

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 2013-002612

Cassandra Donaldson,

Respondent,

v.

South Carolina Criminal Justice Academy,

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. THE ALC ERRED IN HOLDING THAT S.C. REG. 38-004 IS DEFUNCT AS THAT ISSUE WAS NOT RAISED AT THE CONTESTED CASE HEARING OR DURING THE ALC APPEAL BY ANY PARTY
2. EVEN IF THE DECISION OF THE ALC WAS NOT PROCEDURALLY INCORRECT, IT WAS SUBSTANTIVELY IN ERRONEOUS BECAUSE THE CHAPTER 38 REGULATIONS FOLLOWED THE ACADEMY INTO THEIR NEW FORM AS A STAND-ALONE AGENCY
3. WHILE PREMISING ITS DECISION ON AN UNPRESERVED ISSUE NEVER RAISED BY THE PARTIES, THE ALC FAILED TO ADDRESS THE ISSUES RAISED BY THE PARTIES IN THEIR ALC BRIEFS
 - a. Respondent Failed to Preserve Any Objections to Agency Process
 - b. Academy Did Not Exceed Its' Statutory Authority in Denying Law Enforcement Certification to Respondent
 - c. S.C. Reg. 38-004 is Not Arbitrary or Capricious
 - d. S.C. Reg. 38-004 is Not Unconstitutionally Vague or Overbroad
 - e. S.C. Reg. 38-004 Does Not Violate Due Process or Equal Protection
 - f. Denial of Law Enforcement Certification to Respondent was Not an Unconstitutional Taking in Violation of the Fifth Amendment of the United States Constitution, the Fourteenth Amendment of the United States Constitution and/or Article I, Section 3 of the Constitution of South Carolina
 - g. Agency Process is Not Unconstitutional, Arbitrary, or Capricious
 - h. The Denial of Law Enforcement Certification to Respondent Was Not Arbitrary, Capricious, Characterized by an Abuse of Discretion, or Characterized by a Clearly Unwarranted Exercise of Discretion
 - i. The Record Supports the Denial of Law Enforcement Certification to Respondent
 - j. Under S.C. Reg. 38-004, the Academy is Not Required to Consider or Address Issues of Mitigation When Determining Whether to Grant or Deny Law Enforcement Certification to a Candidate

STATEMENT OF THE CASE

On September 27, 2010, Cassandra Donaldson was terminated from the Barnwell County Sheriff's Office. In the Personnel Change in Status form (hereinafter, "PCS") submitted to the South Carolina Criminal Justice Academy and Law Enforcement Training Council (hereinafter, "Academy"), the Barnwell County Sheriff's Office alleged Respondent had engaged in misconduct by "being paid by the Williston School System for working Williston-Elko football games where she was the [School Resource Officer (hereinafter, "SRO")]. Deputy Donaldson would then apply with this office and receive compensatory time for the same duty." (PCS of Separation).

On October 22, 2010, the Orangeburg County Sheriff's Office requested the Academy conduct a "Pre-hire Legal Review"¹ of Respondent to assist them in determining whether Respondent would be offered employment with Orangeburg County Sheriff's Office (Transcript of Hearing, page 18). On October 29, 2010, Hubert F. Harrell, Director of the Academy, made an initial determination that Respondent was ineligible for recertification as a law enforcement officer in the State of South Carolina due to dishonesty/untruthfulness with respect to her employer. On November 2, 2010, a letter from Director Harrell to Respondent advised her of this finding and advised her of her rights, at that time, to immediately appeal that decision to the Administrative Law

¹ A pre-hire review is a review of a person's eligibility for training and/or certification conducted by the Academy and the Law Enforcement Training Council only at the request of a law enforcement agency interested in hiring the person. Such reviews are conducted with the implicit agreement between the Academy, the Law Enforcement Training Council, and the law enforcement agency that if it is determined the person is eligible for training and/or certification the law enforcement agency will hire the person as a law enforcement officer. No pre-hire review is ever conducted unless there is a law enforcement agency interested in hiring the person. Such reviews are offered by the Academy and the Law Enforcement Training Council to assist the field in hiring persons that may have had allegations of misconduct brought against them or other qualification issues, by allowing an eligibility review to go forward based on a promise by the law enforcement agency that it will hire the person if they are found to be qualified.

