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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

ALC Case No. 24-ALJ-30-0425-AP

Omar Brown, Appellant,

v.

South Carolina Criminal Justice Academy, Respondent.

Appellate Case No. 2025-001354

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from a final decision by the South Carolina Criminal Justice Academy (Agency) permanently denying Omar Brown a law enforcement certification. (R. p. 3).

Omar Brown was accused of misconduct by the North Charleston Police Department (Department) and requested a contested case hearing. (R. p. 3). An initial hearing was conducted by a Hearing Officer with the Agency. (R. pp. 24 – 147). Mr. Brown represented himself and the Department was represented by Carlton Bourne. (R. p. 25). The Hearing Officer recommended that the Agency find that Mr. Brown engaged in misconduct. (R. pp. 14 – 22).

The South Carolina Law Enforcement Training Council (Council) met to determine whether to adopt the Hearing Officer's recommendation. The Council determined that the Department had proven by a preponderance of the evidence that Mr. Brown lied about being offered medical treatment following an arrest he made of a suspect, and that he impermissibly used a chokehold on the suspect. The Council voted in favor of permanently denying Mr. Brown a law enforcement certification in South Carolina. (R. pp. 8 – 11).

Mr. Brown appealed the decision to the ALC (Administrative Law Court). Undersigned Counsel represented Mr. Brown on his appeal to the ALC and Rebecca Williams represented the Agency. The ALC affirmed the Agency's decision and denied Mr. Brown's motion for rehearing.

STANDARD OF REVIEW

Section 1-23-610 (B) of the South Carolina Code provides the standard of review in appeals from the Administrative Law Court:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (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.

See also S.C. Dep't of Corr. v. Mitchell, 377 S.C. 256, 258, 659 S.E.2d 233, 234 (Ct. App. 2008) (noting that section 1-23-610 "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").

STATEMENT OF FACTS

Mr. Brown first became a police officer after attending the Criminal Justice Academy in the 1990s and has worked as a police officer ever since. He began working as a police officer for the North Charleston Police Department beginning in 2022. (R. p. 205, ll. 1 – 7).

On August 8, 2023, Mr. Brown was on patrol with another officer named Michael Sanchez. (R. p. 40, ll. 2 – 16). Mr. Brown and Sanchez responded to a call about a mother (suspect) attempting to kidnap her daughter from the child's grandmother who had custody of the child. Sanchez recalled that there was an ongoing custody dispute that involved DSS placing the child with the grandmother. (R. p. 40, l. 12 – p. 41, l. 1). The suspect had a long history of mental health issues and neglecting her child. (R. p. 41, ll. 1 – 4). Sanchez testified: "[E]very time she'd get out of jail or the hospital, she would end up coming back to the house to try to take the child." (R. p. 41, ll. 3 – 8).

Mr. Brown arrived on scene first, located the child and moved her to safety, and separated the suspect and the grandmother. (R. p. 6; State's Ex. 1B, 0:00 – 2:00). When Sanchez arrived, he spoke to the suspect while Mr. Brown spoke with the grandmother. (R. p. 6; State's Ex.s 1A & 1B). The suspect was visibly upset while describing her dispute with the grandmother. (State's Ex. 1A, 0:00 – 3:30). The grandmother was sitting on her front porch and explained the custody dispute from her perspective to Mr. Brown. (State's Ex. 1B, 2:00 – 3:30).

Mr. Brown and Sanchez both told the suspect that the custody dispute would need to be resolved in family court. (State's Ex. 1A, 3:30 – 4:30; State's Ex. 1B, 5:00 – 5:45). At grandmother's request, Mr. Brown retrieved the suspect's belongings from the house and attempted to hand them to the suspect. (State's Ex. 1A, 4:45; State's Ex. 1B, 3:30 – 3:40 & 6:10 – 6:25). The suspect walked past both Mr. Brown and Sanchez and tried to enter the porch where the

grandmother was seated. Mr. Brown grabbed the suspect's arm to stop her from assaulting the grandmother. (State's Ex. 1A, 4:45 – 4:55; State's Ex. 1B, 6:25 – 6:32).

Sanchez testified that he and Mr. Brown both thought the suspect was going to assault the grandmother because she was "charging very aggressively up the stairs" onto the porch where the grandmother was seated. (R. p. 41, l. 19 – p. 42, l. 10). The suspect turned around and pushed Mr. Brown in the chest, causing him to stagger backwards several feet. (State's Ex. 1A, 4:45 – 4:55; State's Ex. 1B, 6:32 – 6:34). Sanchez attempted to grab the suspect's arms and get them behind her, but she spun free and threw Mr. Brown against the wall of the house. (State's Ex. 1A, 4:55 – 5:03; State's Ex. 1B, 6:34 – 6:42).

