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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Appeal From Administrative Law Court

The Honorable Robert L. Riebold, Administrative Law Judge

Appellant Case No.: 2026-001360

Joshua A. Vargo,

Appellant,

v.

South Carolina Criminal Justice Academy

Respondent,

REPLY BRIEF OF APPELLANT

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ARGUMENT

Respondent's Brief confirms the central flaw in the decision below. Respondent does not identify a witness who testified that Appellant Vargo willfully lied during the 2013 application process, does not identify a preserved recording or transcript of what Appellant Vargo said in the background interview or polygraph process, and does not identify any Council finding that weighs the undisputed mitigation before imposing a lifetime bar. Instead, Respondent repeats the word "deference" and asks this Court to treat the existence of inaccurate answers as conclusive proof of willful deception. That is not substantial-evidence review; it is an abdication of review.

I. Respondent's substantial-evidence argument rests on deference, not evidence of willfulness.

Respondent begins from a correct general premise: agency fact findings receive deference, and a reviewing court does not reweigh the evidence. Respondent quotes S.C. Code Ann. § 1-23-380 for the rule that the Court may not substitute its judgment for that of the agency as to the weight of the evidence, but may reverse where the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary, capricious, or an abuse of discretion. Respondent then applies that standard as though it forecloses review whenever an agency announces a conclusion. It does not.

The statute requires evidence that is reliable, probative, and substantial on the whole record. Appellant's Initial Brief quoted S.C. Code Ann. § 1-23-380 for the grounds permitting reversal when findings are in excess of statutory authority, affected by error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or arbitrary, capricious, or an abuse of discretion. Appellant also cited *Bentley v. Spartanburg County*, *Waters v. South Carolina Land Resources Conservation Commission*, and *Tennis v. South Carolina Department of Social Services* for the principle that substantial evidence is more than a

scintilla, cannot be viewed blindly from one side of the case, and must allow reasonable minds to reach the agency's conclusion on the whole record. Respondent never meaningfully confronts that whole-record requirement.

Respondent's theory is straightforward: Vargo used Adderall in college, later answered "no" on DPS paperwork or during the DPS process, and the Council could therefore infer willfulness. Respondent argues that the subsection (k) finding was supported because Vargo denied controlled-substance use and denied using someone else's prescription drug mere months after using Adderall, and that the repeated falsehoods and their temporal proximity made willfulness a reasonable inference. But the statute does not authorize discipline merely because an answer later proved inaccurate. As Appellant's Initial Brief explained, S.C. Code Ann. § 23-23-150(A)(3)(i) and § 23-23-150(A)(3)(k) require that a person "willfully" make or provide false information.

That distinction is dispositive. Appellant's Initial Brief cited South Carolina authority defining willfulness as requiring a consciousness of wrongdoing—a voluntary and intentional act, a deliberate or formed intention, and the specific intent to do something the law forbids or to fail to do something the law requires. Respondent's Brief does not answer that legal standard. It does not identify a deliberate, conscious intent to deceive; it points to the same disputed paperwork and asks this Court to infer intent from inaccuracy.

The record cuts the other way. The Administrative Law Court recognized Vargo's innocent explanation as "plausible," found "no direct evidence of willfulness," and stated that, had it been the trier of fact, it may have reached a different result. Respondent treats those concessions as irrelevant because the Council selected the adverse inference. But where the required element is subjective willfulness, and the agency's inference rests on missing witnesses, unpreserved records,

ambiguous forms, and an explanation the tribunal itself found plausible, the record supplies no substantial evidence of the required mental state.

Respondent also attempts to lower the burden by recasting Vargo's explanation as a mere credibility dispute, asserting that the Council considered his explanations and found them incredible in light of other circumstances. But credibility deference presupposes a witness whose testimony was heard and assessed by the fact-finder. Here, the most important percipient witness to the alleged oral falsehood, J.C. Rikard, did not testify, and his whereabouts were unknown to the Department. The polygraph administrator did not testify, and no audio or transcript exists; the Department did not preserve the polygraph audio or transcript, did not call the polygraph administrator, and did not interview or call Rikard. Deference cannot supply the missing evidence.

II. The subsection (i) finding cannot stand because no percipient witness testified to any false oral statement.

Respondent contends that the subsection (i) misconduct occurred during Vargo's background interview with DPS employee J.C. Rikard, relying on Captain Boehm, Exhibits 4 and 6, and Vargo's own testimony. That contention proves Appellant's point. Rikard—the person who allegedly asked the question and recorded the answer—did not testify. Captain Boehm was not the interviewer. The polygraph administrator did not testify. The Council thus found a willful oral falsehood without testimony from any witness who heard a willfully false oral statement.

