

SCAARLA BRIEFS

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SCAARLA at the Shoals: Navigating the River of Administrative Law Practice

The theme of SCAARLA's 2004 Annual Conference was "SCAARLA at the Shoals: Navigating the River of Administrative Law Practice." The conference was held on Friday, October 1, 2004 at the beautiful River Center in Saluda Shoals Park near Columbia. The River Center is nestled in the woods of the Park, located on 300 acres of land bordering the Saluda River. SCAARLA sponsored the conference in conjunction with the South Carolina Bar Continuing Legal Education Division and the South Carolina Association of Certified Public Accountants. One hundred eighty-two (182) people attended the full-day conference.

Attorneys Jill Rothstein and Barbara Seymour began the day with a discussion of issues related to attorney ethics and the new Attorney's Civility Oath. Justice Costa M. Pleicones administered the civility oath to eighty-two (82) of the participating attorneys. A breakout session on "Civility Across the Professions" was provided for non-lawyer attendees and lawyers who had already taken the oath. Kay Crowe, Esq. led the breakout session.

Justice Pleicones reviewed appellate court decisions on administrative law, providing added entertainment with his humorous stories. Randolph R. Lowell, Esq. and Stephen P. Bates, Esq., the editors of *South*



The River Center

Carolina Administrative Practice and Procedure, highlighted issues from their book, giving particular emphasis on unresolved issues such as where the line is drawn between a substantive regulation and interpretive guidance. Robert Anderson, Esq., provided important tips about the impact of bankruptcy filings on administrative proceedings.

Sweet Magnolia's provided a colorful and tasty buffet lunch of salads and sandwiches. Representative James H. Harrison spoke during the luncheon about proposed legislation to streamline the administrative appeals process. He encouraged conference participants to provide their comments and concerns to him so that his committee could develop a good proposal for the 2005 legislative session.

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Burnie Maybank, Director of the Dept. of Revenue, and Chief ALC Judge Marvin F. Kittrell enjoy lunch.

John Hoefer, Esq., hosted a distinguished panel of experts on the newly enacted Public Service Commission Restructuring Act. The panel consisted of Hoefer, The Honorable C. Dukes Scott, Frank R. Ellerbe III, Esq., and Michael N.

Couick, Esq. The panelists addressed issues arising from the enactment of SC Act 175 and the creation of the newly formed Office of Regulatory Staff.

The afternoon continued with attorneys Celeste Tiller Jones and Cliff Koon debating the hot issues of confidentiality in professional licensing and administrative finality. Richland County Assessor John Cloyd and Auditor Harry Huntley discussed the complications of the 20% property tax assessment cap legislation (which since has been vetoed by Governor Sanford, to Cloyd's great joy and relief!). James Potter, Esq. gave a quick summary of recent administrative

law cases in the environmental field.

The day ended with the University of South Carolina Law School Professor John Freeman and Sheila B. Ogletree's presentation on the Sarbanes-Oxley Act of 2002. Once they were finished, the attendees were ready to return to the regulatory law world with renewed vigor!

Our thanks go out to all who contributed to the event: the speakers, for giving so graciously of their time and talents; Malane Pike and Judge Kittrell, for finding the perfect venue for the conference; Malane, for planning and organizing not only the food, but other logistics; the SC Bar CLE Division for helping with planning, publicizing, compiling and printing materials, and on-site registration; Gloria McSorley at the SC Association of CPAs for handling the money and pre-conference registration; all of the SCAARLA board members for their ideas and support; and of course the conference attendees without which the conference would have been impossible!

- John Hoefer and Linda McDonald, SCAARLA Education Committee Co-Chairs

"The attendees [of the conference are] ready to return to the regulatory law world with renewed vigor!"

Claims Procedures Act Opened Doors to ALC for SCRS Members

During the 115th Session of the South Carolina General Assembly, the state legislature passed Act 12 amending Title 9 of the South Carolina Code of Laws. Act 12 created the South Carolina Retirement Systems Claims Procedures Act, S.C. Code Ann. §§ 9-21-10 to -70, effective July 1, 2003. Pursuant to § 9-21-50, the Budget and Control Board established procedures for dispute resolution in accordance with the Claims Procedures Act. The Claims Procedures Act and the procedures established by the Budget and Control Board effectively provide for the issuance of Final Agency Determinations by the Director of the South Carolina Retirement Systems and for the appeal of those determinations to the South Carolina Admin-

istrative Law Judge Division (now Administrative Law Court). The review of Final Agency Determinations by the Administrative Law Court will be de novo in a contested case hearing. The Claims Procedures Act is the exclusive remedy for any controversy or dispute between the Retirement Systems and a member or a member's beneficiary.

