THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appeal from Administrative Law Court

S. Phillip Lenski, Administrative Law Judge

Case No. 2024-002073

Anthony Crosby, Appellant,

v.

South Carolina Criminal Justice Academy, Respondent.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (CONT'D)

Cases **Page(s)**

TABLE OF AUTHORITIES (CONT'D)

Cases **Page(s)**

Statutes

Other

TABLE OF AUTHORITIES (CONT'D)

Other **Page(s)**

Anthony Crosby, ("Appellant" or "Mr. Crosby"), submits, by and through his undersigned attorney, the following brief in support of his appeal, pursuant to the Administrative Procedures Act, S.C. Const. art. I, § 22. Mr. Crosby appeals the decision of the Administrative Law Judge ("ALJ"), Honorable S. Phillip Lenski's, order upholding the Law Enforcement Training Council of the South Carolina Criminal Justice Academy ("LETC"), decision to permanently deny the Appellant his eligibility for law enforcement certification in South Carolina. Reversal of the ALJ's and LETC's decision and order is justified as set forth herein.

ISSUES ON APPEAL

1. The ALJ Committed Reversible Error by adopting the LETC's findings and conclusions as a matter of law and fact that the LETC could find Mr. Crosby guilty of *willful* fraud and deceit within the meaning of misconduct under S.C. Code Ann. §23-23-150(A)(3)(j), by merely showing that he was duplicating unnecessary "Contact Only" paperwork for the same traffic stops and for failing to follow an allegedly customary practice of printing out all citations and handing them to the drivers, even though the information in the documents and in the SmartCOP software was true, was not contrary to law, and fell within officer discretion .
2. The ALJ and LETC committed reversible error, abused its discretion and acted arbitrarily and capriciously by ignoring the evidence that the Appellant's superior, Captain Brown, directed increased contact activity documentation. .
3. The ALJ erred by affirming, without even addressing the issues concerning, the LETC's arbitrary and capricious treatment of the Appellant , and its commission of fundamental errors in its hearing procedures which substantially impacted the Appellant's rights,

including applying law enforcement decertification in all these misconduct cases, regardless of the circumstances.

STATEMENT OF THE CASE

After conducting an audit of the Appellant's Troop 3 enforcement activities' data in 2022 and 2023 monthly reports, the South Carolina Highway Patrol noted some anomalies for some officers which needed investigation, including for the Appellant. (ROA p.36-37.) The Highway Patrol referred the matter to Lieutenant ("Lt.") Reap, an officer in the Office of Professional Responsibility within the South Carolina Department of Public Safety ("Department"). The Highway Patrol raised the concern that Mr. Crosby had written an unusually high number of "contact only" warnings and that these warnings were not printed out. The Highway Patrol expressed concern that Mr. Crosby was fraudulently inflating the numbers to gain recognition as high activity performer. (ROA, p.39.)

After Lt. Reap finished his investigation, he personally opined that the Appellant was falsely inflating enforcement activity numbers by submitting an inordinate number of "contact only" warnings and not printing them out. (ROA p. 401, line. 4-11) On July 3, 2023, the Department issued a Personnel Change in Status Report (Notification of Separation due to certification misconduct as defined in S.C. Code Ann. 23-23-150(A)(3)(j)). This initial PCS report alleged that Mr. Crosby was separated due to having willfully provided false, misleading, incomplete, deceitful or incorrect information on a document, record, report or form, except when required by departmental policy or by the laws of the state. On October 25, 2023, the Department amended the PCS to additionally allege that Mr. Crosby was separated due to willfully providing false, misleading, incomplete, or incorrect statements to a law enforcement officer, a law enforcement agency, or a representative of the agency, except when required by departmental

policy or by the laws of the state. (ROA p.33, line 3-6.) The factual allegations related to Mr. Crosby's Public Contract/warnings documentation between April 2022 and March 2023. (ROA p. 36-37.)

This matter was referred to the South Carolina Criminal Justice Academy, ("the Academy"), for review, pursuant to S.C. Code Ann. 23-23-80. Mr. Crosby timely requested a contested case hearing to challenge the misconduct charges. The Academy appointed the honorable LETC attorney Timothy Plunkett to sit as the hearing officer, scheduled for hearing on November 7, 2023. (ROA p. 10-12.) At the hearing, the following documentation was accepted into evidence:

Council Exhibit, "Exh.", 1 – Notice of Misconduct Allegation; Personnel Change in Status Report (Notification of Separation Due to Misconduct) (July 3, 2023); Request for Contested Case Hearing; Notice of Contested Hearing

Council Exh. 2 – Personnel Change in Status Report (Notification of Separation Due to Misconduct) (October 25, 2023)

State's Exhibit 1- Blank Uniform Traffic Ticket; blank Public Contact/ Warning

State's Exhibit 2- South Carolina Department of Public Safety Policy- "Use of Individual Discretion'
State's Exhibit 3- Roster for Post D; "Trooper Monthly Presentation"
State's Exhibit 4- Roster for September 2022, January 2023, and February 2023
State's Exhibit 5- Recordings of Trooper Crosby interview and follow-up interview
State's Exhibit 6- "Public Contact/ Warning/ Nature of Warning" list
State's Exhibit 7- Trooper Crosby's body worn camera footage
State's Exhibit 8- "South Carolina Traffic Collision Report Form" in reference to 20223084
State's Exhibit 9- "Uniform Traffic Ticket" in reference to "Ticket # 20232351224790" and {'Ticket # 20232351224791" , "Public Contact/ Warning" in reference to "PCW-B739937"
State's Exhibit 10- "Public Contact/ Warning" in reference to "PCW-B740696", "PCW-B740697" ,UPCW-B740695"
State's Exhibit 11- "South Carolina Department of Motor Vehicles Notice Requirement" in reference to Carlton Revan Plumley, Valdon Scottie Keith, and Jesse Christopher Watson dated 0303-2023
State's Exhibit 12- Summary of citations March 3, 2023

State's Exhibit 13- "Uniform Traffic Ticket" in reference to "Ticket # 20222351190010"; "Public Contact/ Warning" in reference to [U] PCW-B647619" and "PCW-B649954" and SmartCOP screenshots

State's Exhibit 14- "Uniform Traffic Ticket" in reference to "Ticket # 20222351190009", "PublicContact/ Warning" in reference to "PCW-B647618" and "PCW-B649953" and SmartCOP screenshots

State's Exhibit 15- "Uniform Traffic Ticket" in reference to "Ticket # 20222351189087 [1]'; "Public Contact/Warning" in reference to "PCW-B647617 'I and 'I PCW-B647631" and SmartCOP screenshots

State's Exhibit 16- Summary of citations for October 19-20 and 30, 2022

State's Exhibit 17- Screenshot of citations from Mobile Form Screen for July 27, 2022

State's Exhibit 18- Screenshot of public contacts/ warnings from Mobile Form Screen for July 27, 2022

State's Exhibit 19- Summary of citations for July 27, 2022

State's Exhibit 20- "Uniform Traffic Ticket" in reference to "Ticket # 20222351228589" and "Ticket
20222351228590"; "Public Contact/Warning" in reference to "PCW-B676575 and PCWB676576"

State's Exhibit 21- "Uniform Traffic Ticket" in reference to "Ticket # 20222351148351" and "Ticket
20222351148352 , "Public Contact/Warning" in reference to "PCW-B619268" and "PCWB619295'I

Respondent's Exhibit 1- Letter to Anthony Crosby from Captain Kevin Brown

At the hearing, the Hon. Plunkett also heard testimony from the following individuals:

1. Lt. Russell Thompson, South Carolina Dept. of Public Safety (included rebuttal)
2. Lt. James Reap, South Carolina Dept. of Public Safety (included rebuttal)
3. Trp. Kevin Michael Renneker, South Carolina Dept. of Public Safety
4. Anthony David Crosby, Jr.