Respondent claims the facts are "not subject to argument" because Exhibit 6 recorded "maybe childhood from mother" and later recorded "no" to a separate question. Respondent asserts that Rikard asked Vargo whether he had used prescribed medication not prescribed to him, recorded "Maybe childhood from mother," and later recorded "no" to whether Vargo had used an illegal drug or substance not mentioned earlier, and that these facts are not subject to argument. But the meaning of that notation is very much subject to argument. As Appellant's Initial Brief

noted, the only artifact of the Rikard interview is a form Rikard completed, bearing the marginal note “maybe childhood from mother,” with neither “yes” nor “no” checked. The unchecked box undermines Respondent’s certainty about what Vargo said. The note is Rikard’s note, not Vargo’s sworn statement—and Rikard is unavailable to explain it.

Nor can Respondent cure the problem through Boehm’s investigative summary. Respondent’s own statement of facts says only that Captain Boehm compared the 2024 SLED questionnaire with Vargo’s 2013 DPS materials, including a controlled-substance answer, a home-interview entry, and an October 2013 questionnaire answer. Boehm could compare documents; he could not supply first-hand evidence of Vargo’s intent in 2013, and he admitted that he never explored whether Vargo understood Adderall to be a “controlled substance.”

Respondent’s brief also mischaracterizes Vargo’s testimony. Respondent acknowledges that Vargo testified he did not lie or falsify information on the 2013 online application and that he recalled telling the home interviewer he had taken prescription medication that did not belong to him. That testimony directly contradicts Respondent’s suggestion that Vargo concealed everything from Rikard. To prove otherwise, the State needed Rikard, a recording, a transcript, or some reliable account of the actual exchange. It presented none.

The subsection (i) finding therefore rests on inference stacked upon inference: Rikard’s unexplained note is treated as a complete and accurate account of Vargo’s words; that account is then treated as proof of falsity; and falsity is then treated as proof of willfulness. Substantial evidence requires more.

III. The subsection (k) finding collapses inaccuracy into willfulness and ignores the ambiguity Respondent created.

Respondent’s subsection (k) argument shares the same defect. Respondent emphasizes that the term “controlled substance” appeared in only one questionnaire and that the polygraph

questionnaire separately asked whether Vargo had ever used someone else's prescription drug. That response misses two points.

First, the ambiguity is not confined to the phrase "controlled substance." The 2013 online application asked whether Vargo had "ever used and/or experimented with any controlled substance within the last 10 years (excluding marijuana)," to which he answered "No," while the 2013 polygraph questionnaire asked whether he had "ever used someone else's prescription drug." The DPS "Illegal Drugs and Narcotics" list asked whether Vargo had used any of a set of listed drugs and included terms such as "Speed" and "Amphetamine," but did not list Adderall by name; by contrast, the 2024 SLED form specifically listed "Adderall/Ritalin," and Vargo disclosed his use—marking the 2012–2013 timeframe and "a few" uses—when the form named that category. The record thus shows inconsistent terminology across forms and a direct disclosure once Adderall was identified by name.

Second, the issue remains willfulness. Respondent's argument that Vargo—a college graduate, firefighter, and certified individual—should have grasped that Adderall was covered may support a theory of negligence or carelessness. But the statutory element is not what Respondent thinks Vargo should have understood; it is whether the Department proved that he willfully provided false information. The Hearing Officer found it "plausible" that Vargo did not know what a controlled substance was, and the Administrative Law Court stated that, had it been the finder of fact, it may have accepted Vargo's argument.

Respondent's repeated use of the word "lied" does not change the evidentiary record. Respondent says the sanction was supported because "an applicant for a law enforcement position lied, several times, to his future employer during the application process." That is the conclusion under review, not evidence supporting it. The documents show inaccurate answers, ambiguous

terminology, no preserved polygraph audio, no transcript, no testimony from Rikard, and no testimony from the polygraph administrator—followed by a direct disclosure to SLED when the form specifically identified Adderall.

Respondent's inference also ignores conduct inconsistent with concealment. As Appellant's Initial Brief argued, Vargo disclosed to Rikard that he had used another person's prescription medication and later volunteered the same information to SLED—conduct irreconcilable with a deliberate scheme of concealment. Respondent's only answer is that the Council disbelieved him. But the Council disbelieved Vargo without hearing from Rikard, without a transcript, and without a recording. That is not reliable, probative, and substantial evidence of willfulness.

IV. Respondent's preservation and abandonment arguments misstate the record and Appellant's arguments.

Respondent repeatedly argues that Appellant abandoned or failed to preserve his arguments. Respondent contends that Appellant's challenge to the questionnaires should not receive substantive consideration because it is conclusory and unsupported by legal authority, that the delay and laches arguments were unsupported and unpreserved, and that the pre-certification-conduct argument was conclusory, unsupported, and unpreserved. Each contention should be rejected.