Court (hereinafter, "ALC"). (Letter from Director Hubert F. Harrell dated November 2, 2010). On November 23, 2010, the Academy received a courtesy copy of a letter from Respondent's counsel stating Respondent wished to appeal the Director's initial determination to the ALC. (Letter from C. Bradley Hutto dated November 23, 2010). On February 24, 2011, the ALC, at the request of the parties, remanded this case back to the Academy for an agency level contested case hearing. (Order of Remand filed February 24, 2011). The agency level contested case hearing took place on May 31, 2011.

On June 1, 2011, Kela E. Thomas, Director of the S.C. Dept. of Probation, Parole, and Pardon Services, member of the Law Enforcement Training Council (hereinafter, "Council"), and hearing officer for the agency level contested case hearing, issued her written, non-binding, recommendation to the full Council. Director Thomas recommended the Council deny Respondent's request for re-certification despite her claims that she was not properly trained in how to complete her time sheet/paperwork. (Letter from Kela E. Thomas dated June 1, 2011).

On October 19, 2011, the full Council, after receiving Director Thomas' recommendation, the hearing transcript, and all evidence from the hearing, unanimously determined Respondent could no longer be certified as a law enforcement officer in the State of South Carolina. The Chairman of the Council issued the final, written decision of the Council on January 31, 2012. (Order of Denial dated January 31, 2012). This Order stated Respondent's request for recertification was denied based on evidence Respondent "engaged in misconduct through dishonesty and untruthfulness with respect to her employer... by submitting compensatory time requests to her employer when she

had already received pay from the school district for that work.” (Order of Denial, pages 3-4).

On March 2, 2012, Respondent appealed the Council’s final Order to the ALC. (Notice of Appeal of Final Decision dated March 2, 2012). On March 7, 2012, the Honorable S. Phillip Lenski, Administrative Law Judge, was assigned to preside over the appeal. (Notice of Assignment dated March 7, 2012). On September 26, 2012, Respondent filed her Initial Brief. (Brief of Appellant dated September 26, 2012). On November 7, 2012, the Academy filed its’ Initial Brief. (Brief of Academy dated November 7, 2012). Respondent did not file a Reply Brief. On November 8, 2013, the Administrative Law Court issued its Final Order. (ALC Final Order dated November 8, 2013). This Final Order is the Order at issue in the current appeal to this Court. On December 9, 2013, the Academy served its Notice of Appeal on Respondent. (Notice of Appeal dated December 9, 2013).

FACTS

On September 27, 2010, Respondent was terminated from the Barnwell County Sheriff's Office. In the PCS submitted to the Academy, the Barnwell County Sheriff's Office alleged Respondent engaged in misconduct by "being paid by the Williston School System for working Williston-Elko football games where she was the SRO... [and] would then apply with this office and receive compensatory time for the same duty." (PCS of Separation).

The agency level contested case hearing took place on May 31, 2011. During this hearing, Respondent consented to the authenticity of documents entered into evidence as exhibits #1-#26. (Transcript of Hearing, page 4, line 15 – page 5, line 3). These exhibits reflect the following information:

- 1) On September 1, 2006, Respondent applied for 4 hours of payment from Williston-Elko High School for "Security for H-K-T Football Game." (State's Exhibit #1, page 1). On September 5, 2006, Respondent was paid \$80 for "security for HKT." (State's Exhibit #1, page 2). On September 1, 2006, Respondent applied for 7 hours² of compensatory time for "Worked Varsity Football Game." (State's Exhibit #1, page 3).
- 2) On October 9, 2006, Respondent applied for 4 hours of payment from Williston-Elko High School for "Worked Varsity Football Security (Denmark)." (State's Exhibit #2, page 1). On October 10, 2006, Respondent was paid \$80 for "Football Security." (State's Exhibit #2, page 2). On October 6, 2006, Respondent applied for 8 hours³ of compensatory time for "Worked Williston-Elko High School Football Game 10-80 Security Escort." (State's Exhibit #2, page 3).
- 3) On October 16, 2006, Respondent applied for 4 hours of payment from Williston-Elko High School for "Security Football Game." (State's Exhibit #3, page 1). On October 17, 2006, Respondent was paid \$80 for "Security." (State's Exhibit #3, page 2). On October 13, 2006, Respondent applied for 6 hours of compensatory time for "Worked Varsity Football Game." (State's Exhibit #3, page 3).