After hearing testimony and reviewing the numerous exhibits, the Hon. Plunkett issued his decision on January 5, 2024. As the hearing officer, the Hon. Plunkett recommended that Mr. Crosby be found guilty of misconduct under S.C. Code Ann. 32-23-151(A)(3)(I) and (K). On January 24, 2024, Mr. Crosby, through the undersigned counsel, filed a motion opposing adoption of the hearing officer's recommendation. (ROA pp. 31-32.)

After reviewing the hearing officer's transcript, exhibits, motions and the Hearing Officer's Recommendation (HOR), the South Carolina Law Enforcement Training Council ("LETC") met to discuss the case and listen to oral arguments on March 18, 2024. (ROA p. 574-637.) The LETC adopted the HOR's recommendation in total finding that Mr. Crosby engaged in misconduct as alleged and voted to permanently deny a law enforcement certification to Mr. Crosby in South Carolina on April 23, 2024. (ROA p. 635, L. 10-25) (ROA p. 336 L.1-20) On May 22, 2024, Mr. Crosby filed a Notice of Appeal with the Administrative Law Court requesting that the court reverse the LETC's decision and grant Mr. Crosby law enforcement recertification. (ROA p.731). On November 6, 2024, the Hon. S. Phillip Lenski summarily adopted the LETC's factual findings and conclusions, and affirmed the LETC's decision to deny recertification. The Appellant filed his Notice of Appeal from Judge Lenski's decision to this court on November 26, 2024.

STATEMENT OF THE FACTS

Mr. Crosby is a South Carolinian native who graduated from Charleston's Citadel with high academic honors and had been a Company C. Commander. (ROA p.479, line 18-20, p.488 line 25, p.489 line1, p.712 line 19-21.) Up until the recent events, Mr. Crosby had been employed by the Highway Patrol for 4 years. He was certified through the Academy and was an active member of the Department. Mr. Crosby was never known as someone who tried to shirk responsibilities or try to find the easy way to gain recognition or obtain awards. In fact, even those who testified in the hearings below, could not deny the fact that Mr. Crosby was such a hard worker that his productivity, even if there were no data lists, far exceeded the average officer. (ROA p. 16, line 16-17, p.313 line 5-13, p.536 line 7-8.) Mr. Crosby worked extra shifts and long hours. (ROA p. 488 line 17-24) Mr. Crosby had never before been disciplined or even counselled. He did not even miss a workday except when he was sick with Covid-19. (ROA p. 449 line 15-21.) Not one person below had ever known him to be untrustworthy or dishonest. (ROA p. 201-2, line 10.) No one

ever testified or presented any evidence that Mr. Crosby would not take on any task he was asked to do. Mr. Crosby plainly loved being an officer and worked hard to be a good one. In short, Mr. Crosby did not need a "bribe" to do his job…he was already performing exceptionally. This above average productivity won him the reward of an unmarked vehicle, not any deception or lies. (See Captain Brown Commendation letter, ROA p. 708.)

Notably, tickets and public contact notice substantially decreased during Covid-19. Command may have sensed a general lack of laziness among some of the troopers in 2022, especially after working under a long period of restricted and softer enforcement and activity rules from the COVID-19 pandemic period. (ROA p.17-23, p.657.) Accordingly, Captain Brown instructed Troop 3 members that they needed to make sure to document and increase their public contacts: "We need to do a better job of making sure that we do document those individuals that we are out with." (ROA p. 487 lines 22-25.) Such a directive could invite some unproductive or lazy officers to lie and cheat to make it seem like they are working hard, and escape any discipline—*if there was no review or oversight*.

However, enforcement activity data had oversight. (ROA p. 505.) Command staff have monthly meetings to discuss the enforcement activity data for their troops to discern the productivity of those officers. "Lt. Thompson testified that troopers' activity levels were evaluated by looking at tickets, warnings, DUI arrests, collision reports produced, and total number of traffic stops conducted." (ROA p. 36, p.657.)

Critically, the Command generally recognized that data review alone can be misleading because numbers cannot paint the whole picture, or tell the "right picture", of an officer's official activities. (ROA, p. 283 lines 24-25) The data is only "snippets of activity accountability". (ROA, p. 284, lines13-14) This is why Lt. Thompson testified that the Command reviews the numbers

and discusses any possible individual circumstances of the troopers. However, this oversight means that any officer subterfuge cannot be hidden. Command Staff can inspect all video footage of each officer's traffic stop. Public contacts are electronically stored in Department's SmartCOP software and multiple documents for the same incident or stop are tracked under the same case number. Most critically, a trooper has discretion in most situations to either write a ticket or warning, which are both tallied in the same manner for the purpose of the activity report the trooper generates. "Both are generally referred to as a 'contact' for the purpose of the activity report." (ROA, p. 28, lines 20-21) Finally, the software links all tickets, warnings, other documents, and videos from the same incident together so they can be specifically tracked . (ROA p. 274 lines 17-25, p. 275 lines 1-18.)

After one of Lt. Thompson's monthly reviews with Command, the numbers produced some anomalies that could not be easily explained so they conducted a more comprehensive review of "contact only" numbers. This review raised concerns because public contact numbers for some officers did not match up with total stops and collisions. (ROA, p. 291lines 12-18) After the audit of Troop 3, Lt. Thompson discovered that one officer was falsifying contact forms. There also seemed to be a trend in the state so the Department sought investigations of several officers, including Mr. Crosby. Thus, the Department referred the matter to Lt. Reap, from the Office of Professional Responsibility for investigation. (ROA p.291 line 21-25, p.292 lines 1-3)

Without asking Mr. Crosby about the discrepancies directly, in March 2023, Lt. Reap was asked to investigate the alleged abnormally high number of "contact only" of Mr. Crosby and the fact that many of these warnings were not printed out. The Department also raised concerns about how he dealt with forms during collision investigations. (ROA p. 40 lines 15-16) In short, Lt Reap and Lt. Thompson found Mr. Crosby's action to be "inappropriate" or unusual, (primarily based on

duplication of information), even though his form practice was not contrary to state law. (ROA p. 38 lines 41-42, p. 275-276, p. 313 lines 411-420)

As part of this investigation Mr. Reap interviewed Mr. Crosby twice, one time in April and another time in May 2023. Based on his pre-determined conclusions above., Lt. Reap began the first interview telling Mr. Crosby that he would not tolerate any of Mr. Crosby's excuses for his behavior. (ROA 272.) Lt. Reap also reviewed Mr. Crosby's SmartCOP data for the period from April 2022 through May 2023. (ROA p. 263-266). Lt. Reap determined Mr. Crosby generated 398 "contact only" warnings between April 2022 and March 3, 2023, which appeared much higher than the other officers (only about 76 total). Lt. Thompson stated that while the policy did not prohibit officers from issuing warnings when the contact was otherwise recorded, it was not common practice to do so. (ROA p. 419-423.) Regardless, Lt Thompson agreed that Mr. Crosby was a "good trooper" and a hard worker. (ROA p. 16, p. 317, p.536.) Furthermore, throughout the interview process, Mr. Crosby openly discussed how he conducted his traffic stops and generated or issued "contact only" forms even when there were violations of the law. (ROA p. 353.) Mr. Crosby reasonably explained that he strongly desired to be an efficient, but also a thorough law enforcement officer. In specific reference to the contact documentation, Mr. Crosby testified that he was acting directly in response to his Captain Brown's directive to make sure to conduct, and document, more traffic stops.

