STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Administrative Law Judge Robert L. Reibold

Appellant Case No. 2024-001562
Case No. 24-ALJ-30-0054-AP

George Brisbon, ...Appellant

v.

South Carolina Criminal Justice Academy, ...Respondent.

FINAL BRIEF OF RESPONDENT

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September 19, 2025

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STATEMENT OF THE CASE

On February 13, 2020, the South Carolina Criminal Justice Academy (Academy) received a PCS of Separation (PCS) form for George Anthony Brisbon (Appellant) from the Charleston City Police Department (Agency). The Agency alleged that Appellant committed law enforcement certification misconduct. (R. pp. 75-80) Appellant timely requested a contested case hearing which was held on February 28, 2023. (R. pp. 72-74; 81) The Hearing Officer's Findings and Recommendation, hearing transcript, and exhibits were sent to the parties on June 9, 2023. (R. pp. 47-71, 81-363, 364-472) Appellant filed a Motion in Opposition to the Findings and Recommendations on June 29, 2023. (R. pp. 499-500) On October 30, 2023, the Law Enforcement Training Council (LETC) met to discuss Appellant's case and vote on a Final Agency Decision. After considering the recommendation, hearing transcript, exhibits, and all comments, the LETC voted to find misconduct and permanently deny Appellant a law enforcement certification. (R. pp. 501-572) The Final Agency Decision (FAD) was signed January 29, 2024 (R. pp. 47-71), and a letter notifying the parties of the FAD was sent January 30, 2024. (R. pp. 582) Appellant filed a Notice of Appeal on February 29, 2024. (R. pp. 45-46) On July 16, 2024, the South Carolina Administrative Law Court issued its ruling. (R. pp. 11-21) On August 23, 2024, the South Carolina Administrative Law Court issued its order denying the petition for rehearing. (R. pp. 4-10) Appellant filed its Motion to Amend its Notice of Appeal on October 28, 2024.

STATEMENT OF FACTS

In 2019, the Charleston Police Department (Agency) initiated an internal affairs investigation on an officer for charging an administrative fee to fill off-duty employment assignments. The investigation revealed Appellant also charged administrative fees to fill off-duty

employment assignments. Capt. Anthony Cretella was instructed to open an investigation into Appellant. Cretella interviewed Appellant four times during his investigation. Appellant admitted to charging an administrative fee for off-duty assignments he was coordinating. Appellant reported he coordinated movie industry jobs, the ports, Baptist Hill Church, the Bennett House, and Daniel Island Tennis Center. (R. pp.105-107) The port job was a binding contract between Carnival Cruise lines and the City that was very different from other off-duty jobs. It specifically required Appellant to receive an administrative fee because of the amount of time it took to coordinate the officers and the amount of times the cruise ships came in. The other coordinating jobs were governed by the Department's off-duty job policy. (R. p. 108)

Departmental Policy set the minimum and maximum rates an officer would be paid for off-duty work. "No officer will work for any more or less than the established hourly rate. (R. p. 110, 395, and 438) For one movie industry job, Appellant emailed the movie industry representative, including some of the language from the off-duty policy, and then told the representative that since he was a captain, he would be paid more than the maximum hourly rate set by the policy. Appellant could not provide any other documentation from any other movie industry job he coordinated, despite being the coordinator. (R. pp. 111-115 and 399)

For several concert events, documents showed Appellant received payment for more hours than the hours of the off-duty jobs. Documents showed Appellant was paid for an additional nineteen hours on one event. Appellant attributed the additional hours to calling officers to work the job. Appellant also claimed to be doing this work during "administrative time" or "comp time." Department policy did not allow Appellant to charge for organizing work and did not grant Appellant "comp time." (R. pp. 115-146 and 399-403) Appellant charged one concert venue higher rates for all off-duty officers than what the policy allowed at that time. (R. pp. 167-168)