While the Administrative Law Court has had jurisdiction to review Qualified Domestic Relations Orders since 1995, the Claims Procedures Act expands the review by the Administrative Law Court to include any final determination issued by the Director of the South Carolina Retirement Systems. The

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An Announcement from the Public Service Commission of South Carolina:

South Carolina Public Service Commission members G. O'Neal Hamilton and Elizabeth "Lib" Fleming recently completed the two week long "Administrative Law: Fair Hearing" course at the National Judicial College in Reno, Nevada. The intensive two-week course offers specialized training for administrative law judges.

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majority of cases appealed to the Administrative Law Court pursuant to the Claims Procedures Act consists of determinations finding a member of the Retirement Systems is not disabled, i.e. permanently incapacitated from the further performance of his job duties. See S.C. Code Ann. §§ 9-1-1540, 9-9-65(1), 9-11-80(1) (Supp. 2004). A small number of the cases appealed to the Administrative Law Court pursuant to the Claims Procedures Act contest the way the Retirement Systems calculates the Average Final Compensation when computing a member's monthly retirement benefit.

Prior to the enactment of the Claims Procedures Act,



State of South Carolina Administrative Law Court

the Retirement Systems participated in one or two appeals per year to the Circuit Court. As a result, the Retirement Systems originally anticipated as many as six appeals to the Administrative Law Court per year pursuant to new procedure under the Claims Procedures Act. Since July 1, 2003, however, the Retirement Systems has been a respondent in 24 appeals to the Administrative Law Court, including 11 cases that are currently pending at the Court. The Claims Procedures Act created a clear, detailed, and well-utilized procedure for appeals to the Administrative Law Court.

- Kelly H. Rainsford

John Cloyd's Tax Cap Update

On December 17, 2004, Governor Mark Sanford vetoed House Bill 3065 which was the 20% reassessment cap. The Governor has had the bill on his desk since June 3 when it was passed by voice vote by the House and Senate. In his proclamation of December 17, the Governor states, "I've got an obligation as governor to uphold the Constitution of our State. That's ultimately what raising your right hand and putting your left hand on the Bible is all about. The Constitution says that you've got to tax property based on fair market value, but this bill doesn't do that. The Constitution says you've got to pass a bill like this with a two-thirds vote, but this bill doesn't do that either, it got a voice vote. Ultimately, the courts are going to end up making the final determination on this issue but it's my duty to state my opinion on any bill that comes to my desk given the oath of office I took."

"I'm more than open to considering any property tax relief proposal that passes Constitutional muster," Governor Sanford said. "In fact, I have been pushing tax relief for South Carolina's Individual income earners and small businesses for the better part of the past three years. I believe tax relief is urgently needed in our State, but it's got to be Constitutional and it's got to be sound public policy—and in this instance it would result in a significant shift in education funding that I don't believe has been fully considered."

With the veto by Governor Sanford, now it will be up

to the House and Senate to determine if they wish to override the Governor's veto. I think the Governor's veto message indicates that there are Constitutional problems in that this bill is in direct conflict with Article Ten, Section 1 and Article Three, Section 29 of the South Carolina Constitution which requires that tax assessment must be based on fair market value of real property.

Second, the shifting of State education funds, the net effect of the cap law and the distribution of State education funding would be significant according to analysis prepared by the Department of Revenue and the State Department of Education. The distribution of State education funding would shift from school districts with lower property values, including the poorest districts in the State, to districts with higher property values. This result is contrary to extent of the Education Finance Act. School districts with higher value property would be able to contribute less of their local share to education funding and districts with property values with lower value property would have to contribute more by raising local taxes, and otherwise cut funds to schools.

So the saga goes on. The Legislature has sustained the veto by Governor Sanford, and we are still trying to determine who is going to pay the tax. "Stay tuned" for further action.

