South Carolina Bar
Continuing Legal Education Division

2026 SC BAR CONVENTION

Administrative & Regulatory Law Committee

"Navigating the Complexities of Administrative Practice and Procedures"

Saturday, January 24

SC Supreme Court Commission on CLE Course No. 260230

South Carolina Bar

Continuing Legal Education Division

Medicaid State Fair Hearings Best Practices

Nicole T. Wetherton, Esq

Navigating the Complexities of Administrative Practice and Procedure

Advocacy Before a State Agency Hearing Officer

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Chief Hearings Officer
South Carolina Department of Health and Human Services

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Goals

- Introduction
- Medicaid program
- Medicaid appeals
  - Jurisdiction
  - Relevant federal and state regulations
  - Process and procedure for a fair hearing
  - Best practices

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What is Medicaid?

- Medicaid is a joint federal and state public assistance program that helps cover medical costs for individuals with limited income and resources.
- The Social Security Amendments of 1965 created Medicaid by adding Title XIX to the Social Security Act (Medicare was created in tandem through Title XVIII).
- The federal oversight agency is the Centers for Medicare and Medicaid Services which is within the U.S. Department of Health and Human Services.

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What is the South Carolina Department of Health and Human Services (SCDHHS)?

- Each state administers its own Medicaid program and must comply with the Code of Federal Regulations (CFR).
- As a condition for receipt of federal Medicaid funds, states must designate a single state agency to administer the state's Medicaid program. 42 C.F.R § 431.10(b).
- In addition to the federal regulations, there are also state requirements for the South Carolina Medicaid program which can be found in Chapter 126 of the South Carolina Code of Regulations.
- The South Carolina Medicaid program is referred to as South Carolina Healthy Connections Medicaid.

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South Carolina Medicaid Statistics

- Approximately one million South Carolina residents are enrolled in full-benefit Medicaid.
- Medicaid covers approximately 60% of South Carolina's children.
- Approximately 60% of all births in South Carolina are covered by Medicaid.

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SCDHHS Office of Appeals and Hearings

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Federal Jurisdiction

- 42 C.F.R. § 431.200(a): Implements section 1902(a)(3) of the act, which requires that a state plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly.
- 42 C.F.R. § 431.201: Defines "action" as a termination, suspension of or reduction in covered benefits or services, or a termination, suspension of or reduction in Medicaid eligibility or an increase in beneficiary liability.
- 42 C.F.R. § 431.205: Provision of the hearing system

  (b) The state's hearing system must provide for—

  (1) A hearing before—

  (i) the Medicaid agency

  (d) The hearing system must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970), and any additional standards specified in this subpart.
- 42 C.F.R. § 431.244: Requires the agency to take final administrative action on an appeal ordinarily within 90 days for an applicant or member.
  - **Also, expedited status can be granted if the 90-day timeframe would jeopardize the life, health or ability to attain, maintain or regain maximum function.**

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Goldberg v. Kelly, 397 U.S. 254 (1970)

In a five-to-three decision, the Supreme Court held that states must afford public aid recipients a pre-termination evidentiary hearing before discontinuing their aid.

What are the notice requirements in Goldberg v Kelly?

Timely and adequate notice detailing the reasons for a proposed termination.

An effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

If the agency determined at that hearing that the benefits had been wrongfully terminated, the recipient would be entitled to reinstatement.

If the agency affirmed its termination decision, the recipient could take an appeal to court.

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State Jurisdiction

- **S.C. Code Regs. § 126-150(B)**
  - Appeal: The formal process of review and adjudication of agency determinations, which shall be afforded to any person possessing a right to appeal pursuant to statutory, regulatory and/or contractual law; provided, that to the extent that an appellant's appellate rights are in any way limited by contract with the agency or assigned to the agency, said contractual provision shall control.

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Notice of Appeal

- **S.C. Code Regs. § 126-152**
  - An appeal shall be initiated by the filing of a notice of appeal within thirty (30) days of written notice of the agency action or decision which forms the basis of the appeal. The failure to file the requisite notice of appeal within the thirty (30) day period specified above shall render the agency action or decision final; provided, that should the written notice specify some period to appeal other than thirty (30) days, that period shall apply; provided, that the requirement that written notice be given by the agency shall not be applicable to situations where applicants for Medicaid benefits acquire the right to appeal when the agency fails to act on the application within the time period specified by federal regulation.
  - In appeals by providers, the notice of appeal shall state with specificity the adjustment(s) or disallowance(s) in question, the nature of the issue(s) in contest, the jurisdictional basis of the appeal and the legal authority upon which the appellant relies.
  - If a notice of appeal does not satisfy the requirements of paragraph (B) above, the hearing officer, upon his own motion or by motion by an adverse party, may require a more definite and certain statement.

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Good Cause

- If an applicant or Medicaid member did not file an appeal within the thirty (30) day deadline, the appeal will be opened, but they must show good cause for the late filing.

  - Good cause is defined as a "legally sufficient reason" and the burden is placed on the petitioner.
  - Good cause may require showing something more than personal circumstances or common tribulations of life.
    - South Carolina Department of Motor Vehicles v. Watts, Docket No. 07-ALJ-21-0134-AP, at *5 (S.C. Admin. Law Ct. 2008)
    - What constitutes good cause is determined on a case-by-case basis.
  - Lack of proper notice has been found as good cause by the Administrative Law Court (ALC).

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Hearing Officers

- **S.C. Code Regs. § 126-154**
  - A hearing officer has the authority, among other things to:
  - **Direct all procedures**
  - **Issue interlocutory orders**
  - **Schedule hearings and conferences**
  - **Preside at formal proceedings**
  - **Rule on procedural and evidentiary issues**
  - **Require the submission of briefs and/or proposed findings of fact and conclusions of law**
  - Call witnesses and cross-examine any witnesses
  - **Recess, continue and conclude any proceedings**
  - **Dismiss any appeal for failure to comply with requirements under this subarticle**
  - **Has subpoena powers**
- Six full-time hearing officers

(Similar to Rules 9, 17, 22, 23, 29(A) SCALCR)

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Prehearing Conference

- **S.C. Code Regs. § 126–156: Prehearing conference**
- The hearing officer, within his discretion, may direct the parties in any appeal to meet prior to a formal hearing for the purpose of narrowing the issues and exploring the possibilities of settlement of matters in contest.
- It is often an opportunity for the parties to openly communicate and provide additional documentation.
- Different than Rule 28, SCALCR, because hearing officer is not involved, but will order Prehearing Statement pursuant to Rule 14, SCALCR

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Procedural Rights of Applicants or Beneficiaries (Federal)

42 C.F.R. § 431.242

- Petitioner has right to inspect their file
- **Bring witnesses**
- **Establish all pertinent facts**
- **Present argument**
- **Cross examine**
- Request an expedited hearing

Rule 29, SCALCR

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Procedural Rights of Applicants or Members (State)

- **S.C. Code Regs. § 126-158(A): Rights of both parties:**
  - **Represented by counsel**
  - **Call witnesses**
  - **Submit evidence**
  - **Cross-examination**
  - **Make opening and closing statements**
- Record can be left open after the fair hearing at the request of either party to supplement information
- Rules 8, 29 SCALCR

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Pro Hac Vice

- **Rule 404(a), SCACR, is amended to provide**: (a) Motion for Admission Pro Hac Vice; Tribunal Defin[CM1] Upon written motion, an attorney who is not admitted to practice law in South Carolina and who is admitted and authorized to practice law in the highest court of another state or the District of Columbia may be admitted pro hac vice in any action or proceeding before a tribunal of this state. Except as provided by Rule 244(d), a person may not be admitted pro hac vice unless a regular member of the South Carolina Bar in good standing is associated as attorney of record with that person. The South Carolina attorney of record shall file the motion with a copy of the completed application form specified in (d) below (including the certificate of good standing) and the certification by the Clerk of the South Carolina Supreme Court specified in (e) below. For the purpose of this rule, **a "tribunal" includes any court of this state, the South Carolina Administrative Law Court and any South Carolina agency authorized to hear and determine contested cases as defined under S.C. Code Ann. § 1-23-310.**
- **Rule 404(b), SCACR, is amended to provide**: (b) Action on Motion. The tribunal in its discretion may[CM2] hold a hearing on the motion and shall enter an order granting or denying the motion. If the motion is denied, the tribunal shall state its reasons.