² This is 1 more hour than the allowed compensatory time of 1 ½ hours per hour worked.

³ This is 2 more hours than the allowed compensatory time of 1 ½ hours per hour worked.

- 4) On October 27, 2006, Respondent applied for 3 1/2 hours of payment from Williston-Elko High School for "Security Football Game Blackville." (State's Exhibit #4, page 1). On October 30, 2006, Respondent was paid \$70 for "Security." (State's Exhibit #4, page 2). On October 27, 2006, Respondent applied for 6 hours⁴ of compensatory time for "Worked Varsity Football Game." (State's Exhibit #4, page 3).
- 5) On December 11, 2006, Respondent applied for 4 hours of payment from Williston-Elko High School for "Basketball Security Barnwell." (State's Exhibit #5, page 1). On December 12, 2006, Respondent was paid \$80 for "Security-Basketball." (State's Exhibit #5, page 2). On December 8, 2006, Respondent applied for 9 hours⁵ of compensatory time for "Worked J.V. & Varsity Basketball Game." (State's Exhibit #5, page 3).
- 6) On December 15, 2006, Respondent applied for 4 hours of payment from Williston-Elko High School for "Security Escort Basketball Game Aquaris." (State's Exhibit #6, page 1). On December 18, 2006, Respondent was paid \$80 for "Basketball Security." (State's Exhibit #6, page 2). On December 15, 2006, Respondent applied for 6 hours of compensatory time for "Worked Varsity Basketball Game." (State's Exhibit #6, page 3).
- 7) On January 4, 2007, Respondent applied for 3 hours of payment from Williston-Elko High School for "Basketball Security." (State's Exhibit #7, page 1). On January 4, 2007, Respondent was paid \$60 for "Basketball Security." (State's Exhibit #7, page 2). On January 4, 2007, Respondent applied for 6 hours of compensatory time for "Barnwell High School Basketball Game." (State's Exhibit #7, page 3).
- 8) On January 6, 2007, Respondent applied for 4 hours of payment from Williston-Elko High School for "Basketball Security." (State's Exhibit #8, page 1). On January 8, 2007, Respondent was paid \$160 for "Basketball Security." (State's Exhibit #8, page 2). On January 6, 2007, Respondent applied for 7 1/2 hours⁶ of compensatory time for "Worked J.V. & Varsity Basketball Game J.V. Boys Game." (State's Exhibit #8, page 3).
- 9) On January 29, 2007, Respondent applied for 4 hours of payment from Williston-Elko High School for "Basketball Security (Denmark-Olar)." (State's Exhibit #9, page 1). On January 29, 2007, Respondent was paid \$80 for "Security." (State's Exhibit #9, page 2). On January 30, 2007, Respondent applied for 9 hours of compensatory time for "Worked J.V. & Varsity Basketball Game." (State's Exhibit #9, page 3).

⁴ This is 1/2 more hours than the allowed compensatory time of 1 1/2 hours per hour worked (form only allows for request in hour and half hour increments).

⁵ This is 3 more hours than the allowed compensatory time of 1 1/2 hours per hour worked.

⁶ This is 1 1/2 more hours than the allowed compensatory time of 1 1/2 hours per hour worked.