Appellant admitted to charging administrative fees. During his four interviews with Cretella, the Appellant never indicated that he believed he was allowed to charge administrative fees or negotiate his rates per the policy. He told Cretella that he charged administrative fees because Chief Mullen allowed him to charge administrative fees. The Agency reached out to Chief Mullen and Mullen denied giving Appellant permission to charge administrative fees other than in the Port contract. Mullen's email response was admitted without objection as State's Exhibit 11. (R. pp. 153-157) The email indicated that Chief Mullen never instructed or allowed Appellant to charge administrative fees for coordinating off-duty jobs. Appellant was paid for administrative tasks in the Port Authority job because it was written in the contract. (R. pp. 153-168 and 421-423) Appellant did not raise a specific objection to State's Exhibit 11 until Appellant's Initial Brief to this Court. (App. Initial Brf. P. 4)

Finally, Appellant coordinated the Thomas Bennett House off-duty job. Through his investigation, Cretella spoke with the manager of the Thomas Bennett House, Linda McCormick. McCormick told Cretella that when Appellant took over coordinating with the venue, Appellant approached her and told her that because of a memorandum of understanding, she would need to pay him an administrative fee to find officers to work at the venue's events. She then started paying him one hundred and fifty dollars a month to coordinate. Appellant told Cretella that he was supposed to get twenty-five dollars an event unless he worked the event himself. He also testified that he told McCormick she could use the free city system, but McCormick did not want to risk using an automated system. Meanwhile, McCormick provided documentation to prove she paid Appellant one hundred and fifty dollars every month as a coordinating fee whether he worked at an event or not. McCormick asked for the money to be returned, but Appellant refused telling

Cretella it was McCormick's mistake. (R. pp. 144-15,415-416, and 417-420) Cretella's testimony and State's Exhibits 9 and 10 were all admitted into evidence without objection.

During Appellant's contested case hearing, the Agency introduced State's Exhibit 12. Cretella stated the exhibit was an "affidavit" from Linda McCormick. McCormick reiterates in the statement that Appellant approached her and told her, based on the Agency's policy, she would be required to pay a coordinating fee to Appellant for getting officers for events. The exhibit also included the invoices that were admitted as State's Exhibit 9 and an additional email between herself and the Appellant. Cretella explained that the documents in State's Exhibit 12 were consistent information with what McCormick told Cretella in the investigation. (R. pp. 159-161) The Agency requested McCormick write the statement to memorialize what she told them verbally. Cretella could not say how McCormick created the document because he was not with her when she created it. He received the signed statement and accompanying documents through email. Cretella communicated with McCormick over the phone and through email. Cretella did not warn McCormick that she could be implicated in the department's investigation and did not ask her to attest to the veracity of her statement on the form. (R. pp. 182-186)

Appellant objected to State's Exhibit #12 based on authentication and hearsay. Based on the arguments by both parties, the hearing officer allowed both parties two weeks to submit motions on the admissibility of State's Exhibit #12. After reviewing the motions, the hearing officer ruled State's Exhibit #12 was admissible. He ruled the exhibit met the requirements for authentication and the exhibit was hearsay, but fell under the Public Records exception Rule 803(8), SCRE. The hearing officer explained his ruling in his Hearing Officer Findings and Recommendation which was sent to both parties June 9, 2023.(R. pp. 47-71) Appellant filed a Motion in Opposition to the hearing officer's Findings and Recommendation and briefly brought

up his objection to State's Exhibit #12 to the LETC on October 30, 2023. (R. pp. 484-489; 501-656) Appellant failed to raise any additional objections to other exhibits before the LETC. The LETC voted to adopt the Hearing Officer's Findings and issued a sanction of permanent denial of certification. (R. pp. 23-44) Following the Final Agency Decision, Appellant appealed to the Administrative Law Court. The sole issue on appeal was if the hearing officer erred by admitting State's Exhibit #12 into evidence. (R. p. 45-46) On July 16, 2024, the Administrative Law Court issued its order which held State's Exhibit #12 was properly authenticated but did not fall under the Public Records exception Rule 803(8), SCRE. However, the Court also ruled that the improper admission of the statement was not prejudicial to Appellant, as the statement was largely cumulative to other evidence in the record before the hearing officer. (R. pp. 11-21)

