ALAN WILSON
ATTORNEY GENERAL

March 23, 2018

R. Alexander Pate, II
South Carolina Human Affairs Commission
Legal Division
PO Box 4490
Columbia, SC 29240-4490

Dear Mr. Pate:

We received your request for an opinion regarding procedural questions related to appeals from proceedings before the South Carolina Human Affairs Commission. The following opinion sets out our understanding of your question and our response. We quote from your letter at length in order to reproduce the factual background set out therein.

Issue (as quoted from your letter):

> The South Caroline Human Affairs Commission's mission, as affirmed by the General Assembly, is to eliminate and prevent discrimination in employment, housing, and public accommodations. The Human Affairs Commission works to eliminate housing discrimination and to ensure equal opportunity for all people through leadership, education and outreach, public policy initiatives, investigation of fair housing violations, and enforcement. The commission is composed of members appointed by the Governor. The commission employs three attorneys who serve to advise the Commission, represent the Commission in administrative and judicial hearings, and perform other necessary functions as directed by the board.
>
> Upon receipt of a complaint alleging a violation of the South Carolina Fair Housing Law, S.C. Code Ann. § 31-21-10, *et seq.*, the Commission conducts an investigation into the alleged violation. If a determination is made that a violation has occurred, the Commission must commence an administrative hearing pursuant to S.C. Code Ann. § 31-21-130 (C) and (H), in which a Panel of the Board of Commissioners hears the complaint and evidence is presented on behalf of the aggrieved party by agent of the Commission; this task is performed by one of the staff attorneys. While an aggrieved party may intervene to become a party to the hearing and/or have private counsel, the 'default' procedure is for the Commission to file on the aggrieved party's behalf, resulting in an agency attorney representing the Commission, the public interest, and the aggrieved party.

In the employment context, pursuant to § 1-13-90 (C), the Commission holds hearings when a state agency is the employer and a determination is made that a violation has occurred. Unlike a hearing under the Fair Housing Law, a complaining party may, with consent of the Commission, have private representation at the hearing without intervening, pursuant to § 1-13-90 (C) (12).

At the hearing, one of the Commission's attorneys serves as advice counsel for the panel, aiding them in ruling on evidentiary matters, advising them on the relevant law, and aiding them in the form of their order; the advice counsel does not vote on the decision rendered by the panel.

After an order issued by the panel, the Fair Housing Law provides avenues for administrative review and appellate review. § 31-21-130 (O)(1) states: "[i]f an application for review is made to the commission within fourteen days from the date of the order of the commission, the commission, for good cause shown, shall review the order and evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the order." ; § 31-21-130 (O)(2) states: "Either party to the dispute, within thirty days after receipt of notice to be sent by registered mail of the order, but not after that time, may appeal from the decision of the commission to the Administrative Law Court as provided in Sections 1-23-380(B)[fn. 1] and 1-23-600(D)." [Fn. 1 to the letter reads "1-23-380(B) was deleted by amendment in 2008; however, the section still appears to provide relevant direction for the appellate process."]

The Human Affairs Law, at § 1-13-90 (C) (19), also provides for the submission of an application for review; further, (19) (ii) states that "[e]ither party to the dispute" may pursue an appeal.

Administrative hearings held under both the Fair Housing Law and the Human Affairs Law are subject to the Administrative Procedures Act, § 1-23-10, *et seq.*

§ 1-23-380 states that "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review."

Question 1:

If an aggrieved party (that is, someone on whose behalf a complaint is brought) requests an application for review or an appeal, may the agency attorney do so?

Question 2:

(A) If the Agency Attorney or the Commission decides not to submit an application for review or pursue an appeal, may an aggrieved/complaining party pursue either of those remedies themselves, keeping in mind that, absent an intervention, they are not a named party in the matter?

(B) In a hearing under the Human Affairs Law, if the complaining party has private representation at the hearing, does that affect their ability to request a review?

Question 3:

May the Commission ever be a party "aggrieved by a final decision" when that decision is rendered by a panel of the Commission?

Question 4:

(A) Where the language of § 31-21-130(C) and (H) is imperative regarding the agency's duty to bring and prosecute a claim on behalf of an aggrieved party, (O) uses permissive language in regards to the pursuit of an appeal. Is the agency under any obligation to pursue an appeal where it appears one of the factors outlined in § 1-23-380 are implicated?