Lt Reap then focused his investigation on Mr. Crosby's traffic collision stops in February and March 2023 by reviewing bodycam video footage and documents. During these collision investigations, Mr. Crosby would issue contact only warnings to all drivers, even though the demographic information were already stored on FR-10. Mr. Crosby especially noted his concerns during collision investigations was to move the questioning along so that the drivers can

quickly be on their way , and so that he can clear the road. (ROA p. 455 line 23-25) He was obviously thinking about people, not forms. This is precisely why troopers must be given some discretion as they are the ones on the scene. Important to issue most important citations at the scene and contact warnings to all drivers. Should not have to worry about "over-contacting". (ROA p.458 lines 6-7) This becomes especially important when the troop is short staffed. (ROA p.456)

For example, Lt. Reap testified that the March 3, 2023 collision involved four drivers, Karr, Plumley, Watson, and Keith. Crosby determined Watson was at fault and issued him two citations, one for driving on the wrong side of the road and another for being uninsured. Additionally, Crosby generated a "contact only" warning for Watson. Crosby also issued warnings for Karr, Plumley, and Keith. Keith and Karr had "contact only" warnings generated in their names. Plumley was the subject of a "contact only/ vehicle license violation/ other (insurance card)" warning. Reap recalled Crosby had first addressed Karr, who provided Crosby with all of the necessary documents. Crosby was advised by Keith that his insurance documentation was stored on his cell phone. In an effort to move things along, Mr. Crosby advised Keith that he would look it up himself. (ROA p359 line 22-23) Plumley was able to provide Crosby with a driver's license but advised Crosby that the vehicle belonged to his employer. Upon hearing this Crosby ended the conversation as it pertained to providing insurance documentation. (ROA p. 360 lines 10-19)

Mr. Crosby printed and issued the two citations and an FR-IO to Watson and FR-10s for the other three parties. Mr. Crosby testified that it was just his normal practice to generate contact forms for all the drivers in the collision. (ROA p. 353 lines 6-18) The four warnings Crosby generated were not printed, issued to, nor discussed with any of the parties subject to those

warnings. Lt. Reap opined that Mr. Crosby's practice of generating contact only warnings in this case was inappropriate since it duplicated the information on the FR-10. Lt. Reap determined that Mr. Cosby similarly conducted a collision investigation the month before in February 2023. However, again, Lt. Reap could not present any statute or written policy which was violated by Mr. Crosby's practice.

Lt. Reap mentioned a couple of other anomalies out of the hundreds of Mr. Crosby's traffic stops in the review period. (ROA p.373-379.) Mr. Crosby reportedly entered duplicate no contact only warning form days later after the initial stops. However, the SmartCOP software would have logged them in the same case or incident number for the stop, when Mr. Crosby had engaged with the individual. Mr. Crosby asserted that this must have been generated somehow by mistake. Computer glitches certainly happen in today's high-tech world, especially when programs automatically generate another document and information after inputting data into the system. Mr. Crosby indicated that a contact form is generated soon after he completed a ticket with the exact information already inputted. (ROA p. 461 line 25, 462 line 1-15) Conversely, Lt. Reap acknowledged that he was not a "computer" person but merely though that it took too many steps to generate the form to conclude there was a mistake. (ROA p. 435 line 15) Regardless, the Department presented no technical expert to discuss the SmartCOP software program.

Lastly, Lt. Reap pointed to another day as problematic when Mr. Crosby issued 8 traffic citations in the morning of the shift but generated contact only forms at the end of the shift for those same individuals. According to Lt. Reap, the warnings should always be generated at the time of the stop, regardless of incident conditions or the officer's volume of activities that day. This is directly contrary to department policy and Lt. Reap's testimony that documentation transmission at the end of a shift was acceptable. (ROA p. 432 line 1-2) A later transmission of

an identical document does not change the accuracy of the document. Lt. Thompson also testified that troopers can transmit documents later. In addition, it fails to recognize that a transmission time only reflects the time of transmission but does not change he date, time, and details of the stop. All of that information would be identified by the citation/case number of the incident.

Lt. Reap repeatedly commented also on Mr. Crosby's failure to print out warnings and give them to the drivers as inappropriate. The Public Contact Warnings form does not even indicate that the trooper must hand it to the driver. (ROA p. 427 line 16-19.) Lt. Reap ignored any questions of officer discretion as permitted by Policy 300.21, and some actions based on common sense---- or maybe just the result of poor training. Although he was trained on these matters by his FTO, Lt. Reap admitted that he had no personal knowledge on what training on these issues or forms that Mr. Crosby received. Lt. Read stated that as a Trooper, you "didn't do your job" if you did not print out the warnings and hand them to the driver. (ROA p. 346 line 25, 347 line1) Lt. Reap also harped on the fact that Mr. Crosby allegedly did not give drivers enough opportunity to retrieve their insurance or registration cards before ultimately generating a citation or contact only warning. Mr. Crosby was not fired for not printing out warnings or for handing out too many "contact only" forms, or falsely citing or warning a driver. *Id.* The Department fired him for allegedly providing false or misleading information to the Department by intentionally inflating numbers.

STANDARD OF REVIEW

"Section 1-23-610 of the South Carolina Code (Supp. 2006) sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency". *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 258; 659 S.E.2d 233, 234 (2008). The Court of Appeals reviews the administrative law judge's order based on the whole record. S.C. Code Ann. § 1-23-610(B). Notably, initial "Review by an administrative law judge of a final decision in a contested case, heard in the appellate jurisdiction of the Administrative Law

Court, must be in the same manner as prescribed in Section 1-23-380 for judicial review of final agency decisions . . . ." S.C. Code Ann. § 1-23-600(E) (Supp. 2023). Section 1-23-380(5) of the South Carolina Code (Supp. 2023) provides the standard used by appellate bodies to review agency decisions. *See id.* § 1-23-600(D) (Supp. 2023) (directing administrative law judges to conduct appellate review in the same manner prescribed in section 1-23-380).". *Keith Parks, Petitioner, ; v. ; South Carolina Criminal Justice Academy, Respondent*, Docket No. 21-ALJ-30-0393-AP , 2024 SC ALJ LEXIS 211, *6, 2024 SC ALJ LEXIS 211 (ALC, August 15, 2024).

Although ordinarily the court must not substitute its judgment for the ALJ's decisions regarding the weight of factual findings, S.C. Code Ann. § 1-23-610(B) (Supp. 2023) states that 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 "affected by other error of law" or procedural irregularities. Additionally, the administrative order will be overturned when the decision reached is 'clearly erroneous in view of the reliable, probative, and substantial evidence *on the whole record.*"(Emphasis added) *Synovus Bank v. S.C. Dep't of Revenue*, 444 S.C. 30, 36-37, 906 S.E.2d 85 (2024); *S.C. Coastal Conserv. League v. S.C. Dep't of Health & Env't Control*, 380 S.C. 349, 669 S.E.2d 899 (2008); *see also SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (2008); *Original Blue Ribbon Taxi Corp. v. S.C. DMV*, 380 S.C. 600, 605 (2008). Ultimately, these errors and others establish that if an administrative agency abused its discretion or acted arbitrarily or capriciously, the court must act. See S.C. Code Ann. §§ 1-23-380(5), 1-23-610(B) (Supp. 2023). *Blackmon v. S.C. Dep't of Health & Env't Control*, 873 S.E.2d 774, 2022 (S.C. Ct. App. 2022) S.C. App. LEXIS 52, (May 25, 2022). *Sponar v. S.C. Dep't of Pub. Safety*, 2004 S.C. App. LEXIS 234 (S.C. Ct. App. July 19, 2004), op. withdrawn, sub. op., 361 S.C. 35, 603 S.E.2d 412, 2004 S.C. App. LEXIS 272 (2004);

Hendley v. South Carolina State Budget & Control Bd., 325 S.C. 413, 481 S.E.2d 159, 1996 S.C. App. LEXIS 184 (1996), rev'd, 333 S.C. 455, 510 S.E.2d 421, 1999 S.C. LEXIS 4 (Jan. 4, 1999). Ultimately, "the [c]ourt may reverse the decision of ALC where it is in violation of a statutory provision, or it is affected by an error of law." *Books-A-Million, Inc. v. S.C. Dep't of Revenue,* 430 S.C. 388, 391; 844 S.E.2d 399, 401 (2020) (citing *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014).