Mr. Brown and Sanchez wrestled the suspect to the ground to get her under control. Mr. Brown placed his hand on the back of the suspect's neck to bring her to the ground so that he and Sanchez could get her handcuffed. (State's Ex. 1B, 6:42 – 7:15). Sanchez testified that Mr. Brown grabbed the suspect by the head and tried to shove her to the ground while Sanchez tried to "secure her." (R. p. 43, ll. 1 – 18). Sanchez said that Mr. Brown was holding the suspect's head and pinning it "to essentially the dirt" as Sanchez tried to get the suspect handcuffed. (R. p. 43, ll. 19 – 25). Sanchez testified that "when [he] was about to handcuff [the suspect] for the first time, [Mr. Brown] reached up for the throat, neck area at that point in time." (R. p. 44, ll. 13 – 18). Sanchez did not say that Mr. Brown used a chokehold on the suspect.

Once the suspect was successfully handcuffed, Sanchez and Mr. Brown both pulled her to her feet. Mr. Brown pulled the suspect up by her wrists while Sanchez simultaneously pulled the suspect by her arms. (State's Ex. 1A, 5:03 – 5:55; State's Ex. 1B, 7:15 – 7:32). Sanchez then placed the suspect into the back of his patrol car where she continued to be irate. (State's Ex. 1A, 5:55 – 6:35). Mr. Brown safely returned the child to her grandmother. (State's Ex. 1B, 8:30 – 9:00).

After the arrest, Sanchez reported the incident to his supervisor, Diego Lizarazo. Lizarazo initially told Sanchez he "thought that there was really nothing arising out of [the] incident," but Sanchez insisted that Lizarazo "should look at the video and make a separate assessment." (R. p. 45, ll. 2 – 22). Sanchez testified that he heard Lizarazo ask Mr. Brown if he needed to go see a doctor because of the incident and that he heard Mr. Brown tell him no. (R. p. 47, ll. 3 – 16). However, Lizarazo later testified that Sanchez was not present when he offered Mr. Brown medical treatment. (R. p. 71, l. 1 – p. 72, l. 20). On cross examination, Sanchez admitted that he filled out a victim sheet naming himself as the victim of an assault by the suspect even though the suspect had not assaulted him. (R. p. 53, l. 17 – p. 55, l. 11). Sanchez also admitted that EMS was never called for the suspect even though she claimed she had been choked. (R. p. 59, l. 4 – 60, l. 11).

Lizarazo testified that he received a call on August 8, 2023, that Mr. Brown and Sanchez were in a fight with a suspect but were okay. (R. p. 67, l. 22 – p. 68, l. 25). Sanchez told Lizarazo that he "might want to look at that video," and Lizarazo went and spoke with Mr. Brown about the arrest. (R. p. 69, ll. 1 – 11). According to Lizarazo, Mr. Brown showed Lizarazo a scratch on his hand but said that he was fine. (R. p. 69, l. 12 – p. 70, l. 8). Lizarazo testified that Mr. Brown made a comment that he thought the suspect had bitten him on his leg. (R. p. 70, ll. 13 – 24). Lizarazo said that he asked Mr. Brown if he needed EMS or medical attention and Mr. Brown said no. (R. p. 70, l. 25 – 71, l. 18). Even though the Department's policy requires a personal injury report to be filed on the same day that an officer is injured, Lizarazo admitted that he did not fill out this form until the following day. (R. 89, l. 15 – p. 90, l. 3).

Lizarazo said that later that night he received a call from his supervisor stating that Mr. Brown had called Lizarazo's supervisor and said that he was in the hospital bleeding profusely from his leg and was severely injured. (R. p. 73, l. 15 – p. 74, l. 6). Lizarazo told his supervisor

that he offered Mr. Brown medical treatment and Mr. Brown declined. Lizarazo claimed that his supervisor told him that Mr. Brown said Lizarazo did not offer medical treatment. (R. p. 74, ll. 7 – 23). Lizarazo told his supervisor that he would have a "sit-down" with Mr. Brown because Mr. Brown was lying about Lizarazo. (R. p. 75, ll. 3 – 16).