(B) Where the language of § 1-13-90 (C) (5) and (12) is imperative regarding the agency's duty to bring and prosecute a claim on behalf of a complaining party, (19) uses permissive language in regards to the pursuit of an appeal. Is the agency under any obligation to pursue an appeal where it appears one of the factors outlined in § 1-23-380 are implicated?

Law/Analysis:

1. If an aggrieved party (that is, someone on whose behalf a complaint is brought), requests an application for review or an appeal, may the agency attorney do so?

We believe that a court most likely would hold that where an agency attorney is representing the Commission as a party and the interests of an aggrieved party in a proceeding before an agency panel, that attorney may request an application for review or appeal from a decision of that panel for any number of reasons, which may include the request of an aggrieved party. *See Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002). As described in your letter, proceedings before the Commission are governed by Section 1-13-90 in the employment context and Section 31-21-130 in the housing context. S.C. Code Ann. §§ 1-13-90(c)(15) (2005); 31-21-130(K) (2007). Both statutes direct that "proceedings . . . shall be subject to the Administrative Procedures Act." *Id.* A court faced with the question

presented in your letter most likely would use South Carolina's rules of statutory construction to construe these statutes and give effect to the intent of the Legislature which passed them. As this Office has previously opined:

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). The South Carolina Supreme Court also has held that:

> However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning, when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature, or would defeat the plain legislative intention; and if possible will construe the statute so as to escape the absurdity and carry the intention into effect.

State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) (quoting *Stackhouse v. County Board*, 86 S.C. 419, 68 S.E. 561 (1910)). Finally, we note that where a state agency is tasked with enforcing a state law, that agency's interpretation of the law receives substantial deference. *See Logan v. Leatherman*, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986). As our Office has previously opined:

> [O]ur Court of Appeals has stated, "agencies charged with enforcing statutes . . . receive deference from the courts as to their interpretations of those laws." *State v. Sweat*, 379 S.C. 367, 385, 665 S.E.2d 645, 655 (Ct. App. 2008). Our Supreme Court has recognized this fundamental principle of deference to an administrative agency interpretation in *Logan v. Leatherman*, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986), when it concluded that "construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons." Particularly will the courts defer to the agency's interpretation of a statute where, as here, "the agency's construction lies within its area of expertise." *Op. S.C. Atty. Gen.*, January 5, 2011 (2011 WL 380157). . . . For all these reasons, therefore, "[i]t is this Office's longstanding policy . . . to defer to the [interpretation of] the administrative agency charged with the regulation [of] . . . the subject matter." *Op. S.C. Atty. Gen.*, August 9, 2013 (2013WL 4497164).

Op. S.C. Att'y Gen., 2013 WL 4873939 (September 5, 2013).

Turning to the text of Section 1-13-90 and Section 31-21-130, neither code section expressly precludes an agency attorney appealing from a decision of a Commission panel which is adverse to the aggrieved party. *See* S.C. Code Ann. § 1-13-90 & 31-21-130. Conversely, Section 1-23-310 expressly contemplates that a state agency may be a party to a proceeding when it defines "party" for purposes of the Administrative Procedures Act ("APA") as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." S.C. Code Ann. § 1-23-310(5) (2005); *see also Babcock Center, Inc. v. Office of Audits*, 286 S.C. 398, 334 S.E.2d 112 (1985) (holding that under the APA, personnel employed by a state agency may prosecute an administrative proceeding before a panel of other persons, also employed by the same agency, who adjudicate the proceeding). Both Sections 1-13-90 and Section 31-21-130 include an express provision that "[e]ither party to the dispute . . . may appeal from the decision of the commission to the Administrative Law Court as provided in Sections 1-23-380(B) and 1-23-600(D)." Also, the appellate courts of this state have affirmed the propriety of an administrative agency participating as a party to an appeal from a proceeding before that same agency. *See Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002).

We understand from your letter that an agency attorney represents the Commission as a party in a given proceeding before the Commission panel. *See question presented, supra.* These proceedings are undertaken at the request of complainants, and the Commission is tasked with protecting the rights of aggrieved parties. *See, e.g.,* S.C. Code Ann. § 1-13-90 (Supp. 2017). Therefore it logically follows that an agency attorney could represent the Commission as a party in an appeal from such a proceeding, and that appeal might be pursued for any number of reasons, including the request of the aggrieved party. *See* S.C. Code Ann. § 1-23-310(5) (2014).