ARGUMENT

I. The ALJ Committed Reversible Error by opining that the LETC could find Mr. Crosby guilty of willful fraud and deceit within the meaning of misconduct under S.C. Code Ann. § 23-23-150, when there was a complete lack of evidence of intent to deceive or even the presentation of false information in the documents.

A. A review of the whole record reveals a complete lack of reliable, probative, and substantial evidence to justify any conclusion that Mr. Crosby's willfully intended to deceive and defraud the Department.

This case begins and ends with bias and predetermined conclusions, without substantial evidence of misconduct, about a law enforcement officer's activities merely based on data, which the Department admitted does not ever tell the "whole picture." Any evidence cannot be viewed blindly from one side of the case and must be assessed in light of the whole record under a reasonable person standard. *Clemmons v. Lowe's Home Ctrs., Inc.-Harbison*, 420 S.C. 282, 287 (2017) (quoting *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)). In sum, the evidence of misconduct cannot be tenuous and speculative. *Deonta L. Brinston, Appellant v. South Carolina Department of Criminal Justice,* Respondent. No. 14-ALJ-30-0540-AP, 2015 SC ALJ LEXIS 100 (March 18, 2015).

A court should be especially certain about the evidence when assessing an alleged offender's *specific intent to deceive and misrepresent*, and *willfulness to commit fraud or lie* from

mere data. According to the Department's charge, Mr. Crosby must be terminated for misconduct for "willfully mak[ing] false, misleading, incomplete, deceitful, or incorrect statement(s) to a law enforcement officer"). S.C. Code Regs. § 37-026(A)(4)(h). "The term willfully has been described as a "'notoriously slippery term,' a 'chameleon word' that 'takes color from the text in which it appears.'" *United States v. Starnes*, 583 F.3d 196, 210 (3d Cir. 2009)." George W. "Tres" Arnett III, and Daniel P. D'Alessandro, White Collar Criminal Litigation, 220 N.J.L.J. 469 (August 10, 2015).

"An act is done "willfully" if done voluntarily and intentionally and with the specific intent to do something the law forbids." https://www.justice.gov/archives/jm/criminal-resource-manual-910-knowingly-and-willfully#:~:text=An%20act%20is%20done%20%22willfully,do%20something%20the%20law%20forbids. "Willful is defined as '[p]roceeding from a conscious motion of the will; voluntary; knowingly, deliberate; intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.'" *Black's Law Dictionary*. *Walker v. Div. of Empl. Sec.*, 333 S.W.3d 517, 520 (Mo. Ct. App. 2011); *see also Keith Parks, Petitioner v. South Carolina Criminal Justice Academy, Respondent,* 2024 SC ALJ LEXIS 211, *7-9, 2024 SC ALJ LEXIS 211(The Hearing Officer looked to Black's Law Dictionary, which defined "willful" as "[v]oluntary and intentional, but not necessarily malicious. A voluntary act becomes willful, in law, *only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong* . . . ." Willful, *Black's Law Dictionary* (10th ed. 2014)) (emphasis added).

Determining evidence of unlawful intent and willfulness undoubtedly becomes especially problematic in misconduct cases when the agency extrapolates an intent to deceive or misrepresent

from a lawful act. Furthermore, an agency errs if it determines intent and willfulness based on the offender's failure to take certain affirmative actions beforehand to determine that the action would be unlawful when the law does not require the offender to do so.

A misconduct case before the South Carolina Department of Labor illustrates this point well. In *Kendall M. Hassett, Appellant vs. South Carolina Department of Labor, Licensing and Regulation, South Carolina Real Estate Commission, Respondent*, a real estate agent was disciplined (and threatened with license suspension) for engaging in the practice or acting "in a manner inconsistent with the agency relationship another real estate licensee had established with her client." No. 23-ALJ-11-0419-AP, 2024 SC ALJ LEXIS 117, *1 (S.C. Admin. Ct. May 3, 2024). A buyer had contacted Ms. Hassett about buying a home, while she was allegedly still under a contract with another real estate agent. The buyer advised Ms. Hassett that the buyer previously engaged with another realtor, but that contract was terminated. Ms. Hassett did not take any further action to investigate the matter. Ms. Hassett completed a sale with the client. Subsequently, the other licensee sought the sale commission from the sale and filed a complaint with the South Carolina Real Estate Commission for representing a client already under contract with another agent. *Id.*

The South Carolina Real Estate Commission found against Ms. Hassett because she failed to investigate the matter further. It noted two "red flags" which demanded her investigation: "(1) the existence of earnest money held in deposit by an attorney for the Buyer prior to the Appellant's interactions with the Buyer; and (2) the Buyer's admission that he had previously been working with another licensee, but that the prior agency relationship had been dissolved without providing any documentation to that effect to the Appellant." *Id.* at *7. In issuing its ruling, the Commission concluded that section 40-57-710(A)(24) of the South Carolina Code required the agent to take

affirmative steps to confirm the buyer's status with the other realtor when he or she has reason to know that an agency relationship with another exists. The above "red flags" provided the "reason to know" evidence. Since she did not take those affirmative steps, he violated the statute by engaging in a practice or took action inconsistent with said agency relationship. It ordered certain course training and publicly reprimanded him and threatened him with suspension if he failed to comply. *Id.* at *11-12.

On appeal, the Administrative Court reversed. The court concluded that the evidence did not provide substantial evidence to support their findings. *Id.* Although Ms. Hassett knew about that agency relationship, she could reasonably rely on the buyer's assertions that it was dissolved. Additionally, the court determined that the law did not mandate affirmative action as it did not expressly set forth a requirement. The "red flags" were insufficient to imply or establish Ms. Hassett's knowledge of an existing relationship with another agent. The Commission failed to meet its burden to establish the misconduct. *Id.* at *19-20.

As in the Hassett's case, intent to defraud or misrepresent allegations in an officer misconduct matter must demand substantial evidence of particular intent and knowledge upfront. Civil fraudulent misrepresentation actions support such a requirement. Ordinarily, "In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown *by clear, cogent and convincing evidence*: (1) a representation; (2) *its falsity*; (3) its materiality; (4) *either knowledge of its falsity or a reckless disregard of its truth or falsity*; (5) *intent that the representation be acted upon*; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. Failure to prove *any one* of the foregoing elements is fatal to recovery. " *M. B. Kahn Constr. Co. v. South Carolina Nat'l Bank,* 275 S.C. 381, 382 (1980); *Lundy v. Palmetto State Life Ins. Co.*,

256 S.C. 506, 510 (1971); *see also May v. Hopkinson*, 289 S.C. 549, 557-558. Evidence of intent to deceive is critical. *Oak Pointe Homeowners' Ass'n v. Peffley*, 2018 S.C. App. Unpub. LEXIS 135, *4-5 (citing *Save Charleston Found. v. Murray*, 286 S.C. 170, 181, 333 S.E.2d 60, 67 (Ct. App. 1985)).

Although these cases do not specifically invoke the "substantial evidence" standard, surely the evidence for such misconduct in license cases, must be clear, cogent and convincing before terminating a person's career license. *See Foxfire Vill. v. Black & Veatch*, 304 S.C. 366, 374 (1991) ("Fraud cannot be presumed; it must be proved by clear, cogent, and convincing evidence."). *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985) (Fraud cannot be presumed/need clear, cogent evidence).[1] An agency cannot assert any inferences or base any conclusions from the evidence regarding misconduct on mere conjecture speculation or surmise. See *Doe v. S.C. Dep't of Disabilities & Special Needs*, 377 S.C. 346, 349, 660 S.E.2d 260, 262 (2008). Especially in fraud misconduct cases, the agency cannot simply presume that an individual intended to deceive or falsely represent at the time of the alleged misconduct merely by the actions alone. *Foxfire Vill.*, 304 S.C. at 374-75; *Emerson v. Powell*, 283 S.C. 293, 321 S.E.2d 629 (1984) (fraud must relate to a present or preexisting fact; it cannot be based on statements as to future events).