The following day, Lizarazo and his supervisor spoke with Mr. Brown and Mr. Brown told them that he had been bitten on his leg and hand during the altercation. Lizarazo claimed that the marks on Mr. Brown's body did not appear to be bite marks. (R. p. 76, ll. 4 – 14). Lizarazo told Mr. Brown to go see their city doctor. (R. p. 76, l. 15 – p. 77, l. 18). After Mr. Brown went to the doctor, Lizarazo said he tried to get in touch with Mr. Brown. Lizarazo said he tried contacting Mr. Brown, but that it wasn't until the second or third call that Mr. Brown answered. According to Lizarazo, Mr. Brown said he was still at the doctor. (R. p. 81, l. 2 – p. 82, l. 20).

Lizarazo said that after he spoke with Mr. Brown, Mr. Brown texted him saying that Lizarazo was being rude and disrespectful. Lizarazo claimed that he tried to contact Mr. Brown multiple times after that but that Mr. Brown was not reachable. (R. p. 82, l. 21 – p. 83, l. 6). Lizarazo said he called the city doctor who indicated that Mr. Brown had been checked out of their office at noon. (R. p. 83, ll. 6 – 10). Lizarazo said that he later found out that the doctor had prescribed Mr. Brown medicine and Mr. Brown had gone to the Publix just across the Ashley River from North Charleston to pick up the medicine. (R. p. 83, l. 11 – p. 84, l. 24).

Lizarazo admitted that he allowed his officers to cross the river on a regular basis and that it was common practice. (R. p. 91, l. 19 – p. 92, l. 14). Lizarazo continued to deny having spoken to Mr. Brown multiple times the day after the incident even though Mr. Brown introduced phone records showing that they had spoken multiple times. (R. p. 95, l. 7 – 96, l. 14; R. pp. 182 – 183.

Lizarazo also admitted that his supervisor had authorized Mr. Brown to go home that day after he was treated by the doctor. (R. p. 105, ll. 1 – 18).

Jeremy Ledford was the Sergeant who conducted the internal investigation of the arrest. (R. p. 107, l. 18 – 108, l. 11). Ledford reviewed the body-camera videos, and interviewed Mr. Brown, Sanchez, and Lizarazo. (R. p. 109, ll. 3 – 14). Ledford testified that he believed that Mr. Brown placed his hands around the suspect's throat. (R. p. 109, l. 14 – p. 110, l. 19). Ledford also testified that when he interviewed Mr. Brown, Mr. Brown denied being offered medical treatment for his injuries by Lizarazo. (R. p. 115, l. 5 – p. 116, l. 8).

Mr. Brown told Ledford that he never used a chokehold on the suspect but that his hands moved towards the suspect's upper chest area when he was attempting to get his hands behind the suspect to force her to the ground. (R. p. 116, l. 14 – 117, l. 10). This is consistent with what is seen on the body camera videos which shows Mr. Brown with his hand on the back of the suspect's neck holding her still so that he and Sanchez could get the suspect in handcuffs. (State's Ex. 1A, 5:10 – 5:30; State's Ex. 1B, 6:35 – 7:10). Additionally, Ledford admitted that Mr. Brown was treated by the city doctor for two bites to his body and that it would be safe to say that he was being treated for bites because he was actually bitten. (R. p. 125, l. 16 – p. 127, l. 4).

The Department fired Mr. Brown, citing the events of the arrest and subsequent investigation as the reasons. (R. pp. 148 – 158). This was surprising because Lizarazo's supervisor, Lieutenant Joseph Sherwood, indicated that after his review of the video he believed that "it does look like Officer Brown grabs the suspect by the neck but not in a choking manor but in more of a head clinch to pull her down." (R. p. 185). The separation letter also falsely accused Mr. Brown of using a racial slur towards the suspect, a claim that is clearly refuted by the body camera videos. (R. p. 152; State's Ex. 1A, 4:50 – 5:05; State's Ex. 1B, 6:30 – 6:45).

ARGUMENT

1.

The ALC erred in finding that Mr. Brown's due process rights were not violated by the Department's refusal to provide him with the evidence it intended to use against him prior to his contested case hearing.

Relevant Facts

Agency Hearing

During the contested case hearing, the Department sought to introduce the video-recorded interview of Mr. Brown. (R. p. 111, ll. 16 – 24). Mr. Brown objected because the Department had never turned over the video to him prior to the hearing even though he had requested it multiple times. (R. p. 111, l. 25 – 112, l. 15). Counsel for the Department responded that because the interview was of Mr. Brown, there would be "no surprise" to Mr. Brown because he was present for his own interview. (R. p. 113, ll. 8 – 15). The Hearing Officer allowed the video to be introduced. (R. p. 114, ll. 3 – 7; State's Ex. 1C).