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Discovery

- Follow the Administrative Procedures Act
- Allows for depositions but not requests for production or interrogatories.
- Try to address discovery issues first and submit a joint scheduling order.

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De Novo Hearing

- Under *de novo* **review**, the hearing officer steps into the shoes of the previous decision-maker, reviews the same evidentiary record and decides whether the decision was right or wrong.
- By contrast, a *de novo* **hearing** is not limited to the existing record, so new evidence and argument can be introduced. Even though certain evidence was not part of the initial decision being appealed, it can be presented as long as its relevant. The hearing officer draws fresh conclusions instead of basing them on the initial determination.
  - Ex. New records and evaluation that have occurred prior to a fair hearing. They can be introduced as evidence and considered by the hearing officer even though they may not have been in existence at the time of the initial decision.
  - Must provide thirty days notice to parties of fair hearing. (Rule 15, SCALCR)

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Standard of Review and Burden of Proof

- Standard of review
  - Preponderance of the evidence
- Burden of proof
  - One court has noted specifically that "neither federal statutes nor regulations establish the standard of proof required . . . ." Dillingham v. N.C. Dept. of Human Resources, 132 N.C. App. 704, 711 (1999).
  - When an individual appeals an action of a state Medicaid agency, the burden is usually placed upon the party attempting to change the status quo. Those initially applying for eligibility usually bear the burden of proof, while the state Medicaid agency generally bears this burden when attempting to terminate eligibility.
    - South Carolina ALC case held burden of proof can be shifted as a sanction in Medicaid cases.

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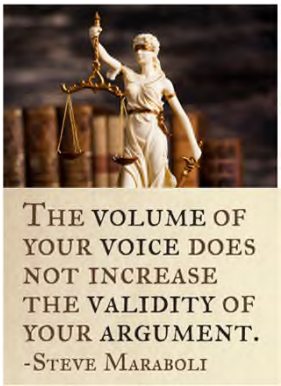
Fair Hearing

- Can be remote or in-person
- Stipulations are favored
- Can request sequestration of witnesses
- Attorney-client privilege exists between Office of General Counsel and witness
- Hearing officer decides which party presents their case first regardless of burden of proof
- Parties placed under oath
- Can bring own interpreter or court reporter but agency interpreter and recording made by hearing officer will control.
- Record can be left open after the fair hearing at the request of either party to supplement information



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Judicial Notice

- S.C. Code Ann. § 1-23-300(4) – Judicial Notice. Notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing and afforded the opportunity to contest the material so noticed. The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of evidence

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Objections/Admissibility

- **Make timely objections**. Most common objections: compound, relevance, hearsay, lack of foundation, cumulative or leading.
- **Three main questions for admissibility:**
  1. Is it relevant?
  2. Is the evidence/testimony repetitious?
  3. Is the evidence/testimony reliable?
- **Hearsay can be admitted** but it should corroborate other reliable evidence in the record.
- **Considerations for hearsay:**
  1. Is this information central to the issue and is this the only proof in support?
  2. Could the other side requested a subpoena?
  3. Does the appeal turn on the credibility of the declarant?
- **Summaries can be admitted** with the other party's consent.

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Administrative Decision

- Requires findings of fact and conclusions of law
- Petitioner can appeal to the ALC within 30 days from the date of the order
- No motions for reconsideration

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Questions?

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Labor, Licensing, and Regulation Board Hearings Best Practices

Bob Horner, Esq

LEGAL SERVICES AND ENFORCEMENT

The Disciplinary Process: How It Works and Why We Do It

1

THE PLAYERS

OIE – Investigators/Inspectors
ODC – Disciplinary Counsel
OAC – Advice Counsel
RPP – Recovering Professional Program

2

Why do we do it?

3

- "Because the unregulated practice of the profession or occupation can harm or endanger the health, safety, or welfare of the public and the potential for harm is recognizable and not remote or dependent upon tenuous argument" [S.C. Code § 40-1-110(b)(1)]

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Part One: Investigations and Inspections

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Complaint-Driven Agency

- Complaints must be from the public
- Exceptions: LLR may file a complaint:
  - As a result of inspections
  - News articles, press releases, info received from other agencies
  - Self reports by licensees

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Inspections

- Inspections for the following Boards:
  - Dental
  - Real Estate Commission
  - Barber, Cosmetology, Massage
  - Funeral

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Opening the Case

- Complaint Analysts review and assess complaint allegations
- They determine:
  - (a) is there jurisdiction
  - (b) is the allegation a violation of the Practice Act, if true

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§ 40-1-90: Good Cause Process

- Complainant's name may be withheld from Respondent
- Complainant must request "good cause" for name to be withheld
- Board Chair decides issue

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Authorizing the Case for Investigation

- Lead Investigator assigns to investigator
- High priority cases take precedence
- The length of the investigation varies depending on:
  - complexity of the issues
  - the type of evidence involved
  - expert review needed

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Investigating the Case

- Evidence is obtained mainly by:
  - interviewing witnesses/Respondent
  - issuing subpoenas
  - law enforcement agencies
  - on-site visits
  - coordinating/communicating with RPP

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Expert Review Process

- In cases where deviation from the standard of care is involved and expert will be retained to opine
  - Medical, Nursing, Dentistry, Veterinary, Engineering, *etc*.
- The expert will prepare a written expert opinion/prepared to testify

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Investigative Review Conference

- Once the case has been fully investigated, it is submitted to the Investigative Review Conference (IRC)

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Investigative Review Conference (IRC)

The IRC is comprised of:

- The Investigator & Lead Investigator
- ODC Attorney
- Board Executive
- Professional members from the profession/occupation
  - appointed by Board but not current board members

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IRC Role

- Meets periodically throughout the year
- Part of the investigative process, so it is a non-public body
- Reviews the evidence in relation to the alleged practice act violations
- Makes recommendations to the Board

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Board Approval of IRC Report

- The IRC report is confidential
- Will not contain any identifying aspects of the case
- IRC report contains recommendations for the Board:
  - Dismissal
  - Letter of Caution
  - Formal Complaint

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JC1
SB1

Requirements for Formal Complaint

- Boards follow the SC Administrative Procedures Act
- Among other things, Boards are required to uphold due process rights, follow rules of evidence, and issue proper notice
- To discipline a licensee, the licensee must have violated the practice act
- Boards are the Finder of Fact and Trier of Law
- If a Board approves a Formal Complaint, the case is transferred from OIE to ODC

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Part Two: ODC and the Prosecution Process

(ODC = Office of Disciplinary Counsel)

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Slide 17

JS1 Do we need this one?
Jennifer Stillwell, 4/2/2025

SB1 We can streamline this, I think.
Susan Boone, 4/2/2025

General ODC Duties

- Prosecutes disciplinary cases
- Interacts & negotiate with opposing counsel, respondents, witnesses, and other agencies
- Collaborates with and advise investigators as needed

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General ODC Duties, cont.

