South Carolina Criminal Justice Academy

January 3, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Cassandra Donaldson, Respondent v. South Carolina Criminal Justice Academy, Appellant,
Case No. 2013-002612

Dear Ms. Kitchings:

Enclosed for filing is a clean copy of the order challenged on appeal pursuant to your instructions in the letter dated December 30, 2012.

January 3, 2014

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Cassandra Donaldson, Appellant, v. South Carolina Criminal Justice Academy, Respondent.	)	Docket No. 12-ALJ-30-0087-AP **FINAL ORDER**

This matter is before the Administrative Law Court (ALC or court) on a Notice of Appeal filed by the Appellant, Cassandra Donaldson, seeking review of the decision of the South Carolina Criminal Justice Academy (Respondent) that the Appellant was no longer eligible for certification as a law enforcement officer in South Carolina. Based upon the Record on Appeal and the parties' briefs as well as the applicable law, the decision is reversed and remanded.

BACKGROUND[1]

The Appellant was employed as a law enforcement officer with the Barnwell County Sheriff's Office and was assigned as a school resource officer for Williston-Elko School District 29. As part of her duties, she was responsible for providing security for home football games. Over a four-year period, the Appellant was paid approximately Two-Thousand Dollars ($2,000) by the school district for the same work for which she applied and received compensatory time from the Sheriff's Office. On September 27, 2010, the Sheriff's Office terminated the Appellant's employment on the basis that the Appellant received compensation from the school district for the same hours she submitted to claim compensatory time with the Sheriff's Office.

On October 22, 2010, the Orangeburg County Sheriff's Office requested a finding regarding whether the Appellant was eligible to be certified as a law enforcement officer and, thus, eligible for employment with the Sheriff's Office. On November 2, 2010, the Director of

[1] The Council's Order summarized the facts and specifically included four brief Findings of Fact as a basis for the Council's decision. Generally, an appeal will be remanded where the finder of fact failed to make sufficient findings of fact required by S.C. Code Ann. § 1-23-350. See, e.g., Able Commc'n., Inc. v. S.C. Pub. Serv. Comm'n, 290 S.C. 409, 351 S.E.2d 151 (1986); Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991). Here, while there are some facts the parties do not agree upon, the material facts are undisputed and are sufficient for this court to review the Council's decision under the appellate standard of review.

the Criminal Justice Academy issued a letter notifying the Appellant that she would not be reinstated due to allegations of misconduct by the Barnwell County Sheriff's Office that had been determined to be founded. The letter also informed the Appellant that if she wished to appeal, she could file a request for a contested case hearing at the ALC. The Appellant timely requested a contested case hearing.

By letter dated December 8, 2010, the General Counsel for the Criminal Justice Academy informed the Appellant that the Law Enforcement Training Council had voted to reinstate the agency level contested case hearing. The parties thereafter submitted to the ALC a Joint Motion to Remand. On February 24, 2011, the case was remanded for an agency level contested case hearing. The hearing officer conducted the contested case hearing on May 31, 2011, and on June 1, 2011, issued a recommendation that the Council affirm the decision to revoke the Appellant's certification as a law enforcement officer. On January 31, 2012, the Council issued an Order of Denial, finding the Appellant is not eligible to be certified as a law enforcement officer in South Carolina. The Appellant timely appealed this decision to the ALC.

STANDARD OF REVIEW

The South Carolina Criminal Justice Academy is governed by the Law Enforcement Training Council. S.C. Code Ann. § 23-23-20 (Supp. 2011); see also About CJA, http://www.sccja.sc.gov/1About/council/default.aspx (last visited Oct. 25, 2013). The Council has the power to "certify and train qualified candidates and applicants for law enforcement officers and provide for suspension, revocation, or restriction of the certification, in accordance with regulations promulgated by the council." S.C. Code Ann. § 23-23-80(6) (Supp. 2011). Therefore, a hearing officer conducts the contested case hearing regarding the decision to suspend, revoke, or restrict law enforcement certification; the hearing officer makes a recommendation to the Council; the Council issues a decision; and the ALC reviews the Council's decision in an appellate capacity. (See S.C. Criminal Justice Academy v. Lee, Docket No. 10-ALJ-30-0401-AP (Dec. 16, 2010) for an analysis of which entity is responsible for conducting the contested case hearing in these matters.) The ALC has jurisdiction to hear appeals of the Council's decisions pursuant to § 1-23-600(D), which provides that the APA's standard of review as set forth in § 1-23-380 governs these appeals. See S.C. Code Ann. § 1-23-600(D) (Supp. 2011). That section provides:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
>
> (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) (Supp. 2011).