After the Department rested its case, Mr. Brown asked the Hearing Officer to be provided with the recorded interviews of Sanchez and Lizarazo that were conducted during the internal investigation. (R. p. 131, ll. 5 – 22). Counsel for the Department responded that Mr. Brown had cross examined Sanchez and Lizarazo thoroughly and that he was "not inclined to go out and get those previous statements and admit them." Counsel said that "nothing would prohibit cross examination of those witnesses, or even calling them during his case in chief if [Mr. Brown would] like to elicit something else from them." (R. p. 131, l. 23 – p. 132, l. 5).

The Hearing Officer asked Mr. Brown if he was okay with recalling Sanchez or Lizarazo to ask them about their previous interviews. Mr. Brown told the Hearing Officer: "I have never

seen the interviews. So, I cannot challenge anything they've said in the interviews." (R. p. 132, ll. 6 – 12). The Hearing Officer then asked Counsel for the Department if these recorded interviews even existed, and Counsel confirmed that both "statements and recorded interviews" of Sanchez and Lizarazo existed. (R. p. 132, ll. 13 – 20).

The Hearing Officer said she would allow Mr. Brown to call Sanchez or Lizarazo back to the witness stand but that she was "not going to compel them to, you know, bring that video forth, just because we're already at this proceeding." (R. p. 134, ll. 4 – 12). Mr. Brown did not call them back to the stand because, as he had already pointed out, without having seen the videos or statements, he was unable to ask them questions about what they had said in their prior interviews.

After the Hearing Officer submitted her recommendation, Mr. Brown filed an affidavit in opposition to her findings and recommendations. (R. p. 187). Mr. Brown specifically referenced the Department's failure to turn over the videos and written documents in relation to his case to him after he requested them multiple times. (R. pp. 187 – 188). Mr. Brown also argued at his hearing before the Council that the Department had failed to turn over the videos of Sanchez and Lizarazo's interviews to him. (R. p. 209, ll. 2 – 12).

Appeal to the ALC

In his notice of appeal to the ALC, Mr. Brown noted that the Department had failed to turn over discovery that he requested from them which was vital to his defense and a fair hearing. (R. p. 12). Mr. Brown argued to the ALC that his due process rights were violated because he was denied a fair opportunity to challenge the evidence against him by the Department's failure to turn over the evidence it intended to use against him at his contested case hearing. (R. pp. 255 – 259).

In its final order affirming the Agency decision, the ALC construed Mr. Brown's due process argument as suggesting that he was entitled to a higher level of due process than that

required in criminal cases. The ALC pointed to Rule 5(a)(2) of the Rules of Criminal Procedure in stating that "[p]rior statements made by prosecution witnesses are typically withheld until *after* the witness has testified on direct examination and even then are supplied only when a defendant moves the court for production." (R. p. 296). The ALC concluded:

> Given that the South Carolina Rules of Criminal Procedure require less disclosure in criminal cases than [Mr. Brown] contends was due in this administrative proceeding, the Court concludes that the South Carolina Supreme Court's statement in [*Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990)] that due process requires disclosure of the evidence used to prove the State's case means that the State must give a license holder *notice* of the evidence which it intends to use rather than to supply the license holder with physical copies of all evidence it possesses.

(R. p. 296) (internal footnote omitted).

In Mr. Brown's motion for rehearing, undersigned submitted to the ALC that its comparison between criminal and civil discovery rules was misplaced. (R. pp. 305 – 307). Not only was the ALC's statement about what "typically" occurs in criminal cases incorrect, the ALC also used this comparison to narrowly, and incorrectly, construe our Supreme Court's decision in *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 391 S.E.2d 866 (1990). The *Brown* Court was clear that "the evidence used to prove the State's case [in an administrative proceeding] *must* be disclosed to the individual so that he or she has an opportunity to show it is untrue." *Brown*, 301 S.C. at 329, 391 S.E.2d at 867 (emphasis added).

In its order denying Mr. Brown's motion for rehearing, the ALC acknowledged its erroneous statement regarding the standard discovery practices in criminal cases but that its "error, however, does not alter the outcome of the case." (R. p. 321). Mr. Brown did not rely on any criminal procedure cases to support his due process argument in his brief to the ALC. Nor did the Agency press the argument that the ALC adopted in its ruling. Instead, the ALC raised the

comparison between administrative and criminal cases on its own. Nevertheless, in its order denying Mr. Brown's motion for rehearing, the ALC continued to insist that Mr. Brown was attempting to "impose criminal procedural requirements in a civil administrative proceeding." *Id*.

The ALC went on to find that "[t]he Constitutions of the United States and of South Carolina require certain due process protections in criminal proceedings which are not required in civil proceedings" and that "[t]o accept [Mr. Brown's] argument would be to ignore the distinction between criminal cases and the civil administrative proceeding underlying this appeal." (R. p. 322).