- Drafts Temporary Suspension Orders, Orders Requiring Evaluation, Cease & Desist Orders, and Reinstatement Orders
- Works in conjunction with the investigator as to these Orders

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Ways to Resolve a Case Once It Is Approved for a Formal Complaint

1. Consent Agreement (CA)
2. Memorandum of Agreement (MOA)
3. Stipulation of Facts (SOF)
4. Voluntary Relinquishment (VR)
5. Full Evidentiary Hearing (Panel or Board)

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What's the difference?

Type of Agreement	Agree on Facts	Agree on Violations	Agree on Sanctions	Board Appearance Required
Consent Agreement	Yes	Yes	Yes	Varies by Board
Memorandum of Agreement	Yes	Yes	No, Board decides	Yes
Stipulation of Facts	Yes	No	No, Board decides	Yes
Panel Hearing	No	No	No, panel/hearing officer/Board decides	Yes
Voluntary Relinquishment				No

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Consent Agreement (CA)

- IRC recommends sanctions based on Board-approved guidelines
- Respondent agrees to facts, violations, and sanctions
- Akin to a guilty plea with a "sentencing" recommendation
- Can be rejected by the Board

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Memorandum of Agreement (MOA)

- Respondent stipulates to facts and violations
- Respondent must appear; may testify, submit letters of support; no other testimony allowed
- If the case has RPP involvement, RPP will testify
- Akin to a guilty plea with no "sentencing" recommendations

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Stipulation of Facts (SOF)

- Respondent agrees with the facts; does not admit to violation(s)
- Board hearing but not an evidentiary hearing
- Only Respondent may testify, offer mitigation
- Board will make finding of violations, if any
- Generally disfavored by most Boards

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Stipulation of Facts (SOF)

- Disfavored by many Boards
- "A stipulation of facts is a stipulation of nothing."
- Too often Respondents will argue against their own stipulated facts
- Board may reject in that case

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Panel Hearings

- Panel hears testimony, takes evidence, decides facts, violations of law, and proposed sanctions (*maybe*)
- A Final Order Hearing (FOH) is held before the Board; Board can accept, reject, or modify the recommendation
- Respondent may appear at the FOH to request the Board reject or modify the recommendations

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Board Dispositions

Dispositions

- Dismissal
- Find violation and impose sanctions
- Letter of Caution
  - Non-disciplinary dismissal, though with Respondent advised to be mindful of certain issues going forward
  - Private
  - No requirements issued
  - Can be considered in future discipline regarding same issue

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Board Dispositions, cont.

Some Possible Sanctions

- Public Reprimand/Private Reprimand
- Continuing Education
- Probation/Supervision
- Suspension/Suspension with Stay
- Monetary Sanctions/Investigative Costs
- Limit the scope of the license

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Board Dispositions, cont.

- Not all Boards have the ability to impose private reprimands
- The authority to issue a private reprimand exists only in the particular Practice Acts
- Read the Practice Act before you show up and ask for a private reprimand

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Respondent's Due Process

- Receive notice of complaint, identity of Complainant (unless good cause granted) and right to respond
- Right to obtain counsel
- Right to surrender or relinquish license
- Right to obtain copies of evidence to be used against them
- May resolve case by way of Agreement
- May choose to have a trial

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Other Legal/Discipline-Related Issues

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Temporary Suspension Orders

- "If the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action." S.C. Code § 1-23-370(c).

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Temporary Suspension Orders

- OIE drafts an affidavit; ODC assesses if there is sufficient probable cause to request a TSO
- If probable cause, ODC drafts and sends proposed TSO to Advice Counsel; Board Chair grants or denies
- TSOs are *ex parte*; Respondents can challenge the TSO before a hearing officer & present evidence

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Orders Requiring Evaluation

- Some Boards have authority to order evaluations for alleged physical, mental, sexual, or substance abuse issues
- Example: "If the board finds that probable cause exists that a licensee or applicant may be professionally incompetent, addicted to alcohol or drugs, or may have sustained a physical or mental disability that may render practice by the licensee [] dangerous to the public, [] the board, without a formal complaint or opportunity for hearing, may require a licensee [] to submit to a professional competency, mental, or physical examination by authorized practitioners designated by the board." S.C. Code § 40-33-116.

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Orders Requiring Evaluation

- OREs follow the same process as TSOs
- OREs are *ex parte*, but licensees may request a hearing & present evidence
- Licensees are required to comply with ultimate evaluation recommendations
- Failure to comply will result in a TSO request
- In some cases, an ORE and TSO may be issued at the same time

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Appealability of TSOs and OREs

- "We find the Board's orders of temporary suspension and the 2001 order requiring Anonymous Physician to undergo an evaluation were not 'final orders' and were not immediately appealable to the ALC." Island Packet v. Kittrell, 365 S.C. 332, 617 S.E.2d 730 (2005)

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Cease and Desist Orders

- Place an unlicensed individual on notice that his/her conduct constitutes the practice of a particular profession without proper licensure and without meeting any applicable exceptions

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Agreement to Voluntarily Surrender

- Respondent voluntarily agrees to temporarily cease practice; provided for by S.C. Code Section 40-1-150
- Usually done in lieu of a TSO
- Investigation continues after a voluntary surrender
- Boards allow reinstatement if Respondent is safe to practice
- Board can also issue an order limiting practice

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Agreement to Voluntarily Relinquish

- Licensees stipulate to permanently give up their license
- Investigation or disciplinary case is closed without resolution
- Licensees can relinquish at any point in the disciplinary process
- Licensees waive appeal, cannot ever reinstate

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Part Three:
Office of Advice Counsel
The Boards and Counsels' Role

(OAC = Office of Advice Counsel)

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Office of Advice Counsel (OAC)

- Provides legal advice to all Boards/Commissions and their administrative staff members
- Assists Boards/Commissions conduct their meetings in accordance with Practice Acts, FOIA, and the APA
- Handles appeals on non-disciplinary issues
- Collaborates with other agencies
- Testifies for the Agency regarding legislation and regulations
- OAC does not provide legal advice to parties outside LLR

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WHAT IS THE RECOVERING PROFESSIONAL PROGRAM (RPP)?