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 S.C., 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 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, "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)).

DISCUSSION

In this appeal, the Council denied the Appellant's certification as a law enforcement officer based on evidence that she engaged in misconduct through dishonesty and untruthfulness with respect to her employer. The Council cited S.C. Code Ann. Regs. 38-004, which provides:

> A. The Department may deny certification based on evidence satisfactory to the Department that the candidate has engaged in misconduct. For purposes of this section, misconduct means:
>
> 1. Conviction, plea of guilty, plea of no contest or admission of guilt (regardless of withheld adjudication) to a felony, a crime punishable by a sentence of more than one year (regardless of the sentence actually

imposed, if any), or a crime of moral turpitude in this or any other jurisdiction;
2. Unlawful use of a controlled substance;
3. The repeated use of excessive force in dealing with the public and/or prisoners;
4. Dangerous and/or unsafe practices involving firearms, weapons, and/or vehicles which indicate either a willful or wanton disregard for the safety of persons or property;
5. Physical or psychological abuses of members of the public and/or prisoners;
6. Misrepresentation of employment-related information;
7. Dishonesty with respect to his/her employer;
8. Untruthfulness with respect to his/her employer.

B. In considering whether to deny certification based on misconduct, the Department may consider the seriousness, the remoteness in time and any mitigating circumstances surrounding the act or omission constituting or alleged to constitute misconduct.

S.C. Code Ann. Regs. 38-004 (2011). The Council found that the Appellant was dishonest and untruthful with her employer by submitting compensatory time requests when she had already received payment from the school district for that work. According to the Council, this practice of "double dipping" constituted a blatant act of dishonesty. Based on this finding of misconduct, the Council denied the Appellant's certification as a law enforcement officer.

The Appellant makes several arguments in this appeal but it is appropriate to first address the Appellant's request to reopen the record. The Appellant seeks to present evidence of examples of individuals who she asserts committed much more egregious misconduct in other professions and occupations but were allowed to keep their certifications and continue in their chosen professions. After due consideration of the Appellant's request, the court finds that the information referenced by the Appellant regarding disciplinary action of attorneys by the South Carolina Supreme Court and disciplinary action of other professionals by the Department of Labor, Licensing, and Regulation is not relevant to the grant, denial, or withdrawal of certification of law enforcement officers by the Council. The Appellant is not proposing to introduce evidence of other law enforcement officers who engaged in the same or similar conduct that the Appellant has admitted to engaging in here. Rather, the Appellant seeks to introduce information about disciplinary actions taken by other governing bodies in this state that may have disciplined non-law enforcement officer members of those bodies for various violations of those governing bodies' laws or regulations. These dissimilar cases are not relevant

to the actions taken by the Council in this case against the Appellant, a law enforcement officer, and therefore, the Appellant's request to reopen the record is denied.

The Appellant also submitted with her brief a compact disc containing videotaped footage of a county sheriff allegedly accused of striking a handcuffed prisoner. The Respondent argues that the videotape, created after the Appellant's contested case hearing, was never provided to the Council for consideration and, therefore, is not properly before this court pursuant to Rule 36(B), SCALC and Rule 210(c), SCACR. S.C. Code Ann. § 1-23-380(3) provides a method for presenting evidence that did not exist at the time of the contested case hearing. Upon a timely application to this court, and upon demonstrating the materiality of the additional evidence and that there was good cause for failure to present the evidence in the original proceedings, the court can order an agency to re-open its hearing and consider the additional evidence. The Appellant did not do this, and instead attached the videotape as an exhibit to her brief. Because the evidence was not considered by the Council, this court cannot consider the appended video tapes. Brown v. Peoplease Corp., 402 S.C. 476, 741 S.E.2d 761 (Ct. App. 2013). Additionally, the court fails to see the materiality of the videotapes to the issue on appeal. The conduct portrayed in the videotape is entirely different from the offense the Appellant admits to having committed, and nothing in the videotape purports to relate to another law enforcement officer practicing "double dipping" or similar act. Therefore, the court is unable to find any justification for remanding this case to the Council for consideration of the videotape.