The ALC also concluded that Mr. Brown failed to request the evidence that the Department had against him and that Mr. Brown's "failure to use the discovery tools provided by statute and regulation [were] fatal to his due process claims." (R. p. 297). In Mr. Brown's motion for rehearing, undersigned pointed out that Mr. Brown did request the evidence against him in an earlier proceeding with the Department, but that the Department refused to comply with his requests.[1] (R. p. 306 – 307). In its order denying Mr. Brown's motion for rehearing, the ALC "acknowledge[d] that the record indicates [Mr. Brown] requested certain documents from the police department in the course of collateral proceedings other than the license revocation proceeding currently on review, [but that] these requests [were] insufficient." (R. p. 323) (internal footnote omitted).

[1] In relation to Mr. Brown's firing, he had a separate administrative hearing with the South Carolina Department of Employment and Workforce which took place before Mr. Brown's hearing with the Criminal Justice Academy. In that case, Mr. Brown served the Department with FOIA requests and subpoenas which the Department refused to comply with. (R. p. 112, ll. 2 – 21).

Legal Framework

Mr. Brown's due process rights were violated because he was denied a fair opportunity to challenge the evidence against him by the Department's failure to turn over any of the evidence it intended to use against him at his contested case hearing.

The citizens of South Carolina are increasingly faced with "the leviathan known as administrative agency rule-making—the so-called Fourth Branch of government." *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 455-56, 790 S.E.2d 763, 773 (2016) (Kittredge, J., concurring). This Court has previously taken note of "the creeping rise of the administrative state, noting agency decisions often are more significant than laws enacted by the General Assembly or decisions made by the courts." *John M. McIntyre & Silver Oak Land Mgmt., LLC v. Sec. Comm'r of S.C.*, 425 S.C. 439, 446, 823 S.E.2d 193, 196 (Ct. App. 2018) (internal quotations omitted). Accordingly, the West Committee[2] determined that "that judicial and quasi-judicial decisions of administrative agencies should be consistent with due process of law and complete fairness to the citizen." *Id*.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." *Robert K. v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Article I, section 22 of the South Carolina Constitution specifically provides the right of due process in administrative proceedings: "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard."

[2] As this Court is aware, the West Committee was a committee appointed by the General Assembly in 1966 to propose changes to our State Constitution.

S.C. Const. art. I, § 22. This section of our Constitution further provides the right against a deprivation of liberty or property "unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review." *Id*.

"The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Robert K.*, 376 S.C. at 171, 656 S.E.2d at 350. The Supreme Court of the United States has noted that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (noting that in determining what process is due, courts should consider "the private interest that will be affected," "the risk of an erroneous deprivation of such interest," and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

"Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990). "Procedural due process often requires confrontation and cross-examination of one whose word deprives a person of his or her livelihood." *Id*. "Moreover, the evidence used to prove the State's case must be disclosed to the individual so that he or she has an opportunity to show it is untrue." *Id*.

"Procedural due process insists upon fair play." *John M. McIntyre & Silver Oak Land Mgmt., LLC v. Sec. Comm'r of S.C.*, 425 S.C. 439, 449, 823 S.E.2d 193, 198 (Ct. App. 2018). "The

right to cross examine witnesses in quasi-judicial or adjudicatory proceedings is a right of fundamental importance which, in regard to serious matters, exists even in the absence of express statutory provision, as a requirement of due process of law or the right to a hearing, and no one may be deprived of such right even in an area in which the Constitution would permit it if there is no explicit authorization therefor." *Spartanburg v. Parris*, 251 S.C. 187, 191, 161 S.E.2d 228, 229 (1968) (quoting 2 Am. Jur. 234, Administrative Law, Sec. 424).

"The right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause." *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990). "The liberty interest at stake is the individual's freedom to practice his or her chosen profession; the property interest is the specific employment." *Id*. "When the State seeks to revoke or deny a professional license, these interests are implicated, and procedural due process requirements must be met." *Id*.

Discussion

In this case, Mr. Brown unquestionably had a right to due process before his law enforcement certification could be permanently revoked. *See* S.C. Const. art. I, § 22 (providing a constitutional right to due process in administrative proceedings generally); *Brown*, 301 S.C. at 329, 391 S.E.2d at 867 (providing for a constitutional right to due process specifically in administrative hearings affecting an individual's ability to hold a specific type of employment).