2. (A) If the Agency Attorney or the Commission decides not to submit an application for review or pursue an appeal, may an aggrieved/complaining party pursue either of these remedies themselves, keeping in mind that, absent an intervention, they are not a named party in the matter?

(B) In a hearing under the Human Affairs Law, if the complaining party has private representation at the hearing, does that affect their ability to request a review?

Where a complainant or aggrieved party is not a named party[1] to an action but wishes to pursue review of a decision or an appeal of a decision which the Commission attorney does not intend to pursue, we believe that a court most likely would conclude that the appropriate course of action is for that complainant or aggrieved party to timely seek to intervene in the action to become a party and then pursue the appeal under the procedure set out in the APA. *See* S.C. Code Ann. § 1-23-310(5) (2005) (defining "party"); *see also* SCALC Rule 20. We emphasize that an aggrieved party with standing to intervene as a named party in an administrative proceeding can lose any opportunity to seek judicial review of the result if the aggrieved party fails to timely intervene. *See* SCALC Rule 20(C) ("Time for Motion for Intervention"); *see also Home Health Services, Inc. v. S.C. Dep't of Health & Envtl. Control*, 298 S.C. 258, 379 S.E.2d 734 (1989). Moreover, because to the general nature of the question this opinion should not be read as a statement on when or whether any particular motion to intervene is timely. *See id.*

You note in your question that aggrieved parties typically are not named parties in Commission proceedings "absent an intervention." *See question presented, supra.* For purposes of the Administrative Procedures Act, Section 1-23-310 defines a "party" as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." S.C. Code Ann. § 1-23-310(5) (2005). "Party" is defined by the SCALC in Rule 2 with language that mirrors that of Section 1-23-310: "each person or agency named or admitted as a party or properly seeking and entitled to be admitted as a party, including a license or permit applicant." SCALC Rule 2. We also note that Rule 8 of those same Rules governs the "Right of Parties to Participate," and that particular rule and several other rules frame numerous procedural rights in relation to a "party." SCALC Rule 8.

Aggrieved parties may seek to intervene as named parties to the proceeding under both the regulations promulgated by the Commission and Rule 20 of the Rules of Procedure for the Administrative Law Court. SCALC Rule 20; *see also* S.C. Code Ann. Regs. 65-233(H). Rule 20 reads:

> A. Motions for Intervention. A motion for leave to intervene shall be served on all parties and shall state the grounds for the proposed intervention, the position

[1] We understand that your question is focused on this particular scenario, and not on the procedural rights of a named party which has rights to review of an administrative decision under, e.g., S.C. Code Ann. § 1-23-380 and S.C. Const. art. I, § 22.

> and interest of the proposed intervenor, and the possible impact of the intervention on the proceedings.
>
> B. Grounds for Intervention. Any person may intervene in any pending contested case hearing upon a showing that:
>
> (1) the movant will be aggrieved or adversely affected by the final order;
>
> (2) the interests of the movant are not being adequately represented by existing parties, or that it is otherwise entitled to intervene;
>
> (3) that intervention will not unduly prolong the proceedings or otherwise prejudice the rights of existing parties.
>
> C. Time for Motion for Intervention. The motion for leave to intervene shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings. Unless otherwise ordered by the administrative law judge, the motion to intervene shall be filed at least twenty (20) days before the hearing. Any later motion shall contain a statement of good cause for the failure to intervene earlier.
>
> D. Conditions of Intervention. A person granted leave to intervene is a party to the proceeding. The intervenor shall be bound by any agreement, arrangement or other matter previously determined in the case. The order granting intervention may restrict the issues to be raised or otherwise condition the intervenor's participation in the proceeding. If appropriate, the administrative law judge may order consolidation of petitions and briefs and limit the number of representatives allowed to participate in the proceedings.

SCALC Rule 20.

One example of the judicial application of this definition of a "party" is found in the South Carolina Court of Appeals case *Home Health Services, Inc. v. S.C. Dep't of Health & Envtl. Control*, 298 S.C. 258, 379 S.E.2d 734 (1989). In that case, Home Health Services, Inc. ("HHS") participated as a witness, but never intervened as a party, in an administrative proceeding before the Department of Health and Environmental Control ("DHEC") that ultimately resulted in DHEC issuing a certificate of need to Roper Hospital. *Id.* at 260, 379 S.E.2d at 735. HHS immediately sought to challenge that issuance in the circuit court, but their case was dismissed under Rule 12(b)(1), SCRCP, on the grounds that HHS "never became a party to the administrative proceedings." *Id.* The Court of Appeals affirmed this dismissal, and noted that despite having notice and the opportunity to seek to intervene as a party to the administrative proceeding, HHS never actually sought intervention at the administrative level. *Id.* at 260-61, 379 S.E.2d at 735-36. The Court of Appeals in *Home Health Services* opined:

> By not seeking party status in the agency proceedings, as it properly could have done, Home Health Services removed itself from the APA's definition of the term "party."
>
> Because it was not a "party," as the term is defined by the APA, to the DHEC proceedings, Home Health Services, therefore, lacks standing under Section 1–23–380(a) to seek judicial review of DHEC's final decision regarding Roper's application.

Id. at 261, 379 S.E.2d at 736. Accordingly, we believe that a court faced with the question presented in your letter most likely would conclude that an aggrieved party should timely seek to intervene to become a named party to the case in order to pursue an appeal as described in your letter.

We do not see any legal reason why the presence or absence of legal counsel at the agency level would have any bearing on this conclusion, except that in practice the presence of legal counsel likely would help ensure that an aggrieved party's procedural rights are timely exercised by seeking to intervene. *See* SCALC Rule 20(C) ("Time for Motion for Intervention"); *see also Home Health Services, Inc. v. S.C. Dep't of Health & Envtl. Control*, 298 S.C. 258, 379 S.E.2d 734 (1989).

3. May the Commission ever be a party "aggrieved by a final decision" when that decision is rendered by a panel of the Commission?

We believe that a court most likely would conclude that the Commission standing as a party before a panel of the Commission operating as impartial decision-makers may be aggrieved by a final decision of the panel. Under the APA, personnel employed by a state agency who act as investigators or prosecutors in an administrative proceeding may appear before a panel of other persons, also employed by the same agency, who adjudicate the proceeding. *See, e.g., Babcock Center, Inc. v. Office of Audits*, 286 S.C. 398, 334 S.E.2d 112 (1985). Agencies which utilize this practice must take care that the same persons act as prosecutor and judge in a case in violation of S.C. Const. art I, § 22, which reads in relevant part: "[n]o person [shall] be subject to the same person for both prosecution and adjudication." However, the South Carolina Supreme Court has held that this practice satisfies the requirements of the due process and Article I, § 22 of the South Carolina Constitution where none of the persons involved in the investigation or prosecution also sit on the adjudicatory panel:

> We hold that the word "person" in the Constitutional language, "nor shall he be subject to the same person for both prosecution and adjudication", does not preclude, as a due process violation, an administrative agency from adjudicating appeals by panels composed of other persons within the same agency who did not participate in investigative or prosecutorial capacities.

Id. at 402, 334 S.E.2d at 114, *see also Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.E.2d 712 (1975) (discussing federal constitutional due process requirements in an administrative proceedings). Conversely, our state's Supreme Court also has held that a state agency administrative proceeding violates S.C. Const. art I, § 22 where agency members involved in the investigatory phase of a proceeding also sat on the panel that adjudicated the proceeding. *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998).

The appellate courts of this state have affirmed the propriety of an administrative agency acting as a party to an appeal from an agency proceeding. *See Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002). In *Dorman v. Department of Health and Environmental Control*, the South Carolina Court of Appeals considered a case where the Bureau of Ocean and Coastal Resource Management ("OCRM"), a state office governed by the Coastal Zone Management Appellate Panel, granted a necessary permit to build a boat dock. *Id.* at 162-63 & fn.1, 565 S.E.2d at 121 & fn.1. Neighbors who opposed the proposed dock sought a contested case, and the Administrative Law Judge reversed the grant. *Id.* at 163, 565 S.E.2d at 121. Thereafter, the case was appealed to the Coastal Zone Management Appellate Panel (the Panel) of the OCRM, and the Panel reinstated the grant. *Id.* When the case reached the South Carolina Court of Appeals, those opposing the permit argued that "because OCRM did not appeal the ALJ's order, it should not have been permitted to argue the agency's viewpoint or interpretation of its regulations before the Panel or the circuit court on appeal." *Id.* at 169, 565 S.E.2d at 125. The Court of Appeals rejected this argument, and opined:

> While OCRM did not appeal the ALJ's order, the agency remains a party at all levels to represent the agency and its policy stance. While we do not hold that the OCRM staff is a necessary party on appeal, we find it clearly is a proper party. In *Owen Steel*, this court held that the agency was not a necessary party to the appeal and was not required to be made a party on appeal by statute. *Owen Steel Co. v. S.C. Tax Comm'n*, 281 S.C. 80, 84–85, 313 S.E.2d 636, 639 (Ct. App. 1984). "In considering whether there is a defect of parties, the distinction between necessary and proper parties is crucial." *Id.* However, the agency may be a proper party on appeal, and the APA requires an appellant to serve the agency with a copy of the petition for review to ensure it has notice of any proceeding. *Id.* at 85–86, 313 S.E.2d at 638. Upon notice, the agency may petition to be made a party to the appeal. "Except in unusual circumstances, we anticipate that such a motion would be granted as a matter of course." *Id.*

Id. at 169-170, 565 S.E.2d at 125. In summary, reported cases of the South Carolina Supreme Court and the South Carolina Court of Appeals affirm that a state agency may participate as a party in an agency-level proceeding within the bounds of due process and the South Carolina Constitution, and a state agency may also participate as a party to an appeal from such a proceeding. *Id.; Babcock Center, Inc. v. Office of Audits*, 286 S.C. 398, 334 S.E.2d 112 (1985).

Turning to the question presented in your letter, we understand that that the Commission typically prosecutes cases before a panel composed of Commission members who were not involved in the investigation of the case. *See question presented.* The General Assembly has codified several statutory provisions with the apparent intent to ensure the impartiality and independence of the panel hearing the case. *See, e.g.*, S.C. Code Ann. § 1-13-90(c)(11) ("no member of the Commission shall be a member of a panel to hear a complaint for which he has been a supervisory commission member") & § 1-13-90(c)(12) ("endeavors at conciliation [i.e. settlement negotiations] by the investigator shall not be received into evidence nor otherwise made known to the members of the panel"); *cf.* S.C. Code Ann. § 31-21-130(H). These provisions likely are also intended to satisfy the requirement in Article I, § 22 of the South Carolina Constitution that "[n]o person [shall] be subject to the same person for both prosecution and adjudication." S.C. Const. art I, § 22; *see also Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998).

Presumably a truly impartial panel will render decisions adverse to an aggrieved party where the Commission panel believes such a decision is proper on the merits, even when a Commission attorney has presented the case. Where Commission attorney prepares a case and presents it on behalf of the Commission as a named party while also representing the interests of an aggrieved party and the public interest, the Legislature cannot have intended that the Commission could not be aggrieved by, and have the right to appeal from, a hypothetical error of law made by the Commission panel – an error which also is likely to be adverse to the aggrieved party and public interest. *See State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("[I]f possible, [courts] will construe [a] statute so as to escape [a plainly absurd result] and carry the intention into effect"). Instead, the most coherent reading of the code sections set out in your letter is that an attorney representing the Commission as a named party to appeal the case in the name of the Commission. *Cf. Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002). We believe that a court would conclude that this more coherent reading is faithful both to the text of the code sections at issue and to the state purposes of the General Assembly in enacting these laws. *See id.*

4. (A) Where the language of § 31-21-130(C) and (H) is imperative regarding the agency's duty to bring and prosecute a claim on behalf of an aggrieved party, (O) uses permissive language in regards to the pursuit of an appeal. Is the agency under any obligation to pursue an appeal where it appears one of the factors outlined in § 1-23-380 are implicated?

(B) Where the language of § 1-13-90 (C) (5) and (12) is imperative regarding the agency's duty to bring and prosecute a claim on behalf of a complaining party, (19) uses permissive language in regards to the pursuit of an appeal. Is the agency under any obligation to pursue an appeal where it appears one of the factors outlined in § 1-23-380 are implicated?

We believe that a court most likely would conclude that the Commission may exercise its discretion not to pursue an appeal where the applicable statutes contain permissive language regarding pursuit of such an appeal.

Based on our follow-up telephone conversations with you, we understand that "the factors outlined in § 1-23-380" referred to in your question are the factors set out in Section 1-23-380(5), which reads in relevant part:

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2017). Turning to the substance of your question regarding mandatory and permissive language, we note that Section 31-21-130(C)(1) reads:

> If the order is for a hearing, the commissioner shall attach to it a notice and a copy of the complaint and require the respondent to answer the complaint at a hearing at a time and place specified in the notice and shall serve upon the respondent a copy of the order, the complaint, and the notice.