STANDARD OF REVIEW

The Law Enforcement Training Council (LETC) is the governing body of the South Carolina Criminal Justice Academy (Academy). S.C. Code Ann. § 23-23-20 (Supp. 2014). As the governing and adjudicative body of the Academy, an "agency" under the Administrative Procedures Act, the South Carolina Administrative Law Court (ALC) had jurisdiction to hear the appeal of a final decision of the LETC in a contested case. S.C. Code Ann. § 1-23-600 (D) (Supp. 2018) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Section 1-23-380 provides, in relevant part:

...The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
a) in violation of constitutional or statutory provisions;
b) in excess of the statutory authority of the agency;
c) made upon unlawful procedure;
d) affected by other error of law;
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); see also *Todd's Ice Cream, Inc. v. S.C. Employment Sec. Comm'n*, 315 S.E.2d 373, 375 (Ct. App. 1984).

The standard to be applied by the reviewing court is that of substantial evidence. A decision is supported by substantial evidence when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Pub. Serv. Comm'n of SC.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 5.C. 219, 226, 467 S.E.2d 913, 977 (1996). The evidence should not be "viewed blindly from one side of the case." *Myers v. S.C. Dept. of HHS*, 418 S.C. 608, 616, 795 S.E.2d 301, 305 (Ct. App. 2016).

When applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. *Rodney v. Michelin Tire Co.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996). Additionally, in applying the substantial evidence rule, when "determining whether the record contains substantial evidence to support an administrative agency's findings, [the appellate court] cannot substitute its judgment on the weight of the evidence for that of the agency." *Myers*, 418 S.C. at 615 – 616, 795 S.E.2d at 305. "[A] reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). In addition, the party challenging an agency action has the burden of proving convincingly that the

agency's decision is unsupported by substantial evidence. *Waters*, 321 S.C. at 226, 467 S.E.2d at 917.

Finally, Rule 61, SCRCivP states "no error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." The party challenging the agency action must "prove both the error of the ruling and the resulting prejudice." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 408, 764 S.E.2d 249, 251 (Ct. App. 2014) Where evidence is cumulative to other evidence in the record, there is no prejudice. *Creech v. South Carolina Wildlife Marine Res. Dept.*, 328 S.C. 24, 35, 491 S.E.2d 571, 576 (1997)

ARGUMENT

1. DID THE ADMINISTRATIVE LAW COURT ERR IN ITS ORDER DATED JULY 16, 2024.

Initially, Respondent would like to note it is unclear if Appellant intends to raise an issue with State Exhibit #11. While not listed as an Issue on Appeal, Appellant brings up State's Exhibit #11 in its Statement of Facts and asks that it be included in the Designation of the Record. State's Exhibit #11 is irrelevant to the issue of admissibility of State's Exhibit #12. Appellant states it objected to State's Exhibit #11 during the hearing; however, a review of the hearing transcript does not support this statement. (App. Initial Br. pp 1 and 4; R. pp. 81-363) Further Appellant did not specifically object to State's Exhibit #11 in its Motion in Opposition, during the LETC meeting, or in its appeal to the Administrative Law Court. (R. pp. 484-489;

501-565;473-483) If Appellant is raising an objection to State's Exhibit #11 with this Court, Respondent objects. This issue was not preserved for appeal. "It is well-settled that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

The sole issue before the Administrative Law Court was whether State's Exhibit #12 was properly admitted during Appellant's contested case hearing. Appellant objected to State's Exhibit #12 under authentication and hearsay grounds. (R. pp. 473-483)

State's Exhibit# 12 was properly authenticated. SCRE 901 requires evidence to be authenticated or identified before it is admissible. It will be admissible where there is sufficient evidence to support the finding that the evidence is what the party claims it is. "The authentication standard is not high, and a party need not rule out any possibility the evidence is not authentic. In the realm of authentication, the law, like science, is content with probabilities." *State v. Green*, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019). SCRE 901(b)(4) allows for authentication from the circumstances surrounding the document. The statement provides consistent information to what Cretella testified McCormick told him in prior conversations. The statement was accompanied by the accounting documents admitted without objection in State's Exhibit #9 which include unique facts very few would have access to except McCormick. It was also accompanied by an email from Brisbon to McCormick which also contained consistent information that was unique to McCormick and her situation.