Turning to the merits of the Appellant's appeal, the Appellant argues that the regulation permitting the Council to deny certification exceeds the authority of the Council because the statute, § 23-23-80, only authorizes the suspension, revocation, or restriction of certification, not the denial of certification. Upon review of the regulation and the statute at issue, this court finds as a threshold matter that it was improper for the Council to refer to S.C. Code Ann. Regs. 38-004 (2011) in deciding whether to certify the Appellant as a law enforcement officer. As this court noted in several decisions issued in December 2010, the regulations contained in Chapter 38, Article 1, Subarticle 1, entitled "Law Enforcement Training" have not been amended since May 2003. See S.C. Criminal Justice Academy v. Lee, Docket No. 10-ALJ-30-0401-AP (Dec. 16, 2010). In fact, the regulation referenced by the Council in this matter still indicates the Department (of Public Safety) is the entity who may deny certification based on evidence of the

types of misconduct listed in that regulation. The Council's reference to this regulation is troublesome given that the regulation was promulgated by the Department of Public Safety in 2003 when § 23-6-450(f) provided that the Director of the Department of Public Safety was authorized to "certify and train qualified candidates and applicants for law enforcement officers and provide for suspension, revocation, or restriction of the certification, in accordance with regulations promulgated by the department." Although the Law Enforcement Training Advisory Council (hereinafter referred to as Advisory Council) existed at that time, its composition and role were markedly different from the Law Enforcement Training Council that exists today.

In 2006, Act No. 317 created the current eleven-member Council. In comparison to the Advisory Council that existed previously, the new composition eliminated four seats: Dean or Chairman of the USC School of Law or the College of Criminal Justice; person in administration of a municipality or holding municipal elective office; person in administration of a county government or elected to a county governing body; and Special Agent in Charge of the FBI, Columbia Division. Compare S.C. Code Ann. § 23-6-420(A) (Supp. 2005) with S.C. Code Ann. § 23-23-30(A) (Supp. 2006). The Act also transferred all functions, duties, responsibilities, accounts, and authority statutorily exercised by the Criminal Justice Academy Division from the Department of Public Safety to the Law Enforcement Training Council. S.C. Code Ann. § 23-23-10(D) (Supp. 2006). Significantly, the authority to "certify and train qualified candidates and applicants for law enforcement officers" was transferred from the Director of the Department of Public Safety to the Director of the Criminal Justice Academy in 2006 and subsequently to the current Council in 2008. 2008 S.C. Acts 335; compare S.C. Code Ann. § 23-6-450(f) (Supp. 2005) with S.C. Code Ann. § 23-23-80(6) (Supp. 2006) and S.C. Code Ann. § 23-23-80(6) (Supp. 2008).

While much of the language in the statutes remained the same, the General Assembly removed the statutes from Title 23, Chapter 6—the chapter allocated for the Department of Public Safety's statutes—and added them to Title 23, Chapter 23, entitled "Law Enforcement Training Council." The actions of the General Assembly established a significantly different structure than the one that previously existed. The new structure separated the Council and the Criminal Justice Academy from the Department of Public Safety. While the Council continued to include a seat for the Director of the Department of Public Safety, the Council no longer was a part of the Department of Public Safety and instead became a separate entity. Moreover, prior to

2006, the statute provided that the Director of the Department of Public Safety served as the chairman of the Council. After Act 317, the statute provided for the Council to elect one of its members as chairperson. S.C. Code Ann. § 23-23-30(C) (Supp. 2006). Rather than the Criminal Justice Academy being a division of the Department of Public Safety, it became a separate entity from the Department with its own director hired by and responsible to the Council. In addition, where the Advisory Council previously made recommendations to the Director of the Department of Public Safety, the Council acquired much of the Department's oversight and decision-making authority. See, e.g., S.C. Code Ann. § 23-23-10 ("minimum standards set by the council"); S.C. Code Ann. § 23-23-50 ("council shall develop guidelines").

Significant to this appeal, the responsibility for promulgating regulations changed from the Department of Public Safety to the Law Enforcement Training Council. Compare S.C. Code Ann. § 23-6-450(f) (Supp. 2005) with S.C. Code Ann. § 23-23-80(6) (Supp. 2006). Not only was the Council responsible for promulgating regulations after its creation in 2006, the Council also should have been conducting a formal review of its regulations every five years and submitting a report to the Code Commissioner identifying whether any regulations needed to be amended or repealed. S.C. Code Ann. § 1-23-120(J) (Supp. 2012). The Council has not done this.