Respectfully, the ALC's ruling is based in significant part on its erroneous and unwarranted comparison between criminal and civil procedure. The ALC's conclusion that the US Constitution and South Carolina Constitutions "require certain due process protections in criminal proceedings which are not required in civil proceedings" is especially odd since the South Carolina Constitution

explicitly provides due process rights to litigants in administrative proceedings. S.C. Const. art. I, § 22. Furthermore, our appellate courts and the Supreme Court of the United States have repeatedly recognized the right to due process in administrative proceedings, including the right to be provided with the evidence the State intends to use against a person. *See, e.g.*, *Brown*, 301 S.C. at 329, 391 S.E.2d at 867 (requiring the State to disclose evidence before an administrative hearing to revoke a teacher's license); *Garris v. Governing Bd. of the State Reinsurance Facility*, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998) ("We have recognized that Section 22 is an additional guarantee of important due process rights, enacted in 1970 as legislators and judges noticed the increasing prevalence and influence of administrative agencies in daily life"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (finding that "[t]he essential requirements of due process" include the right to have an explanation of the evidence that will be used against an employee to justify his firing). Because the ALC's conclusion was controlled by its misplaced comparison of criminal and civil due process rights,[3] this Court should reverse. *See* S.C. Code § 1-23-610 (B)(d).

The ALC's determination that Mr. Brown failed to utilize the discovery tools available to him is also erroneous. Mr. Brown informed the Hearing Officer that he had requested the written statements and video-recorded interviews of Sanchez and Lizarazo prior to the hearing and the Department refused to turn them over. When the Hearing Officer asked Mr. Brown if he requested that information "any time before this proceeding," Mr. Brown responded "[y]es ma'am." (R. p. 132, l. 22 – p. 133, l. 2). Mr. Brown explained: "[M]y original request, which this has gone over

[3] It should also not be lost on this Court that civil litigants are in fact—perplexingly—entitled to more discovery rights than criminal defendants. For instance, requests to admit, interrogatories, and depositions are all allowed in civil and administrative cases while they are prohibited in criminal cases. *Compare* Rules 26-37, SCRCP and S.C. Code Regs. 37-104 *with* Rule 5, SCRCrim.P; *see also State v. Miller*, 289 S.C. 316, 317, 345 S.E.2d 489, 490 (1986) ("There is no right to discovery in a criminal case unless permitted by statute or court rule").

some months. There was a City hearing, and that – it was denied for that hearing. There was a video of the City hearing, and that was denied." Mr. Brown informed the Hearing Officer that the Department had engaged in "a process of denial." (R. p. 133, l. 18 – 134, l. 3).

The ALC determined that because Mr. Brown requested the evidence against him in an earlier proceeding, that his requests were insufficient. However, Mr. Brown's requests were made to, and refused by, the same Department—the North Charleston Police Department. Any additional request in this case by Mr. Brown for the same information the Department had already refused to provide him with would have been futile. Despite Mr. Brown having requested copies of the written statements and video-recorded interviews of Sanchez and Lizarazo, the Department failed to disclose any of the evidence it would use against Mr. Brown prior to his hearing taking place. While the Department introduced Mr. Brown's recorded interview, it withheld the interviews of Sanchez and Lizarazo.

The credibility of Sanchez and Lizarazo were critical in this case, especially in regards to the allegation that Mr. Brown lied about being offered medical treatment. On that allegation, this case was purely their word against Mr. Brown's. As a result, a complete picture of Sanchez's and Lizarazo's credibility was essential. But Mr. Brown could not adequately cross examine Sanchez and Lizarazo without having been given their previously recorded interviews and written statements that were conducted as part of the internal investigation. The Department's refusal to provide Mr. Brown with this evidence substantially prejudiced his ability to effectively mount a defense and resulted in a fundamental denial of his right to due process.

In *Brown v. S.C. State Bd. of Educ.*, the South Carolina Supreme Court reversed the Board of Education's decision to invalidate a teacher's teaching certificate. 301 S.C. 326, 327, 391 S.E.2d 866, 866 (1990). The teacher's certification was revoked based on her test scores on a licensing

exam having been canceled. *Id*. at 328, 391 S.E.2d at 867. The Supreme Court found that the teacher's due process rights were violated because the Board did not disclose the evidence substantiating their claim that the teacher's exam scores had been canceled. *Id*. at 329, 391 S.E.2d at 868. As was the case in *Brown v. S.C. State Bd. of Educ.*, in this case, Mr. Brown's due process rights were violated by the failure of the Department to disclose the evidence against him prior to the hearing.