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Recovering Professional Program

- RPP contracts with LLR to monitor licensees (of certain Boards) who, after evaluation, are diagnosed with a substance abuse disorder, mental health disorder affecting practice, or who are otherwise recommended for monitoring
- Licensees initially complete an intake and evaluation
- Failure to enroll after diagnosis will result in TSO
- RPP notifies Boards when licensees are noncompliant

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RPP

- Recovering Professional Program assists LLR in helping professionals with substance abuse issues or potential substance abuse issues
- One out of every 10 healthcare professionals experiences a problem with drugs or alcohol over their career.
- Performs intake & monitoring if warranted

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RPP

- If ORE is issued, or Board orders an evaluation at any other time, RPP will handle intake of licensee
- RPP rarely performs evaluations; done by other entities
- Respondent picks approved evaluator(s)
- RPP will monitor if diagnosis rendered

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RPP

- Abstinence-based program
- Must check in daily to see if testing is required
- Participation can be between 2 and 5 years if fully compliant
- Length of participation is diagnosis-driven

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APPLICATION HEARINGS

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Application Hearings

- Does applicant meet qualifications in statute?
- If not, does statute offer Board discretion?
- If not, applicant will not be licensed
- If there are mandatory requirements, Boards are without authority to waive

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Application Hearings

- Reasons for denial of license may be outlined in Practice Act or Engine Act
- S.C. Code § 40-1-110 is a disciplinary section in the Engine Act incorporated by reference and can be used for denials

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S.C. Code § 40-1-110
Common grounds for denial of licensure unrelated to qualifications

- Used a false/fraudulent/forged statement related to licensure
- Has had a license in another state canceled, revoked, or suspended
- Has committed a dishonorable, unethical, unprofessional act likely to deceive, defraud, or harm the public
- Lacks the professional or ethical competence to practice the profession or occupation

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Application Hearings

- Boards are prohibited from using vague or generic terms including, but not limited to, "moral turpitude" or "good character"
- Cannot deny licensure for criminal charges where applicant was acquitted, charges dismissed or nol prossed

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Other Considerations

- Open session? Applications are usually held in open session unless an exception exists
- Discipline is usually held in closed session unless the Practice Act requires otherwise
- Read the Practice Acts & FOIA in advance
- Or contact Advice Counsel (last resort?)

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Questions?

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South Carolina Bar

Continuing Legal Education Division

Representing Clients in Administrative Proceedings

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Practicing Administrative Law in South Carolina

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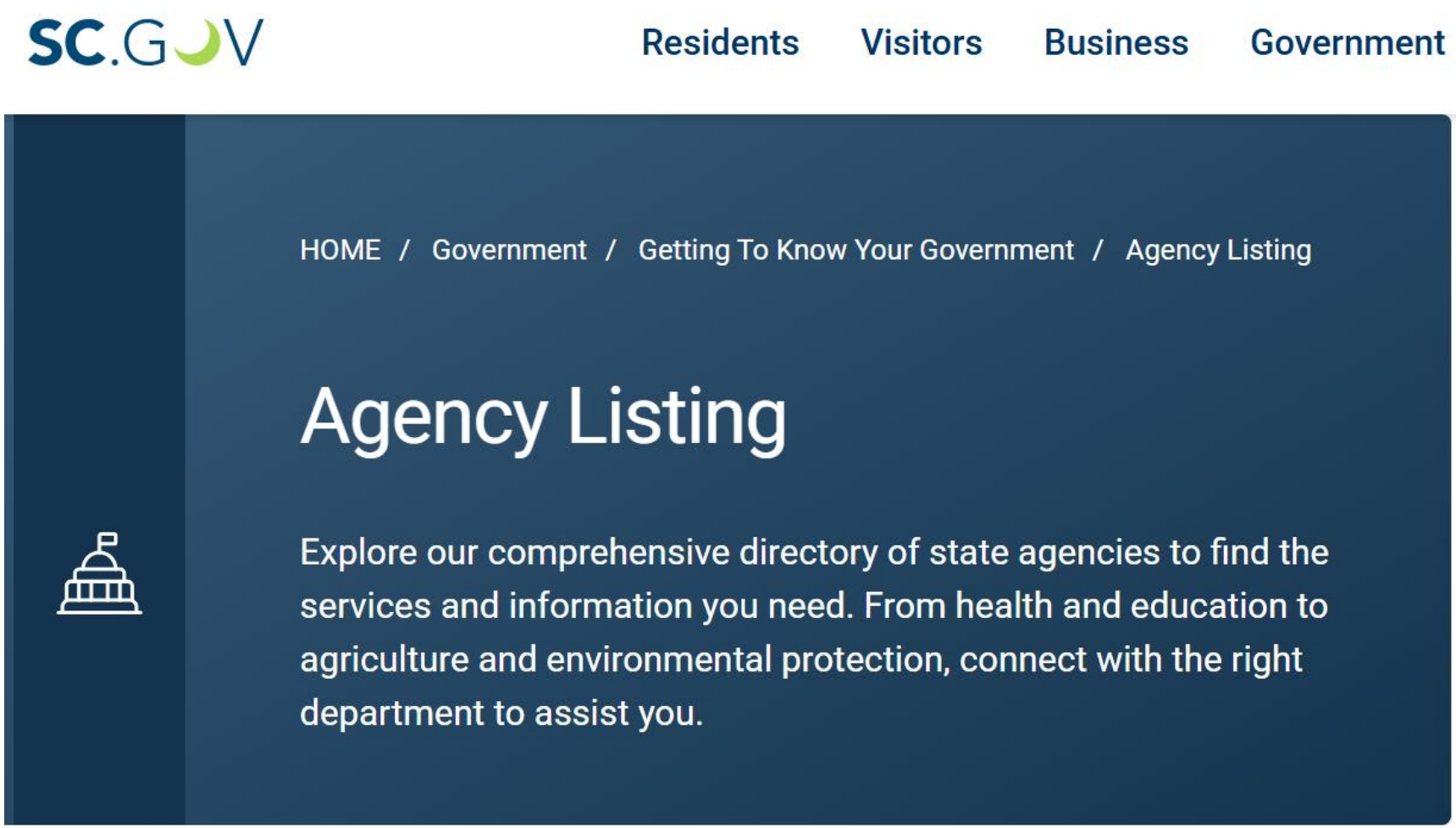
NELSON MULLINS

South Carolina Agencies



- 94 Agencies
  - 23 Cabinet Agencies

My Administrative Law Practice

SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES
Healthy Connections
MEDICAID

South Carolina Department of
Probation, Parole & Pardon Services

NELSON MULLINS

My Healthcare Administrative Law Practice

NELSON MULLINS

DPH Practice

Regulation 61-16

Minimum Standards for Licensing Hospitals and Institutional General Infirmaries

dhec
S.C. Department of Health and Environmental Control

2600 Bull Street | Columbia, SC 29201

SOUTH CAROLINA DEPARTMENT OF PUBLIC HEALTH

Regulation 60-16
Minimum Standards for Licensing Hospitals and Institutional General Infirmaries

400 Otarre Parkway, Cayce

DPH Practice

- 2 primary types of healthcare licensing matters
  - Licensing
  - Enforcement
- For healthcare facilities and providers

DPH Practice – Licensing – Establishing Healthcare Facilities

- Healthcare Quality
  - Certificate of Need
  - Health Facility Construction
  - Healthcare Facility Licensure
  - Medicare Certification
- Certificate of Need
  - S.C. Code Ann. § 44-7-110 *et seq.* and DPH Regulation 60-15
  - Applies to:
    - Hospitals
    - Nursing Homes
    - HHA
    - MUSC
  - 1/1/2027
  - Communication with DPH CON staff

DPH Practice – Licensing – Establishing Healthcare Facilities

- Health Facility Construction
  - New or expanded/renovated healthcare facility
  - Compliance with applicable regulations and building codes
  - HFC Guidelines Manual
  - PIF (Project Information Form)
- Healthcare Facility Licensing
  - New healthcare facilities and existing healthcare facilities
    - Initial licensing
- Certification
  - Medicare COPs