As noted above, in 2006, all functions, duties, responsibilities, accounts, and authority statutorily exercised by the Criminal Justice Academy Division of the Department of Public Safety transferred to the Law Enforcement Training Council. S.C. Code Ann. § 23-23-10(D) (Supp. 2006). Assuming *arguendo* that this transfer of functions and authorities also meant that the applicable regulations—those contained in Chapter 38, Article 1, Subarticle 1—transferred as well, this argument would not resolve the fact that the Council did not promulgate regulations after its creation in 2006. Perhaps if the Director of the Criminal Justice Academy had been authorized at the time of the transfer to certify and train qualified candidates, it would support the conclusion that the authority transferred with the Director and the details established in the regulations somehow transferred with it. However, immediately prior to the transfer in 2006, the individual with the statutory authority to certify and train qualified candidates was the Director of the Department of Public Safety, not the Director or Deputy Director of the Criminal Justice Academy Division. In addition, as referenced above, the regulation referenced by the Council in this matter still indicates the Department (of Public Safety), is the entity authorized to deny

certification based on evidence of the types of misconduct listed in that regulation. This is not a situation where the term "Department" was used in the statutes and regulations prior to Act 317 as the entity responsible for promulgating regulations or certifying qualified candidates and the same term applied to the new entity created by Act 317. If that were the case, then it would be an act of futility to require an entity to promulgate new regulations where the Department substantively changed but the actual term within the regulation did not change and merely referred to a different "Department." However, those are not the facts here. Despite best efforts, this court can find no basis for finding that the Council appropriately referenced Regulation 38-004 when issuing its decision regarding the Appellant.

In this appeal, the Council referenced Regulation 38-004, which was promulgated by the Department of Public Safety pursuant to its authority under § 23-6-450(e) and (f). With the creation of the new Council in 2006, new regulations should have been promulgated pursuant to § 23-23-80(5) and (6). Because the Council has not done this, its reference to Regulation 38-004 was improper.

This finding, however, does not end the analysis. The statute in existence at the time the Council considered the Appellant's certification as a law enforcement officer established that the Council was authorized to "certify and train qualified candidates and applicants for law enforcement officers and provide for suspension, revocation, or restriction of the certification, in accordance with regulations promulgated by the council." S.C. Code Ann. § 23-23-80(6) (Supp. 2011). The cardinal rule of statutory construction is to determine the intent of the legislature. Beaufort County v. S.C. State Election Comm'n, 395 S.C. 366, 718 S.E.2d 432 (2011). The legislature's intent should be ascertained primarily from the plain language of the statute. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003). The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Municipal Ass'n of S.C. v. AT&T Commc'n of S States, Inc., 361 S.C. 576, 606 S.E.2d 468 (2004). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Anderson v. S.C. Election Comm'n, 397 S.C. 551, 725 S.E.2d 704 (2012). However, if the language of the statute is ambiguous, the court must interpret the statute, resolving any ambiguities in favor of a just, beneficial, and equitable operation of the law. Georgia-Carolina, 354 S.C. at 24, 579 S.E.2d at 337.

The court finds that the language in § 23-23-80(6) is ambiguous. The statute provides that the Council has the authority to certify and train a law enforcement officer separate and apart from its authority to provide for the suspension, revocation, or restriction of the certification. A review of Title 23, Chapter 23 reveals two other statutes regarding the Council's authority to certify law enforcement officers, both of which are silent about the promulgation of regulations. See S.C. Code Ann. §§ 23-23-40 and 23-23-60 (Supp. 2011). In contrast, the only reference to suspension, revocation, or restriction of certification is contained in § 23-23-80 and includes the modifier "in accordance with regulations promulgated by the council." Thus, reading the language of § 23-23-80(6) in the context of Title 23, Chapter 23 leads this court to the conclusion that the General Assembly did not intend for the phrase "in accordance with regulations promulgated by the council" to apply to the Council's authority to certify and train qualified candidates. See Grant v. City of Folly Beach, 346 S.C. 74, 551 S.E.2d 229 (2001) ("It is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."). However, it is clear that the General Assembly intended for the Council to promulgate regulations for the purpose of suspending, revoking, or restricting the certification of a law enforcement officer. The Council has failed to do so.