Further, Cretella testified that he asked McCormick to make the statement and State's Exhibit #12 is what she sent him through email. Under the reply doctrine, once it is shown a document is a response to a specific communication it is authenticated without more. *State v.*

Green, 427 S.C. 223, 830 S.E.2d 711 (Ct.App. 2019); *Leesville Mfg. Co. v. Morgan Wood & Iron Works*, 75 S.C. 342, 55 S.E. 768 (1906).

Appellant cited *Williams v. Milling-Nelson Motors*, 209 S.C. 407, 40 S.E.2d 633 (S.C. 1946) to support the argument someone with personal knowledge of McCormick signing the statement must be present to authenticate State's Exhibit #12. In *Williams*, the defense wished to introduce a short, signed document to prove Mrs. Williams authorized the sale of their vehicle. The defendant testified a third party gave him the document and told him it was from Mrs. Williams. However, Mr. Williams testified the signature did not match his wife's signature. No other evidence was introduced to authenticate the document.

In this case, there are ample details and specifics "from which the jury can infer that it is authentic." *Id.* At 410. It is true that "a writing standing alone does not of itself constitute evidence." *Id.* At 409. While testimony from a witness with knowledge is one way to authenticate a document, it is not the only way. The specific details of the documents in State's Exhibit #12 as well as the other evidence admitted in the hearing properly authenticate the exhibit.

Next, while the ALC ruled State's Exhibit #12 was not properly admitted under the public records exception, Respondent argues it was properly admitted. The appropriate interpretation of Rule 803(8), SCRE in the current set of circumstances has not been addressed by the South Carolina Court of Appeals or the South Carolina Supreme Court. As such, Respondent maintains State's Exhibit #12 was appropriately admitted under Rule 803(8), SCRE.

State's Exhibit #12 includes three separate documents: Linda McCormick's signed statement, accounting records also admitted without objection as State's Exhibit #9, and an email conversation between McCormick and Appellant. Because the accounting records were admitted

without objection as State's Exhibit #9 any argument against them in State's Exhibit #12 is moot. The email conversation between McCormick and Appellant falls under an Admission by a Party Opponent under Rule 801(d)(2), SCRE and therefore is not hearsay. Therefore, it is only McCormick's signed statement which is in question.

"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." Rule 801(c), SCRE. Hearsay is not allowed unless it falls under a specific exception. Rule 803(8), SCRE allows hearsay when it is "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..." The Agency did have a duty to investigate and report misconduct. S.C. Code Ann. §23-23-150(B)(1)(2022) mandates the chief executive officer of the agency report to the academy "the occurrence of any act or multiple acts by a law enforcement officer, who is currently or was last employed by his agency, he reasonably believes to be misconduct." Cretella testified that he spoke with McCormick as part of the investigation into Appellant and he asked McCormick to make the statement as part of the investigation. (R. pp. 162-166) Also, State's Exhibit #12 does not involve opinions, judgements, or conclusions which would disqualify the documents. Therefore, it was properly admitted under the public records exception.

Finally, even if State's Exhibit #12 was not a Public Record the admission of the exhibit did not affect the substantial rights of Appellant.

Under S.C. Code Ann. §1-23-380 (2008), the Administrative Law Court may only reverse or modify an agency ruling where the Appellant's substantial rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

a) in violation of constitutional or statutory provisions;
b) in excess of the statutory authority of the agency;
c) made upon unlawful procedure;
d) affected by other error of law;
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.