Appellant's questionnaire argument is not a freestanding objection to the "use of forms." It is part of the substantial-evidence challenge to willfulness. Appellant does not contend that DPS may never use employment forms; he contends that these particular forms—with their inconsistent terminology and their missing explanatory witnesses—do not constitute substantial evidence of willful deception. As the Appellants Initial Brief explained, the online application used the phrase "controlled substance," the Hearing Officer found Vargo's misunderstanding plausible, the

investigator never tested that understanding, and the Administrative Law Court acknowledged that it may have accepted Vargo's argument as finder of fact. Appellant argued that relying on forms with imprecise and confusing language—including one completed not by Vargo but by an interviewer who never testified—was an abuse of discretion. That argument was anchored in the substantial-evidence standard and the willfulness authorities cited in Appellant's Initial Brief.

The statutory-authority argument is likewise preserved and substantive. Appellant does not raise a merely hypothetical constitutional objection; he argues that the Council exceeded its statutory authority by permanently denying certification based on private, pre-certification conduct. The Initial Brief established that the conduct occurred in 2012–2013, before Vargo was hired, trained, or certified, and that no allegation concerned his oath of office, his training, or his decade of service. And it explained that S.C. Code Ann. § 23-23-80 authorizes the Council to certify and train candidates and to provide for the suspension, revocation, or restriction of certification. Respondent's preservation label does not answer that statutory question.

Respondent also misframes Appellant's sanction argument as a claim that the Council was legally required in every case to consider mitigation. Respondent says that Regulation 37-025(B) makes consideration of seriousness, remoteness, and mitigating circumstances discretionary, so that a failure to consider them is not unlawful. Appellant's point is narrower and stronger: once the Council imposed the harshest available sanction after a remand requiring specific findings, its failure to make any findings on undisputed mitigation deprived the reviewing court of a reasoned basis to determine whether the sanction was arbitrary, capricious, or an abuse of discretion. As the Initial Brief noted, the Council reworded its decision after remand without reconvening, without new evidence, and without any finding addressing the mitigating circumstances Vargo placed before it.

V. The delay defense was preserved, applies in administrative review, and is supported by record prejudice.

Respondent's delay argument has three parts: that Appellant failed to preserve laches, that laches is unavailable in this review, and that Appellant suffered no prejudice. Each fails.

First, the issue was preserved. As the initial brief established, counsel argued the ten-year delay in closing at the contested-case hearing; Vargo's Motion in Opposition pointed to the absent interviewer, the missing 2013 records, and the passage of time; and the Hearing Officer engaged the point, acknowledging that it was understandable that someone would not remember the details of multiple interviews from ten years earlier. Respondent answers that Vargo never specifically cited or raised laches before this appeal. But preservation turns on whether the issue was raised to and ruled upon by the tribunal, not on whether counsel used a particular label at the earliest possible moment. The substance was squarely raised: a decade-long delay, missing witnesses, missing records, and resulting prejudice.

Second, Respondent's contention that laches is categorically unavailable conflicts with the authorities Appellant cited. The Appellant's initial brief cited *Richey v. Dickinson* for the application of laches to a stale administrative claim where delay caused the loss of agency files and the unavailability of witnesses, and cited *Emery v. Smith* and *Muir v. C.R. Bard, Inc.* for the elements of delay, unreasonable delay, and resulting material prejudice. Respondent's reliance on the Administrative Procedures Act does not eliminate the equitable problem; it underscores the need for review where delay produced an arbitrary or legally erroneous administrative result.

Third, the prejudice is concrete. Respondent argues that Vargo has not shown prejudice from the missing records or tapes and that he could have called J.C. Rikard himself. That argument attempts to shift the State's evidentiary failure onto the accused officer. The Department brought a misconduct case more than a decade after the hiring process, relying on a background-interview

note prepared by Rikard and on a polygraph process for which no audio or transcript exists. The Department did not preserve the polygraph audio or transcript, did not call the polygraph administrator, and did not interview or call Rikard, whose whereabouts were unknown to the Department. Vargo cannot cross-examine a witness the State cannot locate, cannot test a destroyed recording, and cannot reconstruct a decade-old interview from an unexplained notation written by someone else.

Respondent responds that the delay was caused by Vargo's own concealment and was therefore reasonable. That assumes the very willfulness Respondent failed to prove. As Appellant's Initial Brief explained, unclean hands requires willful wrongdoing—not mere negligence, ignorance, or inappropriateness—and where the evidence is susceptible of competing inferences the defense cannot be resolved against the party as a matter of law. Respondent cannot use an unproven finding of willful concealment to defeat the very defense that the State's delay destroyed the evidence needed to contest willfulness.