One divorce case illustrates how fraud evidence should be assessed. In *Shorb v. Shorb*, the husband and wife were disputing rights and entitlements to the husband's employee stock options. *Shorb v. Shorb*, 372 S.C. 623 (2007). A question arose especially about some stock options sold

[1]"It is a rule of universal recognition that, except in particular cases, he who alleges fraud must clearly and distinctly prove it, whether by circumstantial or direct evidence. The law does not presume fraud, but on the contrary the presumption is always in favor of innocence and not of guilt; and unless the allegations of fraud are proved, relief will be denied, although it may appear that the defendant has not been perfectly fair in his dealings." 8B M.J. FRAUD AND DECEIT § 55 (numerous internal citations omitted).

before the divorce filing. The wife asserted that her husband committed fraud by selling these stock options, without her knowledge and consent, just prior to the divorce filing with the sole intent of depriving her of her marital property share. The husband countered by stating that she received some financial profits from the sale and he paid off some of her debts with the sale----so no intent to deceive or deprive of her property. The court determined that there was insufficient evidence of fraud. *Id.* at 633. "Proceeds from Husband's stock options will be considered marital only if the Wife introduces clear and convincing evidence to establish fraud in relation to Husband's sale of the options." *Id.* (Internal citations omitted) Accordingly, the mere sale of the stock options just prior to divorce filing was insufficient. Since there was no corroborating evidence of intent to deceive, the fraud claim fails. *Shorb,* 372 S.C. 623; *see also Young v. Goodyear Serv. Stores*, 244 S.C. 493, 500, 137 S.E.2d 578, 582 (1964) ("It has been many times stated that fraud is not presumed, and that one who charges another with fraud and deceit as a basis of a cause of action must establish such by clear, cogent and convincing evidence.")[2]. The court should especially impose such a requirement when an agency is not only depriving Mr. Crosby of his livelihood and the career that he loves, but is also asserting that Mr. Crosby committed criminal fraud--which will follow him upon his dismissal from law enforcement.

The ALJ in this case especially compounded the errors of the LETC by merely adopting the agency's findings and conclusions in a conclusory fashion without any real assessment of the evidence of intent to deceive or willfulness requirement under the statute. This is clear error. *See Keith Parks, Petitioner v. South Carolina Criminal Justice Academy, Respondent*, 2024 SC ALJ

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[2]It is a rule of universal recognition that, except in particular cases, he who alleges fraud must clearly and distinctly prove it, whether by circumstantial or direct evidence. The law does not presume fraud, but on the contrary the presumption is always in favor of innocence and not of guilt." 8B M.J. FRAUD AND DECEIT § 55, Michie's Jurisprudence of Virginia & West Virginia.

LEXIS 211, *7-9, 2024 SC ALJ LEXIS 211 (In this case, the LETC's decision is based upon findings of fact that are so conclusory, they merely state that substantial evidence supports the allegations of misconduct; It appears that the LETC only removed the Hearing Officer's analysis section when issuing its decision). The ALJ merely removed the LETC's unsupported conclusions of deceit and analysis that there was misconduct because the Appellant printed contact only forms when not statutorily required,, and the Appellant did not print out copies of citations to drivers, against alleged customary practice, but not against any law, Then the ALJ merely accepted the LETC's leap to finding intentional deception and providing of false information, from the Appellant's practice, even though information was not false on the documents themselves and all traffic stops were real. Most noteworthy, the ALJ failed to cite any case law to support its conclusions, except for general standard of review in these cases. The ALJ did not even address any of the legal authority cited by the Appellant in support of reversal.

Most importantly, if the ALJ had reviewed the entire record, the ALJ would have found that there is not even a scintilla of evidence to tie "contact only" data to any "fraud" or "deceit" by Mr. Crosby against the Department. The mere evidence that there may have been some perceived "effect" on the Department's impressions of his activity, (as mentioned by the ALJ in the Order), does not establish the Appellant's intent to deceive. Ultimately, both the Lieutenants below merely looked at Mr. Crosby's data and presumed fraud and deception from the beginning. Mr. Crosby had done what he had always done in his law enforcement career, he followed orders. Mr. Crosby stepped forward in response to his Captain's directives to document and increase public contacts for the sake of his Troop.

Most importantly, Mr. Crosby testified that at no time did Mr. Crosby falsify any information on the documents or create false public contact warnings or tickets where there was

no contact with a real person, merely to boost those numbers. [3] Mr. Crosby had personal contact with each person referenced in his department documents. The alleged "red flag" for the Lieutenants was the unusually high number of "Contact Only's" in Mr. Cosby's enforcement activity data. Lt. Reap immediately suspected that Mr. Crosby was committing fraud by inflating contact numbers by just looking at the numbers. (ROA p.331 lines5-6) After all, in their view, "Contact Only" documents should rarely be used, and are "inappropriate" according to the general practice in law enforcement—even if not illegal. Lt. Thompson merely concluded that Mr. Crosby was doing his job incorrectly. (ROA p.320 lines2-5.)

Beginning with the presumption that this could only mean wrongful inflation of contact numbers to gain a benefit for himself, the Lieutenants reviewed Mr. Crosby's law enforcement activities going back to March 2022. Even at the conclusion of the investigation, the Lieutenants looked to the harshest results and conclusions. Instead of just merely counseling Mr. Crosby about contact only warnings/form generation and document print outs at traffic stops and in collision investigations, Lt. Reap and Lt. Thompson immediately determined that Mr. Crosby was committing fraud on the Department. After all, Lt Reap stated: He gained from a benefit from these higher numbers…even though they were all linked to the same case number and the officer's enforcement activity level was determined by many factors beyond the data. There certainly was no indication that an officer's activity level was reviewed based on whether the officer printed out and provided to the individual the "contact only" forms. Lt. Reap even boldly presumed that since Mr. Crosby admitted to not being trained to execute contact only forms the way he did, that he was

[3]There certainly was not a scintilla of evidence that Mr. Crosby increased his reporting numbers by engaging in any deceptive practice like "table-topping". "Table topping" occurs where one officer borrows the ticket book of another officer and transfers it to his ticket book, thereby falsely inflating reporting numbers. This is a practice for which officers have been disciplined and remains an improper practice and this practice did not occur in this matter.

obviously trained to do it the right way but disregard it so he could defraud the Department. (ROA p. 408 lines 6-25, p.409 lines 1-25) Bold supposition.

On the contrary, it was only the Lieutenants who "thought in their minds" that Mr. Crosby must have known that the Department would look at his contact numbers and reward him generously because of them, presuming that very few were "contact only" cases. Mr. Crosby indicated that he certainly did not understand that then. (ROA p. 459.) "Crosby acknowledged, in hindsight, that he probably should have printed and issued the warnings he generated but denied lying to a law enforcement officer at any point during his employment." (ROA p.27 line 22-24) In fact, he repeatedly has noted how confusing the training is regarding "contacts" and how and when the "contact only" forms were to be executed. Notably, a fellow trooper, Lt. Kevin Renneker, testified that he was not trained at the academy but by his Field Training Officer (FTO) on what to do with these forms. Lt. Renneker stated that he was trained to complete a public contact warning for every violation. (ROA, p. 443 lines 7-21) Even more egregious, Chief Keel determined fraud and deceit on the Department because it was improper for Mr. Crosby to generate warning documents and not give them to the drivers because they could not change their behavior. This is not the misconduct charged. (ROA p. 631 lines 3-14)

In short, there is no evidence that the Department's presumption about Mr. Crosby's intent was reasonable. In fact, the evidence was tenuous and speculative that Mr. Crosby understood at the time of these stops that he was misleading the Department about his enforcement activities. Mr. Crosby stated that he did not believe each warning would be counted separately for activity tracking purposes. (ROA p. 24) Additionally, Lt. Thompson even testified that once the trooper generated the paperwork, a ticket or a warning, the trooper would have no control over how the Command Staff would weigh it. (ROA, p. 529 lines 13-19)

On the other hand, what did Mr. Crosby have control over and what did he see? All the information on the documents was accurate and were connected to the same case number. Mr. Crosby had contact with every person. There was no "false" contact. Even if a contact only document was recreated from an earlier citation, that warning is still linked to the date and time of the original incident. Even if an officer transmitted a warning five times for the same stop and individual, it would still be linked to one incident, so it is only one reported event.