Additionally, Rule 61, SCRCivP states "no error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." The party challenging the agency action must "prove both the error of the ruling and the resulting prejudice." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 408, 764 S.E.2d 249, 251 (Ct. App. 2014) Where evidence is cumulative to other evidence in the record, there is no prejudice. *Creech v. South Carolina Wildlife Marine Res. Dept.*, 328 S.C. 24, 35, 491 S.E.2d 571, 576 (1997)

Appellant's rights were not prejudiced in this case because the record demonstrates, and the Administrative Law Court correctly ruled, that the State's Exhibit #12 was largely cumulative to other evidence admitted either without objection or for which no appeal was taken. First, Appellant never objected to Cretella testifying to what McCormick told him. Cretella testified that McCormick told him that when Appellant took over coordinating with the venue, Appellant approached her and told her that because of a memorandum of understanding from his agency, she would need to pay him an administrative fee to find officers to work at the venue's events. She then started paying him one hundred and fifty dollars a month to coordinate. (R. pp. 145-149)

Second, State's Exhibit #9, entered without objection, shows McCormick's accounting records. The records show multiple Monthly Coordination Fees for one hundred and fifty dollars. (R. pp. 415-416) Third, State's Exhibit #10, also admitted into evidence, contains an email from Ms. McCormick dated October 8, 2019, to Sergeant Lee Mixon at the Charleston police department asking whether the Bennett House would still be required to pay the $150 monthly administrative fee. The same exhibit contains a second email from Ms. McCormick in which she asks Captain Cretella whether the fees that Appellant charged were unauthorized. Finally, State's Exhibit #14 is an investigative summary signed by Cretella where he states that before Appellant worked at that job location, the prior coordinating officer did not receive an administrative fee, and that Appellant received $150 a month to coordinate that off-duty job.

In addition, there is ample evidence in the record of other instances Appellant misrepresented employment information that would justify the LETC's Final Agency Decision. State's Exhibit #2 which was admitted without objection, shows Appellant misrepresented employment information. Appellant provided a portion of the Agency's policy and then stated it did not apply to him because he was a Captain. Appellant then stated he would charge them $47.50 an hour for his services. This was a direct violation of the policy which stated, "no officer will work for any more or less than the established hourly rate." (R. pp. 398 and 438) Where there may be some argument that the Agency policy does not expressly mention administrative fees, here he is telling the movie representative that he should get a rate for working the event that is higher than what the policy allows.

Finally, Appellant charged another concert venue at a higher rate than was authorized for all the officers working on the event. According to State's Exhibit #1, the off-duty rates were $25.00 per hour and $30.00 per hour for a supervisor. An event commander would be paid $35.00

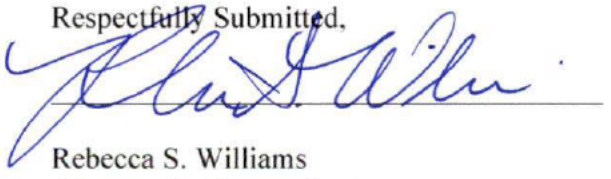
an hour. If the event occurred on a recognized city holiday each of these rates would increase by $5.00. (R. p. 396) This was the policy until October 1, 2018. In October 2018, the rates were all increased by $5.00. Regular officers were paid $30.00 an hour, supervisors were paid $35.00 an hour and event commanders were paid $40.00 an hour. This rate would increase by $5.00 on recognized city holidays. (R. p. 440) Cretella testified that the Hootie and the Blowfish concert was held in August of 2018. The off-duty rates were not increased until October of 2018. Appellant charged the venue for the October rates for all the off-duty officers. (R. pp. 404-405)

Even removing McCormick's signed statement from the record, there is substantial evidence the record allows reasonable minds to reach the same conclusion as the agency. This one piece of evidence did not prejudice Appellant's rights. The LETC's final agency decision should be upheld.

CONCLUSION

Based upon the evidence adduced at Appellant's hearing and for the reasons herein stated, Respondent asks this Court to affirm the Administrative Law Court's Final Order that affirmed LETC's final agency decision that Appellant should be permanently denied a law enforcement certification in the State of South Carolina. In the alternative, should this Court find error, Respondent would request that Appellant's case be remanded for a new contested case hearing to comply with this Court's Final Order.

Respectfully Submitted,



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