DPH Practice – Licensing

- Conventional health facility licensing
  - 19 types of healthcare facilities
    - Renewals
    - Changes
    - CHOWs
  - Communication with DPH staff
  - EEP (Emergency Evacuation Plan)

DPH Practice – Enforcement Actions

- Licensing inspections for healthcare facilities
  - Inspect for elements in the DPH licensing regulation for facility type
  - ROV (Report of Visit)
  - POC (Plan of Correction)
  - Request for Reconsideration
  - Exception or variance
- Enforcement
  - Notice of Enforcement Conference
    - No enforcement
    - Consent Order
    - Administrative Order
      - Contested case in ALC
- DPH Certification Inspections
  - COPs for facility type

DPH Practice – Enforcement Actions

- DPH Bureau of Drug Control
  - Inspections
    - S.C. Code Ann. § 44-53-10 *et seq* and Regulation 60-4
  - Notice of Administrative Conference
    - No enforcement
    - MOA
    - Administrative Consent Order
    - Administrative Order
  - Order to show cause
    - Revocation
    - Hearing right

My LLR Practice

- Two types of LLR healthcare licensing matters
  - Licensing
  - Discipline/Enforcement
- For healthcare providers and facilities
- 43 Boards
  - 14 Boards for healthcare providers
    - Board of Medical Examiners
    - Board of Nursing
    - Board of Pharmacy

LLR Practice – Licensing Matters

- Conventional licensing
  - Obtaining or renewing licenses and permits
    - Individual healthcare providers and healthcare facilities
    - Working primarily with Board Administrator and Board staff
      - Collaborative exercise with staff
    - Timely provide complete and accurate information
      - Nonresident Pharmacy Application

LLR Practice – Licensing Matters

- Unconventional licensing
  - License reinstatement requests
    - Decisions made by Board Chair or Board
  - Unclear whether activity requires a license
    - Decisions made by Board
  - Unclear whether the method by which healthcare is being provided is permitted
    - Decisions made by Board Committee or Board
  - Work with Advice Counsel
  - Advocacy
    - Win-win

LLR Practice – Discipline/Enforcement

- Investigations of licensees
  - Providers – primarily complaint driven
  - Facilities – primarily inspection driven
  - Working primarily with LLR investigators and LLR counsel
  - Decisions made primarily by Boards
  - Early involvement in investigation
    - Periodic check-ins during investigation
  - Understand the LLR – Board relationship

LLR Practice – Discipline/Enforcement

- Outcome of investigation
  - Dismissal
  - LOC (Letter of Caution)
  - Formal complaint
    - Citation
  - Take advantage of process provided
    - E.g. BOME IC (Informal Conference)
- Resolution
  - CA (Consent Agreement)
  - MOA (Memorandum of Agreement)
  - Stipulation of Facts
  - Hearing
    - MOA Hearings
    - Full Hearing
      - S.C. Code 1-23-320 (C) & (D)
  - Issue preservation
  - Reconsideration
  - Appeal to ALC

My Pro Bono Administrative Law Practice

South Carolina Department of Probation, Parole & Pardon Services

My Administrative Law Court Practice

- Accerso Justitiam
  - MCMXCIII
- Contested cases
  - DPH matters
- Appeals
  - LLR matters

Administrative Law Court Practice – Contested Case

- Request for contested case hearing
- Notice of Assignment
- Notice of Appearance
- Pre-hearing statements
  - Standard set of questions per Judge assigned
- Scheduling Order
- Trial
  - Non-jury trial
- *Denovo* consideration of the matter
- Proposed Orders
- Final Order

Administrative Law Court Practice – Appeals

- Notice of Appeal
- Notice of Assignment
  - Settlement
- Record on Appeal
- Briefing
- Argument

- S.C. Code Ann. § 1-23-380
  - Can reverse or modify if agency decision is:
    - in violation of constitutional or statutory provisions;
    - in excess of the statutory authority of the agency;
    - made upon unlawful procedure;
    - affected by other error of law;
    - clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
    - arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Loper Bright

- *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244 (2024).
- Federal agency interpretations of ambiguous agency statutes are no longer entitled to *Chevron* deference.
- Courts now apply the rules of statutory interpretation to determine the meaning of ambiguous federal agency statutes.
- Courts still consider federal agency interpretations and give them "due respect," but not deference.
- Does not apply to
  - Federal agency interpretations of agency regulations or findings of fact.
  - When Congress grants the federal agency the authority to define statutory terms.
  - State agency interpretations of agency statutes and regulations.

S.C. Court of Appeals Post-Loper Bright

Colonial Pipeline Co. v. S.C. Dep't. of Revenue, 443 S.C. 448, 905 S.E.2d 129 (2024).

We are cognizant of the recent United States Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ——, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024), which overruled precedent requiring a reviewing court "to defer to 'permissible' agency [interpretations of the statutes those agencies administered,]" even when a reviewing court might read the statute differently, if " 'the statute [was] silentor ambiguous with respect to the specific issue' at hand." *Id.* at 2247, 2273–74 (quoting ***459** *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

The Court in *Loper* concluded that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Id.* at 2273.

The Court explained independent judicial judgment is part of the "solemn duty" of courts to declare what the law is. *Id.* at 2257.

The Court reminded us that "[t]he Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear, but envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.' " *Id.* at 2247 (quoting The Federalist No. 78, at 525 (A. Hamilton)).

The Court overruled *Chevron*, which "demand[ed] that courts mechanically afford *binding* deference to agency interpretations" while leaving in place *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), which endorses "exercising independent judgment ... consistent with ****135** the 'respect' historically given to Executive Branch interpretations." *Id.* at 2265, 2273–74.

Mindful of these rules governing statutory construction, we first review section 12-37-210 of the South Carolina Code (2014)

- Certiorari denied (Feb. 12, 2025)

ALC Post-Loper Bright

Friends of Horse Creek Valley v. S.C. Dep't of Envtl. Servs. and Rabbit Hill Class 2 Landfill, Docket No. 24-ALJ-07-0316 CC, 2025 WL 3045193 at 7, n.17 (S.C. Admin Law Ct. 2025).