- 10) On February 7, 2007, Respondent applied for 3 ½ hours of payment from Williston-Elko High School for "Basketball Security Blackville-Hila Game." (State's Exhibit #10, page 1). On February 7, 2007, Respondent was paid \$70 for "Security." (State's Exhibit #10, page 2). On February 6, 2007, Respondent applied for 7 hours⁷ of compensatory time for "Worked J.V. Boys and Varsity Girls & Boys Basketball Game." (State's Exhibit #10, page 3).
- 11) On September 7, 2007, Respondent applied for 4 hours of payment from Williston-Elko High School for "Security for Football Game Midland Valley." (State's Exhibit #11, page 1). On September 10, 2007, Respondent was paid \$80 for "Security MV." (State's Exhibit #11, page 2). On September 7, 2007, Respondent applied for 7 ½ hours of compensatory time for "Worked Williston Football Game." (State's Exhibit #11, page 3).
- 12) On September 17, 2007, Respondent applied for 4 hours of payment from Williston-Elko High School for "Football Security (RSM) Game." (State's Exhibit #12, page 1). On September 17, 2007, Respondent was paid \$80 for "Security RSM." (State's Exhibit #12, page 2). On September 14, 2007, Respondent applied for 7 hours⁸ of compensatory time for "Worked W-E High School Football Game." (State's Exhibit #12, page 3).⁹
- 13) On September 21, 2007, Respondent applied for 4 hours of payment from Williston-Elko High School for "Security Football Game (Wagener)." (State's Exhibit #13, page 1). On September 24, 2007, Respondent was paid \$80 for "Security-Wagener." (State's Exhibit #13, page 2). On September 21, 2007, Respondent applied for 7 hours¹⁰ of compensatory time for "Worked Williston Football Game and Escorted Mrs. Battle to Enterprise Bank to make a deposit." (State's Exhibit #13, page 3).¹¹
- 14) On September 28, 2007, Respondent applied for 4 hours of payment from Williston-Elko High School for "Football Security (Bamberg)." (State's Exhibit #14, page 1). On October 2, 2007, Respondent was paid \$80 for "Bamberg Security." (State's Exhibit #14, page 2). On September 28, 2007, Respondent applied for 7 hours¹² of compensatory time for "Worked Williston-Elko High School Football Game/Security Escort to Enterprise Bank." (State's Exhibit #14, page 3).
- 15) On December 5, 2007, Respondent applied for 3 ½ hours of payment from Williston-Elko High School for "Security for Basketball Game." (State's

⁷ This is 1 ½ more hours than the allowed compensatory time of 1 ½ hours per hour worked (form only allows for request in hour and half hour increments).

⁸ This is 1 more hour than the allowed compensatory time of 1 ½ hours per hour worked.

⁹ Notation that Respondent "Need to Show Total Accumulation."

¹⁰ This is 1 more hours than the allowed compensatory time of 1 ½ hours per hour worked.

¹¹ Notation that "Officer Told told [sic] to break down totals 9-26-07."

¹² This is 1 more hour than the allowed compensatory time of 1 ½ hours per hour worked.

Exhibit #15, page 1). On December 6, 2007, Respondent was paid \$70 for "Security." (State's Exhibit #15, page 2). On December 4, 2007, Respondent applied for 7 ½ hours¹³ of compensatory time for "Worked Williston J.V. & Varsity Basketball Game." (State's Exhibit #15, page 3).

16) On December 10, 2007, Respondent applied for 3 ½ hours of payment from Williston-Elko High School for "Security Basketball Silver Bluff." (State's Exhibit #16, page 1). On December 10, 2007, Respondent was paid \$70 for "Security." (State's Exhibit #16, page 2). On December 7, 2007, Respondent applied for 6 hours¹⁴ of compensatory time for "Worked Basketball Game." (State's Exhibit #16, page 3).

17) On December 18, 2007, Respondent applied for 3 ½ hours of payment from Williston-Elko High School for "Security for Varsity Basketball Game Fox Creek." (State's Exhibit #17, page 1). On December 14, 2007, Respondent was paid \$70 for "Security." (State's Exhibit #17, page 2). On December 18, 2007, Respondent applied for 7 hours¹⁵ of compensatory time for "Worked Williston Basketball Game Varsity." (State's Exhibit #17, page 3).

18) On January 9, 2008, Respondent applied for 1 hour of payment from Williston-Elko High School for "Security at Basketball Game." (State's Exhibit #18, page 1). On January 11, 2008, Respondent was paid \$20 for "Basketball Security." (State's Exhibit #18, page 2). On January 11, 2008, Respondent applied for 7 hours¹⁶ of compensatory time for "Worked J.V. & Varsity Basketball Game." (State's Exhibit #18, page 3).

19) On January 14, 2008, Respondent applied for 3 ½ hours of payment from Williston-Elko High School for "Security Basketball." (State's Exhibit #19, page 1). On January 16, 2008, Respondent was paid \$140.00 for "Security Basketball." (State's Exhibit #19, page 2). On January 10, 2008, Respondent applied for 4 ½ hours of compensatory time for "Worked middle Basketball Game Visitor locked keys in car waited with visitor until locksmith came (locksmith [illegible] from Blackville." (State's Exhibit #19, page 3).