In *Spartanburg v. Parris*, our Supreme Court considered whether an officer who was fired had his due process rights violated where an affidavit against him was used at a hearing instead of live testimony which would have permitted him to cross examine the affiant. 251 S.C. 187, 189-90, 161 S.E.2d 228, 228-29 (1968). The Court noted that due process rights in such a situation "include a reasonable opportunity to cross examine the important witnesses against a party when their credibility is challenged." *Id*. at 190, 161 S.E.2d at 229. The Court found that because the most substantial allegations against the officer came from the non-testifying affiant, the denial of the officer's right to cross examine the witness required that the case be remanded for a new hearing. *Id*. at 191, 161 S.E.2d at 230.

Additionally, in *Kelsey v. S.C. Dep't of Prob.*, this Court reversed a parole denial and remanded for a new hearing because the inmate was not given his file prior to the hearing so that he could adequately present his case. 441 S.C. 373, 378, 893 S.E.2d 588, 591 (Ct. App. 2023). And although this Court's decision in *Kelsey* was based primarily on the specific regulation regarding parole hearings, this Court noted that some states require the disclosure of an inmate's file prior to their parole hearing moving forward on the grounds that it is necessary to preserve the inmate's right to due process. *Id*. at 378, 893 S.E.2d at 591.

Although Mr. Brown had a hearing and was allowed to cross examine Sanchez and Lizarazo, his right to cross examination was hollow in light of the Department's refusal to disclose what Sanchez and Lizarazo had previously said during the internal investigation. As Mr. Brown pointed out to the Hearing Officer: "I have never seen the interviews. So, I cannot challenge anything they've said in the interviews." (R. p. 132, ll. 6 – 12). The Hearing Officer's offer to allow Mr. Brown to ask them about their prior interviews was meaningless when Mr. Brown had never seen the interviews and had nothing to base any cross examination questions on.

The decision of the ALC was controlled by an error of law, and Mr. Brown's administrative hearing was made upon an unconstitutional and unlawful procedure in violation of his due process rights. As such, this Court should reverse the Agency decision and remand this case for a new hearing after the Department discloses the written statements and recorded interviews of Sanchez and Lizarazo. *See* S.C. Code § 1-23-610 (B)(a), (c), & (d).

2.

The ALC erred in finding that that Hearing Officer properly excluded evidence of Sanchez's prior inconsistent statement where Sanchez denied making the statement and his credibility was central to the case.

Relevant Facts

During the contested case hearing before the Hearing Officer, Sanchez was asked whether he had ever lied under oath or if he had ever deceived a judge in a sworn affidavit in order to get a warrant. Sanchez denied having done either. (R. p. 61, ll. 21 – 25). Sanchez admitted that there was a lawsuit pending against him in federal court where those allegations were made against him, but Sanchez maintained that those allegations were not true. (R. p. 62, ll. 1 – 15).

Mr. Brown sought to introduce evidence of Sanchez's prior inconsistent statement which was made in federal court where Sanchez had admitted to making false statements in affidavits. (R. p. 62, l. 21 – p. 63, l. 16). Counsel for the Department objected because the lawsuit was still pending. (R. p. 63, ll. 18 – 21). Mr. Brown reiterated that Sanchez had admitted to filling out a false affidavit which was inconsistent with what Sanchez had just testified to. Mr. Brown pointed out that this evidence significantly undermined Sanchez's credibility as a witness. (R. p. 63, l. 24 – p. 64, l. 14). The Hearing Officer refused to allow Mr. Brown to admit the evidence but said that Mr. Brown could question Sanchez about it. (R. p. 64, ll. 15 – 17).

After the Hearing Officer issued her recommendations, Officer Brown filed his affidavit in opposition. Mr. Brown specifically objected on the grounds that he was not permitted to introduce evidence of Sanchez's prior inconsistent statements where he admitted in federal court that he had lied in an affidavit that he submitted to a judge in order to obtain a warrant. (R. p. 188).

In his notice of appeal to the ALC, Mr. Brown noted that the Hearing Officer had erroneously excluded favorable evidence that he offered at his contested case hearing. (R. p. 12). The ALC affirmed the Hearing Officer's exclusion of Sanchez's prior inconsistent statement on the grounds that Mr. Brown made no offer of proof under Rule 103 of the South Carolina Rules of Evidence, and that the exclusion was harmless because it would have been cumulative to other evidence introduced at trial regarding Sanchez's credibility. (R. pp. 299 – 302).

Discussion

The South Carolina Rules of Evidence provide that "[a]ll relevant evidence is admissible." Rule 402, SCRE; *State v. Jenkins*, 436 S.C. 362, 391, 872 S.E.2d 620, 635 (2022). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *State v. Pipkin*, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (quoting *U.S. v. Abel*, 469 U.S. 45, 52 (1984)).