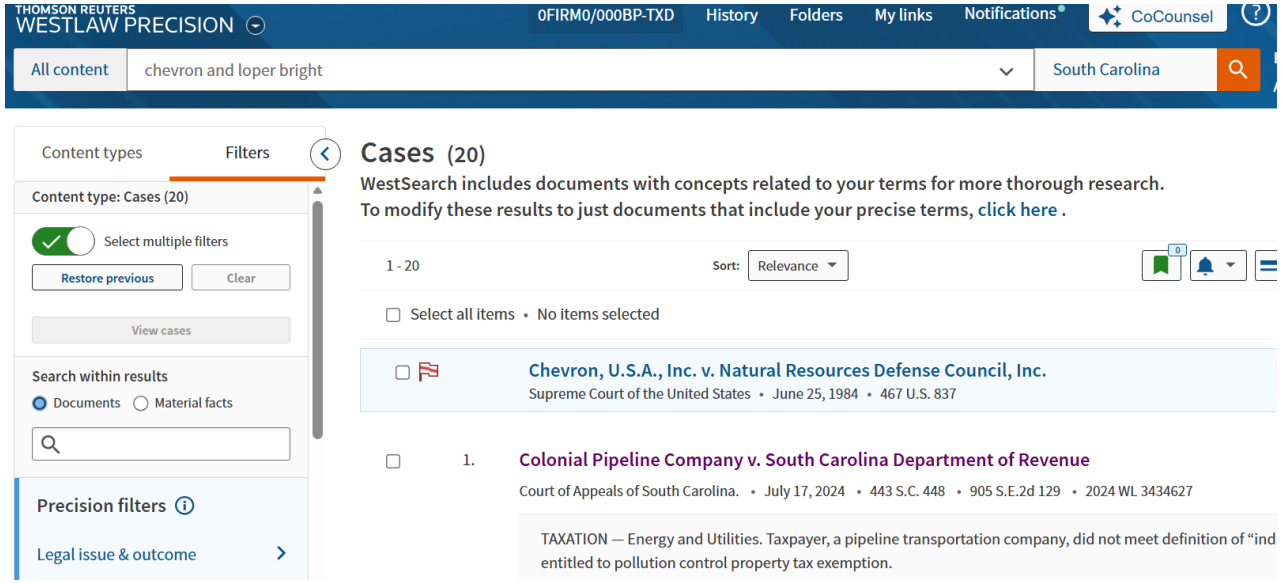
- Applied *Kiawah Island* deference, which is based, in part, on *Chevron* deference.
- Acknowledged *Colonial Pipeline Co. v. S.C. Dep't. of Revenue*
- "Thus, in the absence of any South Carolina appellate court decision overruling our state deference cases, including Kiawah, and substituting our state deference doctrine with Loper deference, it is unclear what impact, if any, the Loper decision has on our state deference doctrine."

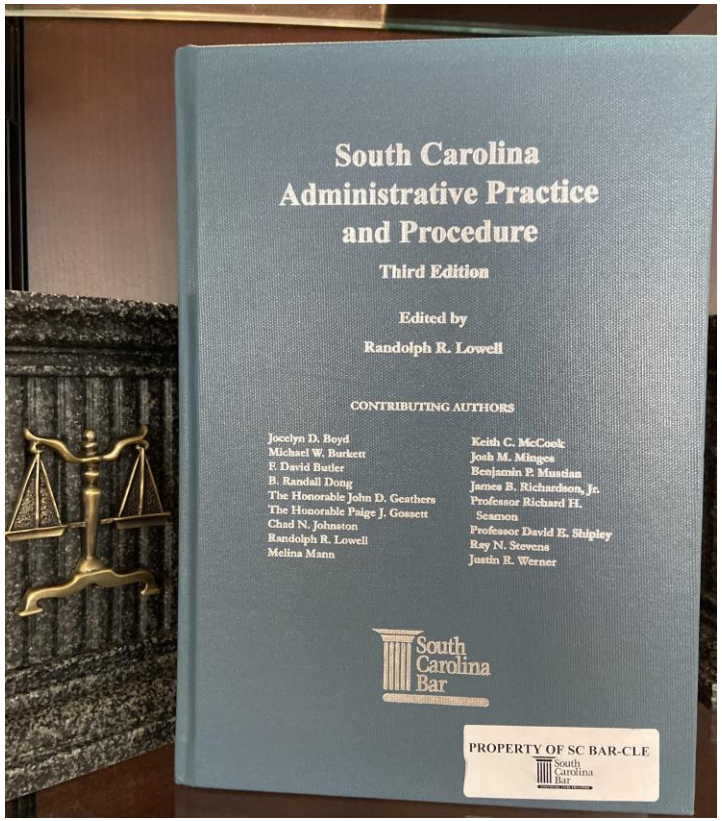
Sources of S.C. Administrative Law

- Before the agency
  - Agency statute
  - Agency regulation
  - Agency policies, opinions, and practices
- Before ALC in case against agency
  - See above and
  - S.C. Constitution
  - Administrative Procedures Act
  - Agency procedural statutes and regulations
  - ALC Rules
  - Case law

Legal Research Resources

- Westlaw





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Administrative Law Court Best Practices

The Honorable S. Phillip Lenski

BEST PRACTICES IN ADMINISTRATIVE LAW – The Administrative Law Court

- **Overview of Rules of Procedure for the Administrative Law Court**

"As provided in subsection 1-23-650(C), **these Rules apply exclusively in all proceedings before the Administrative Law Court**. These Rules should be cited "Rule ____, SCALCR."

These Rules are applicable to all matters within the jurisdiction of the Court, whether they are contested cases under the Administrative Procedures Act or heard pursuant to a constitutional command for a hearing. (The definition of a contested case, as set forth in section 1-23-505, includes matters which are heard pursuant to a constitutional command for a hearing and matters, such as county tax cases, which do not come directly from a state agency.)

Pursuant to subsection 1-23-650(C), these Rules of Procedure apply in the Administrative Law Court to the exclusion of any individual agency rules of procedure, whether those rules are contained in statutes, regulations, or agency rules.

Rule 3C, SCALCR. **Service By Mail.**

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after a party serves a notice or other paper upon him by mail, by electronic means, or upon a person designated by statute to accept service, five days shall be added to the prescribed period. **However, five days are NOT added to the prescribed period for filing when the ALC serves an order by electronic means upon the parties.**

*****Court staff are not authorized to calculate time.*****

Rule 4B, SCALCR. **Filing.**

Any document filed with the court shall be accompanied by a **proof of service** of such document on all parties.

Rule 5, SCALCR. **Service.**

Any document filed with the Court shall be served upon all parties to the proceeding. Service shall be made upon counsel if the party is represented, or if there is no counsel, upon the party. Service shall be made by delivery, by mail to the last known address, or as otherwise approved by the Court through administrative order. Service is deemed complete upon mailing. Service that complies with Rule 5(b)(1), SCRCP, also shall satisfy this Rule. **A party who furnishes an e-mail address to the Court consents to the service of documents issued by the Court via e-mail, and the date of the e-mail is the date of service.**

Rule 6A, SCALCR. **Documents Filed with the Court.**

Unless otherwise ordered, all documents filed with the Court shall be **signed with an original signature**.
The court will not accept documents signed with just "/s/" on the signature line

Rule 7B, SCALCR. **Motions.**

Time for filing. Any party may file a written response to the motion within ten (10) days of the service of the motion unless the time is extended or shortened by the administrative law judge; provided, **however, if a party opposes the motion, the party must file a written response.** Any party may file a written reply within five (5)

days of the service of a response, unless otherwise ordered by the administrative law judge. **Failure of a party to timely file a response may be deemed a consent by that party to the relief sought in the motion or petition.**

Contested Case Hearings:

Rule 11. **Request for a Contested Case Hearing.**

A. A request for a contested case hearing, accompanied by a filing fee as provided in Rule 71, must be filed with the Clerk of Court. **Proof of service must be included with the request.**

Rule 29D, SCALCR. **Motion for Reconsideration.** Any party may move for reconsideration of a final decision of an administrative law judge in a contested case. **A party must file a motion for reconsideration prior to filing a notice of appeal** and must state with particularity the points supposed to have been overlooked or misapprehended by the Court.

1. **Within ten (10) days after notice of the final decision concluding the matter before the administrative law judge**, a party may move for reconsideration of the decision. The opposing party may file a response to the motion within ten (10) days of the filing of the motion.