20) On January 23, 2008, Respondent applied for 2 hours of payment from Williston-Elko High School for "Security Basketball Bamberg." (State's Exhibit #20, page 1). On January 23, 2008, Respondent was paid \$40 for "Security Basketball." (State's Exhibit #20, page 2). On January 23, 2008,

¹³ This is 2 more hours than the allowed compensatory time of 1 ½ hours per hour worked (form only allows for requests in hour and half hour increments).

¹⁴ This is ½ more hour than the allowed compensatory time of 1 ½ hours per hour worked (form only allows for requests in hour and half hour increments).

¹⁵ This is 1 ½ more hours than the allowed compensatory time of 1 ½ hours per hour worked (form only allows for requests in hour and half hour increments).

¹⁶ This is 5 ½ more hours than the allowed compensatory time of 1 ½ hours per hour worked.

Respondent applied for 5 hours¹⁷ of compensatory time for “Worked middle school Basketball game.” (State’s Exhibit #20, page 3).

- 21) On August 27, 2009, Respondent applied for 4 ½ hours of payment from Williston-Elko High School for “Football Security Williston-Elko vs. Barnwell.” (State’s Exhibit #21, page 1). On August 28, 2009, Respondent was paid \$90 for “Barnwell Football Security.” (State’s Exhibit #21, page 2). On August 27, 2009, Respondent applied for 7 ½ hours¹⁸ of compensatory time for “Worked Barnwell vs. Williston Football Game.” (State’s Exhibit #21, page 3).
- 22) On September 5, 2009, Respondent applied for 4 hours of payment from Williston-Elko High School for “Security for Football Ashley Ridge/W-EHS.” (State’s Exhibit #22, page 1). On September 9, 2009, Respondent was paid \$80 for “Football Security.” (State’s Exhibit #22, page 2). On September 5, 2009, Respondent applied for 6 hours of compensatory time for “Worked Williston-Elko High School Football Game.” (State’s Exhibit #22, page 3).
- 23) On September 18, 2009, Respondent applied for 4 hours of payment from Williston-Elko High School for “Security for North W-E Football Game.” (State’s Exhibit #23, page 1). On September 21, 2009, Respondent was paid \$80 for “Football Security.” (State’s Exhibit #23, page 2). On September 18, 2009, Respondent applied for 6 hours of compensatory time for “WK Williston-Elko Football game.” (State’s Exhibit #23, page 3).
- 24) On October 16, 2009, Respondent applied for 4 hours of payment from Williston-Elko High School for “Security W-E Football Against C.A. Johnson.” (State’s Exhibit #24, page 1). On October 19, 2009, Respondent was paid \$80 for “Football Security.” (State’s Exhibit #24, page 2). On October 16, 2009, Respondent applied for 6 ½ hours of compensatory time for “WK W-E High School Football game.” (State’s Exhibit #24, page 3).
- 25) On October 23, 2009, Respondent applied for 4 hours of payment from Williston-Elko High School for “Security Football Game W-E. H.S. vs. Wagener-Salley.” (State’s Exhibit #25, page 1). On October 27, 2008, Respondent was paid \$80 for “Footbal [sic] Security.” (State’s Exhibit #25, page 2). On October 23, 2009, Respondent applied for 6 ½ hours of compensatory time for “?.”¹⁹ (State’s Exhibit #25, page 3).
- 26) On August 20, 2010, Respondent applied for 4 ½ hours of payment from Williston-Elko High School for “Security Football.” (State’s Exhibit #26,

¹⁷ This is 2 more hours than the allowed compensatory time of 1 ½ hours per hour worked.

¹⁸ This is ½ more hour than the allowed compensatory time of 1 ½ hours per hour worked (form only for requests in hour and half hour increments).

¹⁹ This is the exact quote from the compensatory time form.

page 1). On August 23, 2010, Respondent was paid \$90 for "Football Security." (State's Exhibit #26, page 2). On August 20, 2010, Respondent applied for 9 hours²⁰ of compensatory time for "Worked W-E High School Football Game." (State's Exhibit #26, page 3).