- John Cloyd

Ten Important Things to be Aware of in Preparing for an Administrative Law Hearing

1. **"HEAR' TODAY, GONE TOMORROW!"** When the notice of a hearing is received, personally read it for the date, time, and place. Check your calendar immediately; if you have a conflict, be sure to notify the judge and the other party by telephone and in writing and ask for a continuance. If you fail to go to a hearing, it most probably will not be reset by making a telephone request. If you miss a hearing or if you seek a continuance, make sure you have a good reason to give the judge. They are granted for good cause only! Maintaining good credibility with the judge is very important!
2. **"WATCH ME PULL A RABBIT OUT OF MY HAT!"** Take all important documents and provide all important testimony at the hearing. Prepare copies for the opposing party and the judge of all documents you intend to introduce. This is the day you will try and convince the judge. Judges normally close the record after the hearing and may not let evidence in later. Go prepared!
3. **"MY WITNESS HAD A FLAT TIRE ON THE WAY TO THE HEARING!"** Don't tell the judge at the hearing that you could have brought a witness who "would testify that..." If a witness may be helpful to your case, bring him. The judge needs to observe him and listen to his testimony. Remember, you can subpoena witnesses. Look for guidance in S.C. Code Ann. § 1-23-320 (Supp. 2003).
4. **"TABLE FOR TWO."** Do not take snacks, chewing gum, food, or beverages into the hearing room. Turn off the cell phone before you enter the hearing room. Water is provided for the parties, legal counsel, and witnesses. If the judge allows recesses, return timely to the hearing room at the time requested by the judge.
5. **"EXTRA, EXTRA, READ ALL ABOUT IT!"** The judge has discretion to allow prepared testimony. Be familiar with the rules of procedure. Complex testimony oftentimes is best introduced in written form. If used, the witness must be present for examination and for credibility determinations by the judge.
6. **"CURB YOUR ELEPHANT."** Copies of original items or documents may be brought to the hearing. However, make sure they will fit in a 8 1/2 inch folder. Use large documents such as blueprints, charts, etc. as "demonstrative evidence" to assist the court and the parties. Make copies of all items to be introduced; substitute copies for original documents when necessary or requested by the court. Smaller documents facilitate the court in preparing the record on appeal.
7. **"AND NOW FOR SOMETHING DIFFERENT..."** Read the pamphlet that comes with the notice of hearing. If you represent a party, show it to him/her. Visit the website to learn the rules of procedure and become familiar with the judge who will conduct the hearing.
8. **"HEY, GOOD BUDDY!"** Be respectful of the administrative process and the judge. Address the judge as "Your Honor", "Judge", or with some other form of respect. Do not address the judge or other hearing officer by his or her first name.
9. **"WELL, ISN'T THAT SPECIAL?"** The hearing is the time for the parties to speak their positions and explain their differences before a neutral third party, the judge. It is not a time to use profanity, get loud, emotional, or be disruptive. Acting in that manner may cause you to be removed from the hearing room or be subject to sanctions. Being loud does influence the judge. Parties must air their differing views through the calm presentation of witnesses' testimony and the submission of items into evidence. Be respectful and courteous to all when inside the hearing room.
10. **"SAY GOODNIGHT."** Hearing are held Monday through Friday during normal working hours. Do not assume that a hearing will continue past 5:00 pm. Each judge tries his cases differently. Prepare witnesses who come from out of town for overnight stays. If a hardship is involved, communicate with the other party and the request the court to allow the presentation of testimony by a witness "out of turn."



-Judge Marvin F. "Buddy" Kittrell

Legislative Update

2003-2004 Session

During the 2003-2004, the General Assembly passed three substantive bills affecting the practice of administrative law. Additionally, there was significant committee testimony about a bill that would streamline the appeal process from the Administrative Law Court, particularly by eliminating the circuit courts from the appeal process. The following is a summary of the bills from last year's session:

- **H3235** - In order to stress the judicial nature of the Administrative Law Court, the General Assembly overwhelmingly passed a bill that changed the name from the Administrative Law Judge Division to the Administrative Law Court, now referred to as the ALC. Parties before the ALC are advised to recognize this name change in all communications and filings with the court.
- **S208** - This bill overhauled the structure and duties of the Public Service Commission (PSC) and created an investigative agency for PSC issues - the Office of Regulatory Staff (ORS). As of January 1, 2005, all PSC investigative duties are now the responsibility of ORS. **S208** also proscribed detailed prohibitions of *ex parte* communications between PSC staff and parties of PSC cases. Any person that deals with the PSC is advised to read this bill in detail as communications with the PSC and investigations have changed considerably.
- **S687** - With **S687**, the General Assembly fully replaced Title 40, Article 2 regulating accountants with a new act emphasizing the proper regulation of accountants. Specifically, the Department of Labor, Licensing and Regulation has regulatory duties over accountants.
- **H4792** - Although this bill was not passed, it was discussed in numerous House Judiciary committee meetings and considerable testimony was heard. Primarily, **H4792** eliminated the circuit courts' role in appeals from the ALC. Supported by the Judicial Department and the ALC, the bill's aim was to increase efficiency in the court system by removing what was believed to be an unnecessary part of the appeal process - the circuit courts. Although most of the bill was not problematic, the greatest concern was how to handle appeals from DHEC, in particular, whether to keep DHEC's board involved in the appeal process and, if so, to what degree.

2005 Session

As with the previous session, the General Assembly introduced another bill that would streamline the appeals process from the Administrative Law Court. Further, as of January 31, 2005, bills involving Consumer Affairs and the Workers Compensation Commission were introduced. Here is a brief summary of these bills:

- **H3184** - Similar to **H4792** from the previous session, **H3184** seeks to eliminate the circuit courts from the ap-



peals process from the ALC. The bill was assigned to House Judiciary and has not had a committee hearing as of January 31, 2005.

- **H3285** - Introduced by Rep. Wilkins and specifically assigned to House Judiciary, this bill amends S.C. § 1-23-610 by stating that appeals from ALC decisions on DHEC matters would go directly to the Court of Appeals.
- **S95** - This bill considerably revises administrative procedures with the Department of Consumer Affairs. In addition to many changes, Consumer Affairs would not issue fines or orders on their own but instead would petition the ALC for such sanctions. Consumer Affairs would still retain its rights to ask for injunctive relief or similar remedies through the Court of Common Pleas. This bill received a favorable report by Senate Judiciary on January 26, 2005 and second reading by the Senate on January 27th.

Two bills this session deal specifically with the Workers' Compensation Commission:

- **S127** - This bill clarifies that the Workers' Compensation commissioners are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules. Further, commissioners and their administrative assistants would be required to annually take three hours of continuing education on ethics and the Administrative Procedures Act. This bill passed the Senate and was introduced to the House and assigned to House Judiciary on January 26, 2005.
- **H3205** - **H3205** is known as the South Carolina Workers' Compensation Reform Act of 2005 and is intended to be a major revision of administrative procedures in workers compensation, mainly by making the Commission a division of the Department of Insurance. The bill also gives the ALC many remedial duties the Workers' Compensation Commission presently holds. It was introduced in the House and assigned to Labor, Commerce and Industry.

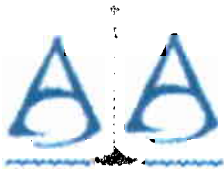
- Neil Rashley

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MISSION

The South Carolina Administrative and Regulatory Law Association (SCAARLA) is a non-profit organization dedicated to fostering the development of Administrative Law and improving the administrative justice system in South Carolina. Through its educational initiatives, SCAARLA offers commissioners, hearing officers, attorneys, certified public accountants, judges, public officials and others a forum for the exchange of ideas and opinions on administrative law issues and promotes uniformity in the administrative procedures throughout South Carolina.

We're on the
Web!

For online information on SCAARLA go to www.scaarla.org. If you would like to post information in the web site such as providing an article on recent administrative law legislation or significant administrative law matters/cases, please contact Zoe Nettles at zoe.nettles@nelsonmullins.com.

Upcoming events:

The next SCAARLA board meeting will be in the conference room at McNair Law Firm (downtown Columbia) on March 18 at 3pm.

Planning for the 2005 Annual Conference is already underway! Mark your calendars for Friday, September 16 and watch for more details in the next newsletter!

Recognition

SCAARLA would like to extend a special thanks to Gloria McSorley for all of her hard work and dedication over the past few years. We wish you the best of luck.