S.C. Code Ann. § 31-21-130(C) (emphasis added). Conversely, Section 31-21-130(O) provides in relevant part that "[e]ither party to the dispute . . . may appeal from the decision of the commission to the Administrative Law Court as provided in Sections 1-23-380(B) and 1-23-600(D)." S.C. Code Ann. § 31-21-130(O) (emphasis added).

Similarly, Section 1-23-380(C) reads in relevant part:

> (5) If not sooner resolved, the investigator shall upon completion of his investigation submit to the supervisory commission member a statement of the facts disclosed by his investigation and recommend either that the complaint be dismissed or that a panel of commission members be designated to hear the complaint. The supervisory commission member, after review of the case file and

> the statement and recommendation of the investigator shall issue an order either of dismissal or for a hearing, which order shall not be subject to judicial or other further review.
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> . . .
>
> (12) At any hearing held pursuant to this subsection, the case in support of the complaint shall be presented before the panel by one or more of the commission's employees or agents, and, with consent of the panel, by legal representatives of the complaining party; provided, that endeavors at conciliation by the investigator shall not be received into evidence nor otherwise made known to the members of the panel.

S.C. Code Ann. § 1-13-90(C)(5)&(12). Conversely, Section 1-13-90(C)(19) provides in relevant part: "[e]ither party to the dispute . . . may appeal the decision of the commission to the Administrative Law Court as provided in Sections 1-23-380(B) and 1-23-600(D)." S.C. Code Ann. § 1-13-90(C)(19) (emphasis added).

As discussed more fully earlier in this opinion,

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). In the each of the code sections quoted above, the General Assembly included both mandatory language ("shall") and permissive language ("may") regarding different duties of the Commission within the same respective code sections. *See* S.C. Code Ann. § 31-21-130(C) & (O); *see also* S.C. Code Ann. § 1-13-90(C)(5) & (19). When the General Assembly uses the term "shall" elsewhere in the statute but the uses the term "may" to preface the power to pursue an appeal, the plain reading of these sections conveys a legislative intent that the Commission as a party to the proceeding would have the option of appealing an adverse decision if appropriate but it is not required to do so. *See id.* Therefore, we believe that a court would conclude that that the Commission may exercise its discretion not to pursue such an appeal. *See, e.g., Op. S.C. Att'y Gen.*, 1996 WL 755786 (November 13, 1996) ("Use of such permissive language thus makes it clear that the Legislature wished to permit, but not necessarily require [a specified outcome]."). We note that there may be instances where public policy and the stated mission of the Commission weigh strongly in favor of pursuing an appeal of a particular case, but ultimately the General Assembly has given the Commission discretion in how they fulfill that mission in pursuing appeals. *See id; see also* S.C. Code Ann. § 31-21-130(C) & (O); see also S.C. Code Ann. § 1-13-90(C)(5) & (19).

Please note that this conclusion is intended to answer only the question of whether the Commission may exercise its discretion in deciding whether to use its limited resources derived from the taxpayer to pursue an appeal. Numerous other opinions of this Office have discussed the use of mandatory and permissive language in statutes, and this opinion should be understood in the conjunction with those opinions and in the context of this particular statutory language and the question presented. *Cf., e.g., Op. S.C. Att'y Gen.*, 1981 WL 96604 (September 17, 1981) ("[I]t is also recognized that the words 'may', 'shall' and 'must' are frequently used interchangeably in statutes without regard to their literal meaning. Therefore, the word 'shall' may be construed as merely permissive, where the language of the statute as a whole, and its nature and object indicate that such was the legislative intent . . . .").

Conclusion:

In conclusion, for the reasons set forth above, it is the opinion of this Office that a court faced with the questions presented in your letter most likely would conclude that:

1. Where an agency attorney is representing the interests of an aggrieved party in a proceeding before an agency panel, that attorney may request an application for review or appeal from a decision of that panel;

2. Where a complainant or aggrieved party is not a named party to an action but wishes to seek review or pursue an appeal of a decision of the panel, the appropriate course of action is for that complainant or aggrieved party to timely seek to intervene in the action to become a party and then pursue the appeal under the procedure set out in the APA. The presence or absence of legal counsel at the agency level would not have any bearing on this conclusion;

3. The Commission standing in the position of a party before a panel of the Commission operating as impartial decision-makers may be aggrieved by a final decision of the panel; and

4. The Commission may exercise its discretion not to pursue an appeal where the applicable statutes contain permissive language regarding pursuit of such an appeal.

Sincerely,

David S. Jones
Assistant Attorney General

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:

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