These exhibits establish Respondent was paid \$2,070 by Williston-Elko High School for 96 hours of work performing security at sporting events, and Respondent also applied for 178 ½ hours of compensatory time for these same hours of work. These exhibits establish Respondent regularly used her compensatory time. In fact, Exhibit #26 shows that as of August 20, 2010, little more than a month before her termination, Respondent had used all of her compensatory time with the exception of the 9 hours applied for on that date. (State's Exhibit #26, page 3).

At the contested case hearing, Respondent testified she worked for the Barnwell County Sheriff's Office as a school resource officer. (Transcript of Hearing, page 15, lines 7-18). Respondent admitted she would provide a report to the school requesting payment for officers for each sporting event worked, that she was paid \$20 per hour to work at these sporting events, and she also received compensatory time from the Sheriff's Office at the rate of one and a half hours for each hour worked. (Transcript of Hearing, page 16, line 17 to page 17, line 26 and page 24, lines 3-7). Respondent further admitted she received payment for working these sporting events (Transcript of Hearing, page 18, lines 1-5).

Respondent testified she would also fill out a request for compensatory time with the Barnwell County Sheriff's Office for the same sporting events. (Transcript of Hearing, page 18, lines 6-13). Respondent testified that when she stopped requesting pay from the school for these sporting events, the school asked her why, and "that's what led

²⁰ This is 2 more hours than the allowed compensatory time of 1 ½ hours per hour worked (form only for requests in hour and half hour increments).

to the whole Sheriff's office finding out about it." (Transcript of Hearing, page 21, lines 10-20).

Respondent admitted that being compensated twice for doing work only one time was wrong. (Transcript of Hearing, page 24, lines 17-19). Further, Respondent stated in a letter dated October 19, 2012, to Bette Kottmyer that "I Deputy Cassandra Donaldson was being paid for working Williston-Elko High School Football games and also receiving Comp-Time on some occasion [sic]. I admitted that I received both and was wrong." (State's Exhibit #29).

Respondent called Lonnie Hosey to testify as a character witness. Respondent presented **no** other evidence to explain or defend her actions. Significantly, in addition to stipulating to the exhibits, Respondent never raised **any** objections during the contested case hearing.

Arguments

I. THE ALC ERRED IN HOLDING THAT S.C. REG. 38-004 IS DEFUNCT AS THAT ISSUE WAS NOT RAISED AT THE CONTESTED CASE HEARING OR DURING THE ALC APPEAL BY ANY PARTY.

In holding that 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,” because S.C. “Regulation 38-004 is defunct and, therefore, cannot be relied upon by the Council,” the ALC violated the fundamental principle of appellate practice that “appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991).²¹ This rule is followed in the Administrative Law Court as well. *See, e.g., Young v. S.C. Dept. of Health and Environmental Control*, 383

²¹ *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (S.C. 2003) (Issues not raised and ruled upon in the trial court will not be considered on appeal. No point will be considered which is not set forth in the statement of issues on appeal); *Commander Health Care Facilities, Inc. v. S.C. Dept. of Health and Environmental Control*, 370 S.C. 296, 634 S.E.2d 664 (Ct. App. 2006) (Issue which is procedurally barred should not be raised *sua sponte* by an appellate court); *State v. Dicapua*, 383 S.C. 394, 680 S.E.2d 292 (S.C. 2009) (Granting of a new trial *sua sponte* on a ground waived by a party is an error of law); *Coogler v. California Ins. Co. of San Francisco, Cal and London Assur. Of London, England*, 192 S.C. 54, 5 S.E.2d 459 (S.C. 1939) (The general rule undoubtedly is that the moving party should be confined to the relief asked for in his motion or specified in the notice thereof, or at most the relief necessarily incident thereto); *State ex rel. McLeod v. Brown*, 278 S.C. 281, 294 S.E.2d 781 (S.C. 1982) (An order substantially affecting a party’s rights should not be made in a case without notice to the party prejudiced by it and an opportunity to be heard); *State v. Felder*, 290 S.C. 521, 351 S.E.2d 852 (1986) (Criminal defendant precluded from raising attorney’s conflict for the first time on appeal); *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (S.C. 1995) (Court cannot raise issues *sua sponte* that had not been raised at trial, nor raised on appeal); *Southern Railway Company v. Coltex, Inc.*, 285 S.C. 213, 329 S.E.2d 736 (S.C. 1985) (Trial Court erred in granted new trial *ex mero motu* on ground not raised by railroad); *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (S.C. App. 2013) (Party asked “court to apply the plain error doctrine by combing the record for unpreserved issues and arguing the cumulative effect of these unpreserved matters deprived him of a fair trial. However our appellate courts do not apply the plain error rule.”); *State v. Sheppard*, 391 S.C. 415, 706 S.E.2d 16 (S.C. 2011) (*Ex mero motu* is a synonym for *sua sponte*. Argument that a “judge commits and abuse of discretion by not *ex mero motu* addressing an issue at trial is not supported by our case law.”); *State v. Brockmeyer*, 2013 WL 6191628 (S.C. 2013) (Appellant objected to admission of evidence based only on the foundation for admitting each item and did not object based on an alleged Confrontation Clause violation. Court did not allow Appellant to “bootstrap a Confrontation Clause objection onto his objection to the State’s proof of foundational facts.”).