VI. The Council imposed the maximum penalty without reasoned findings on overwhelming mitigation.

Respondent argues that the statutory scheme broadly permits the Council to deny or revoke certification and to address suitability issues whenever they arise, invoking statutory purpose language concerning public safety, training standards, and professional law enforcement, and arguing that suitability issues may not become apparent for years. Appellant does not dispute the importance of honesty or public safety. The question is whether this Council, on this record, lawfully imposed a lifetime statewide bar for pre-certification, pre-employment conduct without substantial evidence of willfulness and without reasoned sanction findings.

Respondent asserts that the statutes and regulations “clearly” authorize discipline for pre-application and application conduct—that S.C. Code Ann. § 23-23-60 and 23-23-150 and

Regulation 37-025 codify acts during and before an application that can support denial of certification, and that S.C. Code Ann. § 23-23-80(6) and Regulation 37-108 authorize permanent revocation. But Respondent never addresses the limiting principle. The conduct here was not an on-duty violation, not a training violation, and not conduct during certified service. As Appellant's Initial Brief emphasized, the conduct occurred when Vargo was a private citizen, before he was hired, attended the Academy, or held any certification, and no allegation concerned his oath of office, his training, or any act during his decade of service. On Respondent's view, any pre-certification ambiguity in an employment application could be converted years later into a permanent professional ban, regardless of subsequent service and regardless of whether the Council explains the sanction.

That explanation is missing here. Respondent acknowledges that the Council had a range of sanction choices—permanent denial or revocation, time-limited denial or revocation, probation, additional requirements, or public reprimand. Yet Respondent says the inquiry ends because mitigation is discretionary and because the Council found dishonesty, reasoning that consideration of seriousness, remoteness, and mitigation under Regulation 37-025(B) is discretionary and that the permanent sanction was supported because Vargo lied several times during the application process. That response cannot be squared with meaningful abuse-of-discretion review.

The record contained powerful mitigation. Vargo was a ten-year veteran of the South Carolina Highway Patrol who was named Trooper of the Year for his post five of those ten years. He earned canine and post awards, received recognition from MADD, was subject to random drug and alcohol screening, and never tested positive or had any drug-related issue. Appellant's Initial Brief identified mitigation that included no oath violation, no drug-policy violation, no training violation, conduct more than ten years old, private-applicant status at the time, disclosure to the

Department that he had used another person's prescription, direct disclosure to SLED when asked about Adderall, DPS's failure to ask specifically about Adderall, and a record of exemplary service. The Council imposed the maximum sanction without any findings explaining why those facts did not matter.

Respondent says review remains possible even without mitigation findings, asserting that the sanction is subject to review regardless of whether the Council made findings concerning mitigation. But review of what? A reviewing court cannot evaluate whether the Council exercised reasoned judgment if the Council never said whether it considered remoteness, exemplary service, the absence of on-duty misconduct, the later direct disclosure, or any lesser sanction. As the Initial Brief argued, the Council's silence prevents review of whether it exercised reasoned judgment or instead applied a reflexive, unwritten rule that every dishonesty allegation yields permanent denial.

The sanction issue is especially acute because the Administrative Law Court had already remanded for specific findings. On the first appeal, the court remanded for the Council to issue specific findings of fact and conclusions of law, and the Council then reissued its decision without reconvening a hearing, calling the missing witnesses, or developing new evidence. A remand for reasoned findings cannot be satisfied by repeating the conclusion while omitting the very mitigation that bears on whether the harshest sanction is rational.

Respondent's final position is that honesty matters, that six of the statute's categories of misconduct concern honesty, and that repeated dishonesty supports the highest penalty. Appellant agrees that honesty matters. That is precisely why the required finding of willfulness matters. A permanent, career-ending sanction cannot rest on equivocal forms, absent witnesses, unpreserved records, and an unexplained refusal to address mitigation.

CONCLUSION:

Respondent's Brief does not cure the evidentiary and legal defects in the decision below. The Council found willful misconduct without direct evidence of willfulness, without testimony from the critical interviewer, and without preserved polygraph evidence, despite acknowledged and plausible innocent explanations. It then imposed the harshest available sanction for decade-old, pre-certification conduct without reasoned findings on undisputed mitigation.

For these reasons, Appellant Joshua A. Vargo respectfully requests that this Court reverse the finding of misconduct and the permanent denial of certification. In the alternative, Appellant requests reversal or remand with instructions that the Council make specific findings on mitigation, address the prejudice caused by the decade-long delay, and reconsider any sanction under a reasoned and reviewable standard.

Respectfully submitted,



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