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

MATTERS HEARD ON APPEAL FROM FINAL DECISIONS OF CERTAIN AGENCIES:

Rule 33, SCALCR. **Notice of Appeal.**

Contents of Notice of Appeal. The notice shall be accompanied by a filing fee as provided in Rule 71 and shall contain the following information:

1. the name, address, telephone number and email address of the party requesting the appeal, and the name, address, telephone number and email address of the attorney, if any, representing that party;
2. a general statement of the grounds for appeal as provided in section 1-23- 380(5). The appellant may later amend, supplement or modify the grounds for appeal in the Statement of Issues on Appeal in the brief pursuant to Rule 37(B)(1);
3. a copy of the final decision that is the subject of the appeal and the date of receipt;
4. a copy of the request for a transcript pursuant to SCALC Rule 35; and
5. **proof of service of the notice of appeal on all parties.**

Any notice of appeal that is incomplete or not in compliance with this Rule or Rule 71 will not be assigned to an administrative law judge until all required information is received and the filing fee is processed.

Rule 34A, SCALCR. **Motions.**

Any party may file a written response to the motion within ten (10) days of the service of the motion unless the time is extended or shortened by the administrative law judge. **Failure of a party to timely file a response may be deemed a consent by that party to the relief sought in the motion.**

Rule 35, SCALCR. **Ordering and Filing of Transcript.** The party filing the notice of appeal shall be responsible for ordering a transcript and shall file a copy of the request for a transcript with the notice of appeal. Unless otherwise agreed by all parties in writing, the appellant must order the entire transcript. The transcript of the proceedings shall be filed with the clerk of the Court by the agency pursuant to Rule 36.

Rule 40B and C, SCALCR. **Final Decision and Motion for Rehearing.**

B. Prior to filing a notice of appeal from the final decision of an administrative law judge, a party must file a motion for rehearing stating with particularity the points supposed to have been overlooked or misapprehended by the Court. A motion for rehearing must be filed within ten (10) days of receipt of the order.

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

The stamping of a document as "FILED" by the ALC staff does not establish that a document was timely filed with the Court.

SECTION 1-23-660. Office of Motor Vehicle Hearings

(A) There is created within the Administrative Law Court the **Office of Motor Vehicle Hearings**. **The chief judge of the Administrative Law Court shall serve as the director of the Office of Motor Vehicle Hearings**. The duties, functions, and responsibilities of all hearing officers and associated staff of the Department of Motor Vehicles are devolved upon the Administrative Law Court effective January 1, 2006. The hearing officers and staff positions, together with the appropriations relating to these positions, are transferred to the Office of Motor Vehicle Hearings of the Administrative Law Court on January 1, 2006.

(B) For purposes of this section, any law enforcement agency that employs an officer who requested a breath test and any law enforcement agency that employs a person who acted as a breath test operator resulting in a suspension pursuant to Section 56-1-286 or 56-5-2951 is a party to the hearing and shall be served with appropriate notice, afforded the opportunity to request continuances and participate in the hearing, and provided a copy of all orders issued in the action. **Representatives of the Department of Motor Vehicles** are not required to appear at implied consent, habitual offender, financial responsibility, or point suspension hearings.

(D) **Appeals from decisions of the hearing officers must be taken to the Administrative Law Court pursuant to the court's appellate rules of procedure.**

Rules of Procedure for the Office of Motor Vehicles Hearings:

17. Appeal of Final Order.

A. Notice of Appeal and Request for Transcript. The decision of the hearing officer may be appealed to the Administrative Law Court as provided by law and in accordance with the rules of procedure for the Administrative Law Court. An appellant shall **file** a copy of the notice of appeal with the OMVH at the same time the notice of appeal is **filed** with the clerk of the Administrative Law Court.

Does not say serve, but file

B. Transmission of Record. The Office shall prepare an index listing each document contained in the record, transmit the index and the record of the contested case to the Court in accordance with the SCALCR upon receipt of a notice of appeal and the transcript, and serve one (1) copy upon each party to the appeal.

What this means – OMVH and DMV are two separate and distinct entities – OMVH is NOT a party to the Appeal, DMV is. OMVH prepares the Record on Appeal.

DMV is located in Blythewood, OMVH is located at Pendleton Street.

- **Background/General Court Information about the ALC**
  - Jurisdiction, Standards of Review governed primarily by the APA
    - Dual jurisdiction with appeals and contested cases
      - 1-23-380 and 1-23-600 for appeals
      - 1-23-600 for contested cases
    - Also holds regulation hearings
  - ALC has its own rules of procedure (SCALC Rules) separate and apart from SCRCP and SCACR. Some differences include:
    - Different sets of rules within SCALC Rules that govern contested cases, appeals, regulation hearings, and "Special Appeals" (DOC and DPPPS)
    - Motions for Reconsideration and Rehearing mandatory before filing appeal
      - SCALC Rule 29 (D)—Motion for Reconsideration is a prerequisite for filing notice of appeal in *all* contested cases, without exception
      - SCALC Rule 40(B)—Motion for Rehearing Required for *all* appeals
        - However, no explicit requirement for DOC and DPPPS cases
      - ***This requirement is unique to the ALC
        - Old rule was that motions for reconsideration/rehearing were not a prerequisite for appeal (except for issue preservation purposes)
        - Motion for reconsideration/rehearing must be filed within 10 days from the date of decision
    - Prehearing statements (PHS) are usually required pursuant to SCALC Rule 14
    - Filing by Fedex, UPS and other methods are expressly allowed but are filed <u>when received</u>; only documents sent via USPS are filed on postmark date (SCALC Rule 4(A))
    - ALC has its own discovery procedures and deadlines
    - Representation
      - Any party not a natural person must be represented by an attorney, except for OSHA cases, in which the corporation may be represented by officer or employee (SCALC Rule 8(A))
      - LLCs and Corps must be represented by an attorney but individuals d/b/a can represent themselves (*See* SCALC Rule 8(A))
    - <u>Do not</u> assume the SCRCP or SCACR are the same as the SCALC – significant differences
  - Bench trials only (no juries)—good to remember when framing arguments
  - <u>E-filing now mandatory</u> (as of November 12, 2025) for attorneys
- **Quirks and Features of Admin Law**
  - Generally agency actions are stayed by filing of a request for contested case hearing
    - Can move to lift stay (after 90 days) pursuant to 1-23-600(H)(4)(a)
  - Right for valid protestants to challenge ABL permits, right for affected parties to intervene in other contested cases

- Different Departments/Department decisions have different requirements under our rules and/or each Department's governing statutes, such as:
    - Special requirements for DEW appeals under our Rules
        - SCALC Rule 33A—30 days from date of receipt of decision for appeals but 30 days from date of mailing for DEW cases (pursuant to S.C. Code Ann. §41-35-750)
        - SCALC Rule 36A—agencies have 45 days from notice of assignment to file record but only 30 days in DEW cases
        - SCALC Rule 37A—30, 30, 10-day timeframes for briefs in most cases vs 20, 20, 10 for DEW appeals
            - Clock starts ticking for first deadline when record on appeal is filed
- Limited jurisdiction in DOC appeals, extremely limited jurisdiction in DPPPS appeals (per *Al Shabazz, Howard, Furtick, Cooper, Compton,* etc.)
    - Different time limits for briefs (SCALC Rule 60A)
        - Record due within 70 days of date of assignment, initial brief within 90 days of assignment, within 110 days for respondent's brief, and within 120 days for reply
- Different discovery rules for CONs pursuant to SCALC Rule 21B
    - Also CON contested cases, while de novo, are limited to issues presented to or considered by department (44-7-210(E))—exception to typical de novo standard
- OMVH is not the DMV, nor is it the SCALC
    - OMVH is a separate and distinct entity
    - ALC hears appeals arising from OMVH
    - OMVH has its own rules of procedure (not part of the SCALC rules)
- Agencies file Agency Information Sheet setting forth general grounds, evidence, and support (SCALC Rule 12)