S.C. 452, 680 S.E.2d 784 (S.C. App. 2009) (Appellate court has a limited scope of review of the final decisions of administrative agencies and cannot ordinarily consider issues not raised to and ruled on by the agency from which an appeal is taken.), and *South Carolina Department of Motor Vehicles v. Haddock*, 2006 WL 2224705 (S.C. Admin. Law Ct. 2006)(South Carolina appellate courts do not recognized the “plain error rule,” under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party.). This concept is so firmly grounded in South Carolina jurisprudence that the Order should be reversed solely because it is premised on an issue the ALC was never asked to consider, and the Academy was never afforded an opportunity to address.

If Respondent wanted to challenge the validity, applicability, and/or authority of the Academy to promulgate any of the Chapter 38 regulations, she could have done so under S.C. Code §1-23-150. Respondent has never pursued such a challenge. Even if Respondent had objected to the validity, applicability, and/or authority of the Academy and Council to promulgate any of the Chapter 38 regulations, the ALC does not have authority to rule on such a facial challenge. See *Drummond v. S.C. Dept. of Revenue*, 378 S.C. 362, 370, 662 S.E.2d 587, 591 (S.C. 2008).

II. EVEN IF THE DECISION OF THE ALC WAS NOT PROCEDURALLY INCORRECT, IT WAS SUBSTANTIVELY IN ERRONEOUS BECAUSE THE CHAPTER 38 REGULATIONS FOLLOWED THE ACADEMY INTO THEIR NEW FORM AS A STAND-ALONE AGENCY.

As discussed above, the Academy submits the decision of the ALC reversing the Council's Order of Denial should be reversed simply because it was a *sua sponte* conclusion on a ground never raised by any party and, therefore, the Academy was never afforded the opportunity to address it. Even if the ALC's decision is procedurally proper, however, it is substantively erroneous.

S.C. Code §23-23-80 provides:

The *South Carolina Law Enforcement Training Council* is authorized to:

...

(6) *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;...²²

(Emphasis added). In addition, S.C. Code §23-23-10(D) states:

Upon the signature of the Governor, *all functions, duties, responsibilities, accounts, and authority* statutorily exercised by the South Carolina Criminal Justice Academy Division of the Department of Public Safety are *transferred to and devolved upon the South Carolina Criminal Justice Academy*.

(Emphasis added).²³ It is clear from these provisions the Legislative intent was for the Chapter 38 regulations to follow the Academy in its new form as a stand-alone agency.

²² 2006 Act 317 originally stated, "The *Director of the Criminal Justice Academy* is authorized to: ... (6) *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;...*" (Emphasis added). 2008 Act 335 changed this section to its current form.

²³ 2006 Act 317 originally stated, "Upon the signature of the Governor, *all functions, duties, responsibilities, accounts, and authority* statutorily exercised by the South Carolina Criminal Justice Academy Division of the Department of Public Safety are *transferred to and devolved upon the South Carolina Law Enforcement Training Council*." (Emphasis added). 2008 Act 335 changed this section to its current form.

Statutory interpretation is a question of law subject to *de novo* review. *Barton v. S.C. Dept. of Probation, Patrol, and Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (S.C. 2013) (citation omitted).