Despite his alleged findings, Lt. Reap did not question Mr. Crosby about these traffic incidents with days later transmission of warnings until the hearing. (ROA p. 410 lines 17-20) Thus, Mr. Crosby was reasonably confused about additional contact only warnings that were issued for three drivers ten days after he issued them citations in October 2022. Reasonably, they could not be created within 32 seconds of one another as Mr. Crosby would have had to comb through ten days of traffic stop citations to retrieve them and then also generate the warnings. (ROA p. 460-467) He was a good trooper who unquestionably conducted a lot of traffic stops. (ROA 416-417) This situation fails to compare to a day when Mr. Crosby generated such a warning at the end of a shift on the same day.

Notably, Lt. Reap and Lt. Thompson could only raise *three* such anomalies in the paperwork, amidst hundreds and hundreds of citations and warnings. These three matters concerned the incidents of digital record of contact only warnings issued later after a traffic stop. Mr. Crosby's defense of possible mistake was completely reasonable considering the massive amount of his traffic stops and other activities. He was a very busy trooper and tried to be as thorough but expeditious as possible. Certainly, computer glitches or reduplication, or even mere human error, are not beyond reason. Alas, there was no expert who testified for the Department on how this contact form generation worked to cross-examine on the matter though. Mr. Crosby

was never trained on the program as he was out in the field during troop software training. (ROA p. 451 lines 1-16) The Department just relied on the lay testimony of Lt. Reap, who was not a "computer" guy or even knew how documents were transmitted.[4] This was a fundamental error.

B. It was legal error to presume intentional deception for issuing "Contact Only's" in all of Mr. Crosby's contacts with the public even though the Public Contact statute does not prohibit such duplication, merely based on alleged *customary*, not regulatory, practice procedure, especially when officer discretion is permitted, the documentary evidence presented no false information about traffic stops, and the Captain pressed for increased contact and its accountability.

The appellate court must reject the ALJ's and the agency's interpretation if it is contrary to the law's plain language. S.C. Code Ann. § 1-23-610; *Blackmon*, 873 S.E.2d at 2022 S.C. App. LEXIS 52 (May 25, 2022); *Paschal v. State Election Comm'n,* 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) ("Whe[n] the terms of the statute are clear, the court must apply those terms according to their literal meaning."). "A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *Lockwood Greene Eng'rs, Inc. v. S.C. Tax Com.*, 293 S.C. 447, 449, 361 S.E.2d 346, 347 (1987).

The Public Contact documents and review of the data lie at the center of the issues in this case. The Public Contact Statute, S.C. Code Ann. § 56-5-6560, provides that: "*anytime a motor*

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[4]On the other hand, the evidence in the case undoubtedly points to deception by the Lieutenants in this case. They assert that Mr. Crosby was alone in his practice and understanding but yet the investigation began in a review which revealed data anomalies from several other troopers. Mr. Crosby even testified about other troopers questioning him about what the Department seeks in these traffic stops regarding "contact" accountability. They argue that you can imply deception merely by the numbers but yet they knew that the Department reviewed them monthly with the understanding that the data does not show the "whole picture" Lastly, they introduced a spreadsheet to try to show Mr. Crosby misrepresentation of his enforcement activities but delete other columns in the worksheet which favored Mr. Crosby because they included high numbers in other areas like with DUI investigations. Lastly, Lt. Reap indicated that policy dictates that "contact" documents must be transmitted at the time of issuing of the document. Other testimony established that this was false and misleading. Lt. Russel recognized that a transmission could be completed later. To complicate matters, Lt. Reap admitted in testimony that he did not know how documents were transmitted. (ROA p. 258:16-17.) Finally, Lt. Reap presented exhibits which captured screen shots of the warning forms from the software program. The image distorted the view of the document during a stop because it was enlarged.

vehicle is stopped by an officer without a citation being issued or an arrest made, the officer shall complete a public contact/warning form that includes information regarding the age, gender, and race or ethnicity of the driver of the vehicle." (Emphasis added) Lt. Thompson recognized that the Public Contact statute requires that troopers complete the demographic information in a "contact only" form whenever the trooper stops a driver but does not issue a citation for a violation of the law or does not arrest the person, or incident involves a collision. (ROA, p. 308-309) The whole purpose of this mandate and the form is to assure the Department and the public that troopers are not harassing individuals, especially based on race, ethnic, gender, or other class-based animus. There is no indication in the statute that it was meant to judge whether troopers are enforcing the law or are being lazy. There is certainly nothing in the statute which indicates that it was meant for tracking an officer's fraud or deceit regarding enforcement. The statute makes no mention either of needing to print out the contact only forms and handing them to the person. It is undisputed that the demographic information was needed for law enforcement (and general public for review of its unbiased enforcement), so providing copies to drivers is unnecessary to meet this goal.

Lastly, the ALJ and LETC especially committed reversible error by failing to take into account the Appellant's right as a law enforcement officer to officer discretion on whether to issue warnings or contact only forms to all his contacts and to print out the documents and hand them to the drivers. Department Policy 300.21 grants officer discretion in traffic investigations and contacts. Even if there was no policy directing increased contacts and accountability, the Public Contact statute did not prohibit Mr. Crosby's "contact only" practice and there was no written policy or regulation requiring printing out the forms and handing them to the driver. The LETC and the Lieutenants merely stated that they thought Mr. Crosby's practice was "inappropriate" or

unusual investigative procedure. Accordingly, the above Department Policy 300.21 would apply to Mr. Crosby's contact practices, by allowing officer discretion under the circumstances. In finding misconduct, LETC ignored Mr. Crosby's right to exercise officer discretion in conducting his law enforcement interactions and documenting traffic stops.

Most critically, S.C. Code Ann. § 56-5-6560 terms do not prohibit using the form when there are violations or arrests. Yet, Lt. Thompson and Lt. Reap indicated that they considered it "inappropriate", and rare, for troopers to complete "contact only's" when there are violations or in a collision. They presented no evidence that anyone specifically trained Mr. Crosby on this alleged policy. Furthermore, Lt. Thompson admitted that the Public Contact law does not prohibit a trooper from issuing them every time he or she is in contact with someone. Mr. Crosby repeatedly attested to the confusion about what the Department expects regarding "contacts" and documenting those contacts. Certainly, Captain Brown's plea to his troops to increase contacts and accountability reasonably contradicts Lt. Thompson's and Lt. Reap's statement of policy.

Ultimately, in attaching misconduct to Mr. Crosby's practice, the Department, and its counsel, effectively treated this case as if this statute provided a mandate which it does not. This was an error of law. Even more egregiously, to attach fraud and deceit to Mr. Crosby's lawful practice, even though the documents all contained accurate and truthful information about the "contacts", the Department showed its arbitrary and capricious actions and complete abuse of any discretion. Even if some customary practice was required under law or regulations, the facts could only point to some possible employee negligence or misconduct in failing to follow the rules, not intentional fraud and deceit. This would certainly not warrant decertification and termination, especially without previous warnings. Unfortunately, Mr. Crosby is really being fired for providing

too much paperwork and being too thorough in his policing—the exact opposite of what should happen to such capable and hardworking law enforcement officers. This court must reverse.