- **Best Practices**
    - Be knowledgeable about and apply specific admin law and rules of procedures
    - Remember you are not practicing before a jury
        - No need for extended opening and closing statements
    - Stipulate to undisputed facts when possible, prepare exhibits in orderly, easily referenceable fashion (such as by paginating and/or compiling and labeling in a binder), Premark prior to hearing with court reporter
    - Let the statutory factors/elements and standard of review guide argument
    - Maintain decorum and civility
    - Minimize policy arguments
    - Agency attorneys:
        - Be consistent applying the law in cases and varying fact patterns
        - Agency guidelines must be promulgated to be binding
        - Err on the side of caution when it comes to due process
        - Work with pro se litigants to ensure fairness
    - Advocate, don't misrepresent—Avoid cherry picking cases, law, or facts or ignoring those that aren't in your favor
    - If you intend to use technology, confer with SCALC IT department if you have questions or concerns about options or compatibility in advance of the hearing (arrive early for hearings to ensure everything is working)

- For complex legal issues or those of first impression, a memorandum of law or authorities is helpful and appreciated
- Ensure there is an actual dispute and attempt to resolve issues with opposing counsel – only ask for teleconferences when necessary.
- Respond to opposing counsel's arguments / motions / positions - even if to say that you will not be taking a position

PANEL DISCUSSION ISSUES

1) **Procurement Review Procedures**
    a. Step 1: Procurement related determination or action
    b. Step 2: Administrative review of aggrieved party's protest by a Chief Procurement Officer regarding (11-35-4210):
        i. formal protests of the solicitation or award of State contracts;
        ii. suspension or debarment of individual vendors;
        iii. contract controversies; and
        iv. other written decisions, policies, or procedures affecting the state procurement system.
        v. Note: May attempt to settle dispute/protest by mutual agreement before initiating administrative review (11-35-4210(3)-(4))
    c. Step 3: A party dissatisfied with a CPO's decision may request de novo review by the S.C. Procurement Review Panel (11-35-4410).
        i. Panel chairman may convene panel for administrative review or schedule a hearing
    d. Step 4: A party may appeal only to the Court of Appeals (1-23-380, 1-23-600(D), 11-35-4410(6))
    e. Other points:
        i. Currently carved out of ALC jurisdiction by 1-23-600 (A)(1) & (D)
2) **FOIA Review Procedures**
    a. Step 1: FOIA request is made pursuant to 30-4-30
    b. Step 2: Public body responds to FOIA request (30-4-30) during applicable timeframe
        i. Failure to timely respond constitutes approval (30-4-30)
    c. Step 3A: Citizens may apply to circuit court for a "declaratory judgment, injunctive relief, or both, to enforce the provisions of" FOIA (30-4-100)
        i. Court must issue final ruling within six months unless good cause is shown for extension (30-4-100)
    d. Step 3B: Public body may file request with the circuit court to seek relief from "unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure." (30-4-110)
    e. Step 4: Appeals from circuit court FOIA decisions follow standard appellate process
3) **Deference Overview**
    a. *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161 (1944).
        i. Language
            1. "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and

litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

ii. Takeaways

1. Established non-binding, discretionary ability to look to agency interpretations for guidance and afford them weight commensurate with their "power to persuade"

b. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

i. Language

1. "If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."
2. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."
3. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."
4. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."
5. "Judges are not experts in the field, and are not part of either political branch of the Government."
6. "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."

ii. Takeaways

1. Where a statute is silent or ambiguous as to a specific issue, the question becomes whether the agency's interpretation is based on a reasonable, permissible construction of the statute. This means, in the context of regulations, they should be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."

c. *Kiawah Dev. Partners, II v. S.C. Dep't of Health and Env't Control*, 411 S.C. 16, 766 S.E.2d 707 (2014).

i. Language

1. "If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." (citing *Chevron*).
2. "[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations."
3. "[O]ur deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'"
    a. Cited to a long lineage of state case law dating back to 1937 establishing that our longstanding deference doctrine as deferring to agency's interpretation absent compelling or cogent reasons.
4. "[T]he deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" (citing *Chevron*)

ii. Takeaways

1. Seminal South Carolina case adopting *Chevron* deference framework, specifically the "arbitrary, capricious, or manifestly contrary to the statute" language.
2. Solidified our existing state deference doctrine, which it honed using *Chevron* wording.

d. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 144 S.Ct. 2244 (2024).

i. Language

1. "[T]he Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches."
2. "[E]xercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes." . . . "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." . . . "Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time." . . . "That is because 'the longstanding "practice of the government"'—like any other interpretive aid—'can inform [a court's] determination of "what the law is."'" . . . "'Respect,' though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge 'certainly would not be bound to adopt the construction given by the head of a department.'"
3. "In the business of statutory interpretation, if it is not the best, it is not permissible."
4. "Congress in 1946 enacted the APA 'as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.'"

5. "When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority' . . . and ensuring the agency has engaged in '"reasoned decisionmaking"' within those boundaries."
6. "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."

ii. Takeaways
1. Overruled *Chevron*
   a. Found exception to stare decisis because of what the Court determined was a lack of quality in precedent's reasoning and lack of workability
2. Left *Skidmore* in place

iii. Note:
1. Apparent effort to codify *Loper*
   a. Session 126 - (2025-2026) – H 3322 proposes that section 12-2-150 be amended to provide that questions of law must be made without any deference to any interpretation by the Department of Revenue

e. *Colonial Pipeline Co. v. S.C. Dep't of Revenue*, 443 S.C. 448, 905 S.E2d 129 (Ct. App. 2024).

i. Language
1. "We are cognizant of the recent United States Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ——, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024), which overruled precedent requiring a reviewing court 'to defer to "permissible" agency [interpretations of the statutes those agencies administered,]' even when a reviewing court might read the statute differently, if '"the statute [was] silent or ambiguous with respect to the specific issue"' at hand.' . . . The Court in *Loper* concluded that '[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.' The Court explained independent judicial judgment is part of the 'solemn duty' of courts to declare what the law is. The Court reminded us that '[t]he Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear, but envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts."' The Court overruled *Chevron*, which 'demand[ed] that courts mechanically afford *binding* deference to agency interpretations' while leaving in place *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), which endorses 'exercising independent judgment ... consistent with the "respect' historically given to Executive Branch interpretations.'" (citations omitted)

ii. Takeaways
1. First and only case in SC to cite *Loper*

2. Discussed it favorably but did not apply it, adopt it, or overrule *Kiawah*, which the Court of Appeals could not do as *Kiawah* was a S.C. Supreme Court decision.
3. Court did not reach issue of agency deference as it found that the plain and ordinary meaning of the term at issue was clear and dispositive