STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

George Brisbon, Appellant, vs. City of Charleston, South Carolina Criminal Justice Academy, Respondent.	Docket No.: 24-ALJ-30-0054-AP

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the hearing officer err by admitting the unsworn statement of Linda McCormick into evidence over the objections of counsel?

STATEMENT OF THE CASE

This Appeal arises from an Administrative Law Court Order issued on August 23, 2024, by the Honorable Robert L. Reibold of the South Carolina Administrative Law Court. The Court of Appeals on November 1, 2024, received Appellant George Brisbon's Motion to Amend Notice of Appeal to the South Carolina Court of Appeals. This case arises from an Administrative Hearing before the South Carolina Criminal Justice Academy ("Respondents"), in which the Charleston Police Department sought the revocation of George Brisbon's ("Appellant") Law Enforcement Officer Licensure, on the grounds that he had committed misconduct by misrepresenting Department information to third parties.[1]

Appellant began his career with the Charleston Police Department in May of 1984, as a Patrol Officer. (R. at 14). Appellant held numerous positions within the Department, until he attained the rank of Captain. *Id.* As Captain of the Special Operations Bureau, Appellant was responsible for managing off-duty jobs with the Department.

Appellant contends that he first began working with the City's Port Authority, during which time he was allowed to charge an administrative fee, as part of his duty to find officers for the jobs available. He would also be paid at a higher rate per hour than other off-duty work with the Department. Appellant further contends that when he inquired with then Chief Mullen as to how he should handle other off-duty assignments, he was told to handle them "just like the port" including the administrative fees. Appellant staffed and worked several off-duty jobs, including jobs with the movie industry, the Port Authority, the Daniel Island Tennis Center, and the Thomas Bennett House.

[1] S.C. Code Ann.

During the course of a discussion with the Charleston County School District regarding the placement of more officers in schools, the Department learned that Corporal Clyde Johnson charged an administrative fee to staff those jobs. During the investigation into Corporal Johnson, the Department learned that Appellant likewise charged a fee. As a result, an investigation into Appellant was initiated.

The investigation was spearheaded by Captain Anthony Cretella, who also investigated Corporal Johnson. Captain Cretella maintains he was gathering evidence for the South Carolina Law Enforcement Division ("SLED"). Ultimately, SLED did not find Appellant guilty of any criminal action. However, as a result of Captain Cretella's investigation, Appellant's employment with the Department was terminated. Thereafter, the Department sought to file an allegation of misconduct against Appellant.

Appellant timely requested a contested case hearing, and the hearing before respondents was held on February 28, 2023. During the hearing, the Department sought to introduce a total of sixteen exhibits, notably State's Exhibit #11 and State's Exhibit #12.[2] State's Exhibit #11 is the unsworn, emailed statement of former Chief Greg Mullen, and State's Exhibit #12 is the unsworn statement of Linda McCormick, which despite its lack of notarization, is referred to as an affidavit in the record. Although Appellant's counsel objected to these exhibits, they were admitted over objections of counsel.

During the course of the contested case hearing, these exhibits, particularly State's Exhibit #12, caused contention among the parties. Ultimately, the Hearing Officer allowed the parties two weeks to submit briefs regarding the admissibility of State's Exhibit #12, which was found by the

[2] For the purposes of the hearing, the Department's exhibits are labeled "State's Exhibit." State's Exhibit #5, which included handwritten notes of Department's counsel, was not admitted.

hearing officer to be properly authenticated, and to be admissible under the public records exception to the hearsay rule.

A final Agency decision was entered on January 29, 2024. Regarding the analysis and findings of the situation, the agency found the State's Exhibit #12 to be admissible, and likewise found that Appellant had committed misconduct. As a sanction, the Agency found that Appellant should be permanently denied a law enforcement license.

Thereafter, Appellant timely filed his Appeal of this decision to the South Carolina Administrative Law Court on February 29, 2024. On August 23, 2024, the South Carolina Administrative Law Court issued its order denying the petition for rehearing. Appellant timely filed its Motion to Amend its Notice of Appeal on October 28, 2024.

STANDARD OF REVIEW

"The South Carolina Criminal Justice Academy is governed by the Law Enforcement Training Council." Adams v. S.C. Criminal Justice Acad. (South Carolina Administrative Law Court, 2020) The Council may "certify and train qualified candidates and applicants for law enforcement officers and provide for suspension, revocation, or restriction of the certification, in accordance with regulations promulgated by the council." S.C. Code Ann. § 23-23-80(6) (Supp. 2018). The Court has jurisdiction to hear appeals of the Council's decisions pursuant to § 1-23-600(D). S.C. Code Ann. § 1-23-600 (Supp. 2018).

The Administrative Law Court acts in an appellate capacity, and is not an independent fact-finder. The review is limited to the record. When acting in an appellate capacity, the Court must apply the following:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. 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
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> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §§ 1-23-380 and 600 (Supp. 2018).

ARGUMENT

A. The Administrative Law Court Erred By Admitting The Unsworn Statement of Linda McCormick Because The Statement Was Not Properly Authenticated.

The Administrative Law Court erred in ruling on the admission of State's Exhibit #12 into evidence because the writing was not properly authenticated. Generally, SCRE 901, much like its federal counterpart, requires "authentication or identification as a condition precedent to admissibility." SCRE 901(a). Here, we have an unsworn "affidavit" of Lisa McCormick, which Captain Cretella testifies he received as part of the investigation into Appellant. As shown below, this document was erroneously admitted into evidence by the hearing officer.