II. The ALJ and LETC committed reversible error, abused its discretion and acted arbitrarily and capriciously by ignoring the evidence that the Appellant's superior, Captain Brown, directed an increase in contact activity documentation which justified, or at a minimum explained, the Appellant's activities.

The Appellant's, Mr. Crosby's, "contacts" bookkeeping practice was in conformity with a directive given to Troop 3 by Captain Brown to increase numbers and account for all contacts with drivers and individuals, as permitted under exception clause under *id.* § 23-23-150(A)(3)(g). Pursuant to S.C. Code Ann. 23-23-150(A)(3)(g), misconduct includes " willfully making false, misleading, incomplete, deceitful, or incorrect statements to a law enforcement officer, a law enforcement agency, or a representative of the agency, *except when required by departmental policy or by the laws of this State*." (emphasis added). In merely adopting the LETC's analysis, findings and conclusions, the ALJ did not address nor even mention critical evidence regarding the Appellant's superior, Captain Brown's, directing increased documentation of contacts, which effected the Appellant's behavior regarding citations. It is undisputed that Captain Brown held a meeting in March 2022 which discussed the lower enforcement activity numbers which continued even though COVID-19 restrictions were lifted. "Crosby explained that he began documenting his public interactions through warnings because he believed it was his job to do so based on Brown's instructions. He assumed the documentation of these interactions was important to members of the command staff." (ROA p. 26 lines 25-26) In line with that policy, "Crosby explained he felt it was proper to issue "contact only" warnings whenever he dealt with a member of the public in his official capacity". (ROA p. 26 line 18-19) Mr. Crosby had an outstanding record of enforcement activity, performance, following directives and commands and especially of being trustworthy and honest. (See Respondent's Exhibit 1, Captain Brown's letter.) Consistent

with that work ethic, performance, and integrity, Mr. Crosby sought to follow his Captain's directives by accounting for all contacts, which reasonably would dramatically increase those particular numbers. Why would a trooper then think that he was doing something wrong after his Captain directed the action? Yet, instead, the Department and the Lieutenants imply nefarious intent and ascribe to the Appellant a desire for personal gain---which is completely contrary to his whole record while working with the Highway Patrol. Regardless, the statute expressly states that the agency cannot find misconduct if there is a policy which directs the action. This is certainly the case here. The ALJ erred by adopting the LETC's finding which concluded otherwise. Notably, the LETC never even rebutted it in their response to the issue raised in the Appellant's brief before the ALJ.

III. The LETC and the Hearing Officer acted arbitrarily and capriciously, abused its discretion and committed fundamental errors in hearing procedures.

In merely adopting the LETC's findings and conclusions, the ALJ failed to address any of these issues raised below. Although the LETC has significant latitude in deciding whether to terminate an officer's law enforcement license, it cannot act arbitrarily and capriciously or abuse the process in reaching that decision. A decision is arbitrary and capricious "if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (1985). Additionally, a decision is arbitrary and capricious when it is "not supported by competent, substantial, and material evidence, and [i]s based on opinion and speculation testimony." *Wyndham Enterprises, LLC v. City of N. Augusta*, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012). [*17] *Deonta L. Brinston, Appellant v. South Carolina Department of*

Criminal Justice, Respondent No. 14-ALJ-30-0540-AP, 2015 SC ALJ LEXIS 100, *16-17 (March 18, 2015) (Abuse of discretion exists in cases which lack evidentiary support).

As already established previously herein, the LETC acted arbitrarily and capriciously by presuming intent to defraud and misrepresentations based on mere data, by implying nefarious intent to an officer following a Captain's directive to increase contacts and their corresponding documentation, and by ignoring Mr. Crosby's right to exercise officer discretion in his "contacts" procedures. However, various other reasons also establish that the Department has abused the administrative process and acted arbitrarily and capriciously in reaching its final decision.

A. The Hearing Officer and the LETC Treated Lt Reap as an expert without appropriately classifying him as one.

The testimony of both the Department's witnesses agreed that the facts put on the documents by Mr. Crosby were all true and accurate. Thus, the question of fraud did not arise from this information provided but from the mischaracterizations of the misconduct by the investigators. In resolving this issue, this court should be guided by its analysis in *Deonta L. Brinston, Appellant v. South Carolina Department of Criminal Justice*, Respondent. ("Brinston", No. 14-ALJ-30-0540-AP, 2015 SC ALJ LEXIS 100 (March 18, 2015).

In *Brinston*, the court reversed the South Carolina Department of Criminal Justice Academy's ("the Academy's") final decision denying Brinston's law enforcement certification due to misconduct based on substance abuse. *Id.* In the midst of a divorce and custody battle, Deputy Brinston's spouse called his Sheriff's office to state that Deputy Brinston was taking illegal steroids with another deputy. No official complaint or statement was filed but Deputy Brinston was directed to take a urinalysis test. The test results showed positive results for anabolic steroids under S.C. Code Ann. § 44-53-1510(A) of the South Carolina Code (2002). Deputy Brinston contested the results because he takes over-counter legal steroids which can result in false

positives. Brinston had requested blood work to confirm his assertion, but it was not completed. Thus, Brinston had a private physician do another test which came back negative. The tests also indicated that Brinston had low testosterone. *Id* at *4.

During the administrative hearing, a Sergeant testified that there was a month-long gap between the urinalysis test and Brinston's private test. *Id.* at *10. However, there was no medical testimony about how long steroids stay in your system. *Id.* The Hearing Officer concluded that Brinston could have been taking illegal steroids. Besides the urinalysis test results, the Hearing Officer opined that the private doctor's results were informative because [i]t is well known that the use of anabolic steroids suppresses the naturally occurring testosterone in the body." *Id.* at *11. However, since the County did not present any medical testimony rebutting Deputy Brinston's claims that he was merely taking supplements, the Hearing Officer recommended recertifying the officer with two years' probation and that Brinston be subject to random drug testing. *Id.* However, the Academy decided to permanently withdraw Brinston's law enforcement certification due to substance abuse. The Academy relied on the Hearing Officer's statement about testosterone and concluded that the private doctor's test results and attached note support the County's conclusion.

On appeal, the court reversed because the Academy based its decision on a lay person's medical opinion and unnecessary medical expert testimony. *Id.* Critically, "a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Id.* at *23 (citing *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (citing Rules 602 and 701 of the South Carolina Rules of Evidence). The court further found the Academy's evidence of misconduct was tenuous. *Id.* at *23.

Adding to its many errors, the LETC's abuse of procedures in this matter was one of its most egregious. The LETC asserts that it was completely proper for Lt Reap to testify about documents, exhibits and data from the SMARTCOP software system merely because he has been a law enforcement officer for a long time and discussed only documents and exhibits in the record. (Respondent's Brief, p. 27) LETC boldly asserts that he did not need to be an expert to testify to such matters. First, any expert would be testifying about exhibits or evidence in the record. Second, he was being asked to testify about documents and data from a computer system, how and why they are initiated and generated, how the program works and what the data means----all despite the fact that Lt Reap admits that he is not a "computer person". (ROA p. 435 lines 19-20) Many questions were left unanswered about the program without such an expert opinion. This was clear error. See *Deonta L. Brinston, Appellant v. South Carolina Department of Criminal Justice,* Respondent. ("Brinston"), No. 14-ALJ-30-0540-AP, 2015 SC ALJ LEXIS 100 (March 18, 2015); citing *Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d* 169, 175 (2010) (citing Rules 602 and 701 of the South Carolina Rules of Evidence). Contrary to the LETC' s assertion, this was not harmless error, because the entire case for misconduct rests on the forms generated by the software which was the subject of the Lieutenant's testimony. There was no equivalent expert testimony to rebut the Lieutenant's claims and discussion of the exhibits from the software.