In Captain's Quarters Motor Inn v. S.C. Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1991), the S.C. Supreme Court addressed facts similar to this case in which a South Carolina agency failed to promulgate regulations as mandated by the General Assembly yet proceeded to regulate the subject matter circumscribed by the statute. The Court established the precedent that an agency's issuance of guidelines rather than promulgating regulations after the General Assembly expressly mandated the promulgation of regulations rendered the formulated test of the agency invalid. The Supreme Court again addressed this issue under a different set of facts in S.C. Coastal Conservation League v. South Carolina Department of Health and Environmental Control, 363 S.C. 67, 610 S.E.2d 482 (2005). In Coastal Conservation, the issue was whether an island was so small as to be regulated under the Small Islands Regulation. Though OCRM promulgated regulations concerning the subject matter of its regulation, it failed to define "small island." The Court found that since the regulations provided no "benchmark for comparative size," it thus afforded DHEC an impermissible "unrestrained discretion" in deciding what islands were small and covered by the more stringent criteria. Accordingly, the Court held that since

there was no promulgated test to determine whether an island is small, the promulgated regulations were invalid. Applying the holdings of these cases to the case at bar, the Council's revocation of the Appellant's law enforcement certification without valid, promulgated criteria to make that determination as required by statute appears void.

In Captain's Quarters, the Court's holding was based upon the premise that "[a]s a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." Captain's Quarters, 413 S.E.2d at 490. Under that premise, because Coastal Council did not comply with the General Assembly's specific requirement to promulgate regulations for evaluating permit applications, the Court determined that the Coastal Council had overstepped its statutory authority in formulating and applying a test to evaluate those applications without first formalizing the test by regulation. Following that theory, the Court in Coastal Conservation found that OCRM's failure to promulgate a regulation defining "small island" as it was required by the General Assembly allowed OCRM to exercise unrestrained discretion, which is inconsistent with the requisites of the statute. The reason the discretion was improper and the regulation was unreasonably vague was because OCRM had overstepped its statutory authority in failing to formulate and apply a test to evaluate those applications without first formalizing the test by regulation. Accordingly, the two cases present both sides of the same coin: the failure to promulgate any criteria; and the creation of criteria that are not promulgated. In this case, the Council failed to promulgate criteria for the evaluating and exercising their authority to suspend, revoke, or restrict a law enforcement certification. Moreover, the Council relied upon criteria set forth in a defunct regulation that has not been promulgated under the Council's authority, thereby using a test that was not properly promulgated as a regulation. Based on the holdings of Coastal Conservation and Captain's Quarters this court can reach no conclusion other than that the actions of the Council in this case were prohibited, and the Council's revocation decision was invalid.

The Council failed to promulgate regulations for the purpose of suspending, revoking, or restricting the certification of a law enforcement officer. As a result, the Council's decision to revoke the Appellant's law enforcement certification was an error of law, arbitrary and capricious, made upon unlawful procedure, and characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Moreover, the Appellant's rights to be employed as a law

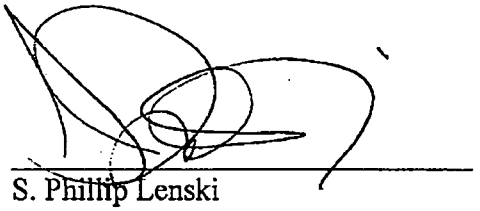
enforcement officer have been prejudiced as a result of the Council's decision. The court, therefore, reverses the Council's decision and remands this case to the Council to promulgate regulations. Based on this court's finding that Regulation 38-004 is defunct and, therefore, cannot be relied upon by the Council, all other challenges by the Appellant to the regulation are moot.

ORDER

IT IS HEREBY ORDERED that the Council's Order of Denial is **REVERSED** and this matter is **REMANDED** to the Council for the promulgation of regulations as required by S.C. Code Ann. § 23-23-80(6); and

IT IS FURTHER ORDERED that within ninety (90) days after promulgating regulations pursuant to S.C. Code Ann. § 23-23-80(6), the Council shall make a determination regarding the Appellant's certification as a law enforcement officer based upon the newly promulgated regulations.

AND IT IS SO ORDERED.



S. Phillip Lenski
Administrative Law Judge

November 8, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah Garland

Leah E. Garland
Judicial Law Clerk

November 8, 2013
Columbia, South Carolina

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