In *Williams v. Milling-Nelson Motors,* the Supreme Court, much as here, dealt with whether a letter, purportedly signed by the Plaintiff's wife, Mrs. Williams, had been erroneously entered into evidence by the lower court because it was not properly identified. The court noted the letter "carried no witnesses and none were presented to testify to the genuineness of the signature thereto, or execution thereof..." *Williams v. Milling-Nelson Motors*, 209 S.C. 407, 409; 40 S.E.2d 633 (S.C. 1946). The court stated as follows:

> A writing standing alone does not of itself constitute evidence; it must be accompanied by competent proof of some sort from which the jury can infer that it is authentic and that it was executed or written by the party by whom it purports to be, unless such facts are admitted by the adversary.

Id. (citing 20 Am. Jur., p. 776, Evidence No. 922).

Here, like in *Williams,* Captain Cretella testifies he did not witness the writing of the alleged "affidavit." There are no witnesses able to testify regarding the authenticity of the document, as Ms. McCormick herself was not present at Appellant's contested case hearing. Additionally, the document, which purports to be an affidavit, is not signed by a notary, further lacking witnesses as outlined in the authentication requirements by the Supreme Court.

Because there are no witnesses to the document, Ms. McCormick was not present to testify to the authenticity of the document, and no notary witnessed Ms. McCormick's signature, The Administrative Law Court erred in determining the document was authenticated under Rule 901(a) SCRE, and this evidence should be excluded. The Appellant argues that The Administrative Law Court erred in concluding that the content of Ms. McCormick's statement was cumulative rather than being highly prejudicial against the Appellant as it relates to the material issues of fact, Appellant disagrees as the admission of this incompetent evidence had great probative value upon the material issue of the case and should be extremely prejudicial citing Mali v. Odom, 295 S.C. 78, 84, 367 S.E.2d 166, 170 (Ct. App. 1998) ("[T]he admission of incompetent evidence having some probative value upon material issue of fact in the case is ordinarily presumed to be prejudicial"). The Appellant argues that it was the predominant genuine issue of fact in the case. Appellant asserts that without Ms. McCormick's statement at the hearing, Appellant's counsel was prevented from contesting the authenticity of the statement and was denied the opportunity to introduce evidence contesting the authenticity of the statement.

B. The Administrative Law Court Erred By Agreeing with The Hearing Officer to The Admittance of The Unsworn Statement of Linda McCormick Because It Did Not Meet The Public Records Exception For Hearsay.

Second, The Administrative Law Court erred by denying the Appellant's argument before the ALC to the admittance of the unsworn affidavit of Linda McCormick, and ruling that it was admissible under the public records hearsay exception. Generally, hearsay is not permitted. SCRE 802. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." SCRE 801.

Many exceptions exist to the hearsay rule. The exception at issue in the instant case is the public records exception. The public records exception is as follows:

> Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; provided, however, that investigative notes involving opinions, judgments, or conclusions are not admissible. Accident reports required by S.C. Code Ann. §§ 56-5-1260 to -1280 (1991) are not admissible as evidence of negligence or due care in an action at law for damages.

SCRE 803(8). Here, Respondent's argue that because Linda McCormick's statement was taken as part of the investigation into the Appellant, it should fall under the public records exception to the rule. For the reasons below, the Appellant argues the statement should not be admitted and its Motion denied by the Administrative Judge below.

First, allowing such an unsworn "affidavit" into the record is inimical to the very purpose of the public records exception. Public records are meant to be relied upon, just as one might rely upon a regular business record—the rule itself is clear that opinions are not to be included. *See Fowler v. Nationwide Mut. Fire Ins. Co.,* 410 S.C. 403, 764 S.E.2d 249 (S.C. App. 2014) (finding a report involving a firefighter's non-expert opinion of where the fire started to be inadmissible as a public record). Further, the public has a right to rely upon information freely available to it. In *Hooper v. Ebenezer Sr. Services,* the court reaffirmed this, stating the Plaintiff "was entitled to rely on the public records..." *Hooper v. Ebenezer Sr. Services,* 687 S.E.2d 29,34; 386 S.C. 108 (S.C. 2009).

Here, Ms. McCormick's statement is not the sort of public record the rule anticipates the public can rely on. First, it is not a document setting forth "the activities of the office or agency," but rather a statement collected solely at the behest of the department's legal team, not taken in the routine order of operations. Second, the statement is not a matter "observed pursuant to a duty

imposed by law," as Captain Cretella testifies he did not witness Ms. McCormick sign the statement. These are not matters conducted or observed by the agency, and therefore should not fall within the public records exception to the hearsay rule. The Administrative Law Judge erred in his conclusion for the reasons cited above.

CONCLUSION

As shown herein, the South Carolina Court of Appeals should reverse the Administrative Law Judge's decision upholding the agency's decision, because it was clearly erroneous at the hearing by the Hearing Officer, and The Administrative Law Court's Order of August 23, 2024, is erroneous, a misapplication of the South Carolina Rules of Evidence, and The Administrative Law Court's Order should be reversed by this Court. Ms. McCormick's statement is neither authenticated nor admissible under the Public Records exception to the Hearsay rule, and should not have been admitted, and The Administrative Law Court's Order in its review and determination is clearly erroneous.