The court should reach the same conclusion in this case as the court did in the Brinston case above. Lt. Reap was treated as an expert on many matters, especially ones relating to the SmartCOP software technology, traffic stops, documenting contacts, mandated time to transmit warnings, and even determining how long a trooper must wait for a driver to obtain a license, registration or insurance card. Mr. Crosby's counsel objected to Lt. Reap testifying as an expert on matters that he is not certified to do. The Hearing Officer merely recanted that he found Lt.

Reap credible and this was sufficient. He adopted his testimony even though in several areas his testimony was shown to be false, as noted in Section IB, supra. This error prejudiced Mr. Crosby's rights and critically led to an erroneous finding of misconduct. It must be reversed.

B. LETC Chair denied remand to hearing officer for review of spreadsheet of enforcement data which had been doctored by the Agency council.

At the first hearing, the Department submitted a spreadsheet from the Smart Cop program, in Exhibit 4, which contained only some of the columns and data in that spreadsheet. The full worksheet with 12 columns, included numbers for Mr. Crosby's tickets, 10-38s, DUIs, seatbelts, speeding, pedestrians, 10-46s, TR-330s, and fatalities. (ROA, p.21, p.580) The Department submitted a spreadsheet showing only two columns of data---only data which favored their case when viewed alone. This exclusion unfairly skewed the evidence in the Department's favor. Mr. Crosby's counsel sought a remand at the LETC hearing so that the hearing officer could re-review in light of that data which significantly impacted this case. The LETC denied the request. This decision compounds the many errors and irregularities which dramatically impacted Mr. Crosby's right to a fair and unbiased process. This should not be tolerated, especially when Mr. Crosby's career has been eviscerated by such actions.

C. Another unfair procedural irregularity arose when Lt. Reap and Lt. Thompson were allowed to remain in courtroom during Mr. Crosby's testimony, even though they were going to be recalled to rebut his testimony.

Lt. Reap and Lt. Thompson were both recalled to the stand after Mr. Crosby finished his testimony. (ROA, pp. 51-52) Although ordinarily the judge may have discretion to allow such witnesses to stay, *see State v. Simmons*, 384 S.C. 145 (2009), this decision fundamentally caused harm to the impartial adjudication of this matter under the circumstances of this case. The alleged misconduct critically rises or falls based on Mr. Crosby's intent to deceive his superiors. Accordingly, not only is the credibility of Mr. Crosby at issue, but those Lieutenants who allegedly

provided the exact nexus from Mr. Crosby's actions to that intent, must also establish their credibility. Allowing them to listen in provided the Lieutenants with the opportunity to adjust anything that they would say later. This decision led to further abuse of the process, an injustice to Mr. Crosby's rights, and prejudiced the case against Mr. Crosby. This demands reversal.

D. The LETC erred, acted arbitrarily and capriciously and abused its discretion, by failing to even consider any other discipline besides denial of law enforcement certification and termination regardless of the circumstances of this case.

"Pursuant to S.C. Code Ann. § 23-23-80(6), the [LETC] is authorized, inter alia, to 'provide for suspension, revocation, or restriction' of law enforcement certification in accordance with the regulations promulgated by the [LETC]." *Alexander Sanford, Appellant, ; v. ; South Carolina Criminal Justice Academy, Respondent*, Docket No.: 24-ALJ-30-0079-AP, 2024 SC ALJ LEXIS 267, *9-14, 2024 SC ALJ LEXIS 267 (ALC, October 2, 2024). Moreover, S.C. Code Ann. § 23-23-150(G)(1) states that the agency may issue the following actions after issuing a final decision finding officer misconduct: the person may be granted certification, be granted certification with probation, be granted certification with any additional requirements deemed just and proper by the council, or be granted certification with a public reprimand. Paragraph J further states: "In addition to other actions outlined in regulations promulgated by the Law Enforcement Training Council, willful submission of false, misleading, incomplete, deceitful, or incorrect statements to the Criminal Justice Academy, or its representatives, constitutes law enforcement certification misconduct and must be addressed as other allegations of misconduct are addressed by the council." Additionally, S.C. Code Regs. 37-025 establish that the LETC can consider the seriousness, the remoteness in time and any mitigating circumstances surrounding the act or omission constituting or alleged to constitute misconduct when considering decertification. Notably, South Carolina Administrative Law Courts have held that the LETC is not required to

consider mitigating or other circumstances under the regulations. *Alexander Sanford, Appellant, ; v. ; South Carolina Criminal Justice Academy, Respondent,* Docket No.: 24-ALJ-30-0079-AP, 2024 SC ALJ LEXIS 267, *9-14, 2024 SC ALJ LEXIS 267 (ALC, October 2, 2024); *Kristin Cosby, Appellant, ; vs. ; South Carolina Criminal Justice Academy, Respondent,* No. 19-ALJ-30-0389-AP, 2020 SC ALJ LEXIS 231, 2020 SC ALJ LEXIS 231 (ALC, May 6, 2020).

However, South Carolina courts "have held a flat refusal to exercise discretion—or to not realize one has such discretion—is in itself an abuse of discretion. *See Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly."); id ("[T]he mere recital of the discretionary decision is not [*526] sufficient to bring into operation a determination that discretion was exercised[; i]t should be stated on what basis the discretion was exercised."); *Richardson on Behalf of 15th Cir. Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry,* 430 S.C. 594, 601, 846 S.E.2d 14, 17 (Ct. App. 2020) ("A court that does not use discretion—or recognize it has discretion—when discretion exists commits an error of law.")." *City of Charleston Hous. Auth. v. Brown*, 437 S.C. 514, 525-526; 878 S.E.2d 913, 919 (2022) ("The circuit court erred in concluding the housing authority demonstrated it exercised discretion simply by being aware of the applicable regulations under 42 U.S.C.S. § 1437d(l)(6) when it chose to evict a tenant's family for her son's criminal actions because the record was silent as to the authority's exercise of discretion.).

The LETC operates with a blanket policy of always decertifying officers for alleged deceptive misconduct regardless of circumstances. Accordingly, the LETC never considers other

sanctions allowed under South Carolina codes and regulations. Thus, the exercise of this policy must be an abuse of discretion and arbitrary and capricious. The ALJ failed to even consider the LETC's refusal to exercise any discretion regarding sanctions for misconduct which was established by statute and regulations. This was clear error.

CONCLUSION

The ALJ below merely adopted the LETC's factual findings and analysis in toto. The ALJ failed to even address numerous legal and factual errors presented by the Appellant which more than justified reversal here. In fact, a review of the whole record establishes that the Department's case is riddled with errors, falsehoods and deceptive practices like unsupported presumptions, assumptions and conclusions, laity- presented expert testimony on traffic stops and computer software, and even preconceived notions of what a trooper should have known about how the Command Staff interprets the activity data. Critically, the evidence shows a trooper who had to prove his innocence from the beginning against a biased officer and investigator. Moreover, instead of harassing, and firing one trooper, over incorrect bookkeeping, the Department should have corrected a flawed system which generated imprecise data to judge trooper activity. The LETC did not even give Mr. Crosby a chance for reform and exercise any discretion in deciding on sanctions for the alleged misconduct (even if it was established). This decision not only lacked substantial evidence, it was arbitrary and capricious, and the abuse of process and procedures substantially affected Mr. Crosby's right to a fair and impartial process.

The Appellant, Mr. Anthony Crosby, respectfully requests, through his undersigned counsel, that this court reverse the LETC's decision to terminate Mr. Crosby's law enforcement certification and grant re-certification. At a minimum, the matter should be remanded for a new hearing based on the correct interpretation of the Public Contact law and without adoption of lay testimony as experts. Alternatively, even if the misconduct finding is upheld, Mr. Crosby requests

that this Court modify the LETC's punishment from termination to probation and suspension only, in light of the strong mitigating circumstances in this case.

May the court also issue any related order which is deemed just and proper.

Respectfully submitted,

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