court's Rules as Respondent advocates would render those rules inconsistent with the APA, which describes the ROA as including materials that were before the agency in question. *See Roper v. S.C. Tax Comm'n*, 231 S.C. 587, 594-95, 99 S.E.2d 377, 381 (1957) (noting that agencies have "no power delegated to make any rules or regulations inconsistent with the law enacted" (quotation omitted)); *see also Wangen v. Comm'r of Pub. Safety*, 437 N.W. 120, 124 (Ct. App. Minn. 1989) ("Rules which are inconsistent . . . with the statutory authority . . . are ineffective and do not carry the force and effect of law.").

Moreover, even assuming that Mr. Blackwell did not put the evidence in question before the ALC (although he did), the APA specifically addresses circumstances in which a party, for "good reasons," fails to put "additional evidence" that is "material" in front of the ALC. S.C. Code Ann. § 1-23-380(4). If this Court does determine that Mr. Blackwell failed to put the evidence at issue before the ALC, the Court should treat Mr. Blackwell's proposed designation of matter as "a timely application . . . for leave to present additional evidence" and should treat the ALC's cramped reading of SCALC Rule 61 as a "good reason[] for failure to present it in the proceeding before the [ALC]." *Id. See also Fountain v. Fred's, Inc.*, 429 S.C. 533, 554-55, 839 S.E.2d 475,

486-87 (Ct. App. 2020) ("It is the substance of the requested relief that matters regardless of the form in which the request for relief was framed." (cleaned up)).

III. SCDPPPS's Interpretation of Rule 210(c), SCACR Is Inconsistent with the Language and Purpose of the Rule and Would Lead to Absurd Results.

The final piece of Respondent's argument is that Rule 210(c), SCACR, prohibits this Court from considering the materials the ALC refused to consider in this case, plus the pleadings submitted to the ALC and the ALC's order. According to SCDPPS's reading of Rule 210(c), SCACR, "the only materials that may be submitted and included in the record are the Record on Appeal of the Administrative Law Court's case." Obj. to the Designation of Matter Submitted by App. & Mot. to Strike at 1. This is inconsistent with the language of Rule 210(c), SCALC, is out of step with how courts have interpreted the rule, and is fundamentally at odds with the purpose of the rule and with due process.

Rule 210(c) defines the ROA broadly to include "all matter designed to be included by any party," with the exception of matter "not presented to the lower court or tribunal." Rule 210(c), SCACR. By the rule's plain language, Mr. Blackwell should not be prohibited from including materials that he presented to the ALC and the agency in this Court's ROA. Moreover, that is the outcome most consistent with the rule's purpose. Rule 210(c), SCACR relates to error preservation and is aimed at ensuring that, before a party seeks redress from an appellate court, the "lower court or tribunal" had an opportunity to consider the record material and any arguments it raises for the first time. *E.g.*, *Brown v. S.C. Dep't of Health & Envt'l Control*, 348 S.C. 507, 519-20, 560 S.E.2d 410, 417 (2002) ("[I]ssues not *raised to and ruled on* by the agency are not preserved for judicial consideration." (emphasis added)); *Fountain*, 429 S.C. at 554 n.18, 839 S.E.2d 486 n.18 (refusing to consider a document and any argument based on that document where the parties had not asked the lower court to consider it because the argument was "not preserved for this court's review").

But where a party presents materials to a lower tribunal and asks that tribunal to consider them, that body is not deprived of a first chance to consider the materials and the arguments they raise, and those materials have been "presented to the lower court or tribunal" for the purposes of Rule 210(c), SCACR.

In this case, Mr. Blackwell moved to supplement the record before the ALC in a formal motion and received an adverse ruling on that motion. Order Denying Mot. to Supp. the ROA & Order of Dismissal, *Blackwell*, No. 21-ALJ-15-0011-AP (Sept. 14, 2021). Now, SCDPPPS asks this Court to disregard the fact of that motion, the motion itself, the materials that are the subject of the motion, and the lower court's ruling on the motion. Obj. to the Designation of Matter Submitted by App. & Mot. to Strike. At every possible juncture, Mr. Blackwell has attempted to get administrative and judicial review of his argument, based on the materials SCDPPPS now seeks to preclude from review, that the agency—SCDPPPS—deprived him of due process. At every possible juncture, SCDPPPS has objected in an attempt to skirt any merits review. This is not consistent with the purpose of the Appellate Court Rules, with the APA, with the ALC's rules, or with fundamental notions of fairness. If judicial review of an agency decision is to have any meaning, it has to be on the "whole record" that was before the agency, not on a record the agency has been permitted to sanitize.

Conclusion

For the preceding reasons, Mr. Blackwell respectfully requests that this Court deny Respondent's Motion to Strike and reinstate the briefing schedule.

[Signature block appears on the following page]

Respectfully submitted,

/s/ Hannah Lyon Freedman

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February 21, 2022

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court

Judge H.W. Funderburk, Jr., Administrative Law Judge

Appellate Case No. 2021-001162

Larry Blackwell, #176790.....Appellant,

v.

SCDPPPS.....Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellant's Return to Respondent's Motion to Strike was served on opposing counsel by e-mail on at the address provided in the Attorney Information System: Matthew.Buchanan@ppp.sc.gov. Service was made on February 21, 2022.

/s/Hannah Lyon Freedman
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From: **Hannah Freedman** hannah@justice360sc.org
Subject: Return to motion to strike
Date: February 21, 2022 at 12:00 PM
To: Matthew Buchanan Matthew.Buchanan@ppp.sc.gov
Cc: John Blume jb94@cornell.edu, jon@ozmint.com

HF

Hi Mr. Buchanan,

I hope you had a nice weekend. Please find a copy of our return to SCDPPPS's motion to strike attached here. I will file this with the Court via the electronic system shortly. Thanks very much.

Hannah Freedman

Return to Motion...ike.pdf