Rule 608(c) of the South Carolina Rules of Evidence provides that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." This Rule makes clear that "anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony." *State v. Sims*, 348 S.C. 16, 25-26, 558 S.E.2d 518, 523 (2002) (quoting *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001)). "A trial court may not exclude evidence of bias because the court believes the witness is not biased,

nor evidence of credibility because it thinks the witness has not been untruthful." *Whitfield v. Schimpf*, 444 S.C. 633, 652, 911 S.E.2d 310, 320 (2025).

In its final order affirming the Hearing Officer's exclusion of Sanchez's prior inconsistent statement, the ALC determined that this issue was governed by Rule 608(b), of the South Carolina Rules of Evidence which prohibits the introduction of extrinsic evidence to prove a specific instance of prior untruthfulness. (R. p. 301). However, this issue is more properly viewed under Rule 613(b) which allows for the admission of extrinsic evidence of a prior inconsistent statement when the witness has been "advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement." If the witness denies making the statement or does not admit to making the statement, the extrinsic evidence of the statement is admissible. Rule 613(b), SCRE.

The Record in this case supports a finding that Mr. Brown was seeking to introduce evidence of a prior inconsistent statement. In this case, Mr. Brown directly mentioned the federal lawsuit currently pending against Sanchez and confronted Sanchez about statements he made in conjunction with that case. (R. p. 62, l. 21 – p. 63, l. 16). It was clear that Mr. Brown was asking Sanchez about claims he made regarding obtaining a search warrant in connection with a federal lawsuit against him and Sanchez's answers indicate that he knew precisely what Mr. Brown was referring to. Thus, the substance of the evidence was apparent from the context which constituted a sufficient offer of proof. *See* Rule 103, SCRE ("[e]rror may not be predicated" upon the exclusion of evidence unless "the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer *or were apparent from the context*") (emphasis added). Sanchez was sufficiently advised of the prior inconsistent statement and was given a fair opportunity to admit, explain, or deny making it. *See State v. Bixby*, 388 S.C. 528, 551, 698 S.E.2d

572, 584 (2010) (finding the trial court did not err in allowing extrinsic evidence of a prior inconsistent statement where the series of questions asked of the witness identified the substance of the statement and the time, place, and to whom it was made).

Finally, the exclusion of Sanchez's prior inconsistent statement was prejudicial to Mr. Brown because witness credibility was the most important aspect of this case; especially on the question of whether Mr. Brown lied about being offered medical treatment. The body camera videos corroborated Mr. Brown's statement that he never used a chokehold of any kind on the suspect. While Mr. Brown's body camera video shows his hands moving towards the suspect's neck, it never shows Mr. Brown use a chokehold against the suspect. Instead, it shows Mr. Brown holding his hand on the back of the suspect's neck to restrain her while he and Sanchez got the suspect into handcuffs. Just as Lizarazo's supervisor noted: "it does look like Officer Brown grabs the suspect by the neck but not in a choking manor but in more of a head clinch to pull her down." (R. p. 185). The body camera videos also refute the false allegation made against Mr. Brown that he used a racial slur in referring to the suspect. (R. pp. 152 – 153; State's Ex. 1A, 4:50 – 5:50; State's Ex. 1B, 6:30 – 6:45).

Without proving that Mr. Brown used a chokehold against the suspect, the Department was required to show he engaged in some other kind of misconduct to justify firing him. What the Department relied on was the claim that Lizarazo had offered Mr. Brown medical treatment which Mr. Brown denied. Because this allegation was purely Mr. Brown's word against Sanchez's and Lizarazo's, it was essential that all evidence tending to diminish their credibility be allowed into evidence. Mr. Brown could not adequately attack Sanchez's credibility without being permitted to introduce his prior inconsistent statement. During his cross examination, Sanchez denied having made a false statement in an affidavit to a judge in an effort to obtain a warrant. In response, Mr.

Brown sought to introduce evidence that Sanchez had admitted to doing exactly that in federal court filings. The Hearing Officer's refusal to accept that evidence and consider it in evaluating Sanchez's credibility was error and prejudiced Mr. Brown's ability to adequately impugn Sanchez's veracity. The Hearing Officer erred in refusing to allow the introduction of Sanchez's prior inconsistent statement and the ALC erred in affirming this ruling. This Court should reverse and remand for a new hearing.

CONCLUSION

By reason of the foregoing arguments, this Court should reverse the final decision by the Agency and the ALC's affirmance of that decision and remand this case for a new administrative hearing.

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