The construction of a regulation is a question of law to be determined by the court. *S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480 (S.C. 2012) (citations omitted). The Appellate Courts will correct an ALC decision if it is affected by an error of law, and questions of law are reviewed *de novo*. *Id.*

In this case, the ALC states the statutory provisions referenced above do not “resolve the fact that the Council did not promulgate regulations after its creation in 2006.” (ALC Final Order, page 7). As another basis for invalidating the applicable regulations, the ALC found:

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.... The Council has not done this.

(ALC Final Order, page 7). Neither stated ground constitutes a legitimate basis for invalidating the regulation, nor reflects the whole picture of the Academy’s efforts to update their regulations.²⁴

As stated above, the Legislature intended the Chapter 38 regulations to follow the Academy in its new form as a stand-alone agency. Based on this legislative intent, the

²⁴ In 2009-2010, the Academy attempted to update the regulations under Chapter 38 to reflect the split of the Academy from the Department of Public Safety. See Document #4067 in State Registers 33-1, 33-3, 33-6, 33-7, 33-8, 33-9, 33-10, 33-11, 33-12, 34-1, 34-2, 34-3, 34-4, 34-5, 34-6, and 34-7. In 2012-2013, the Academy again attempted to update the regulations under Chapter 38 to reflect the split of the Academy from the Department of Public Safety. See Document #4347 in State Registers 37-1 and 37-3.

Academy still conducts all functions listed in the Chapter 38 regulations.²⁵ Significantly, the same Administrative Law Judge who ruled in this case implicitly recognized this regulatory continuance in a decision he issued in *S.C. Criminal Justice Academy v. Lee*, Docket No. 10-ALJ-30-0401-AP.

Ultimately, regardless of which entity is making the decision (Director of Academy, Law Enforcement Training Council, Department of Public Safety), the underlying behavior prohibited by S.C. Reg. 38-004, i.e. “Dishonesty/Untruthfulness with respect to his/her employer,” has not changed at all since the Chapter 38 regulations were originally promulgated in 1991. Indeed, intuitively, lying to one’s employer has always been a basis for termination of employment, particularly for law enforcement officers charged with upholding the very basic laws of society.

The ALC’s reliance on certain cases is misplaced. In *Captain’s Quarters Motor Inn, Inc. v. South Carolina Coastal Council*, 306 S.C. 488, 413 S.E.2d 13 (1991), the South Carolina Supreme Court held that the legislature expressly mandated Coastal Council promulgate regulations to govern the evaluation of permit applications and Coastal Council failed to promulgate any regulations. Thus, the test Coastal Council used to evaluate permit applications overstepped its statutory authority. *Id.* at 490.

In this case, however, the Academy has regulations that followed it into its new form as a stand-alone agency. South Carolina Reg. 38-004 clearly states:

²⁵ A review of the history of legislative actions shows the bill to split the Academy from the Department of Public Safety moved from its’ initial committee referral to passage in less than a month (April 20, 2006-May 17, 2006). In fact, the 2008 bill (Act 335) was primarily a clean-up bill to get all the statutes referencing the Academy to cite to the proper agency and/or statute number(s) given the separation from the Department of Public Safety carried out in Act 317. See Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 17. Moreover, until 2012 Act 119 passed (Act effective February 1, 2012), S.C. Code §1-30-90 stated the “Law Enforcement Training Council, formerly provided for in Section 23-23-30, et seq.” was part of the Department of Public Safety.

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:...

7. Dishonesty with respect to his/her employer;

8. Untruthfulness with respect to his/her employer....

As noted above, this regulation had been in place in substantially the same form since 1991.

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), the South Carolina Supreme Court held the legislature expressly mandated the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM), promulgate rules and regulations to fulfill their duty to approve or deny permit applications, but OCRM failed to promulgate any regulations defining a “small island.” Therefore, the test OCRM used to determine if an island was a “small island” was invalid because it was never promulgated in any regulation. *Id.* at 74. Again, that is not this case here. The Academy’s regulations followed it into its new form as a stand-alone agency, and the regulation at issue has been in place in substantially the same form since 1991.

III. WHILE PREMISING ITS DECISION ON AN UNPRESERVED ISSUE NEVER RAISED BY THE PARTIES, THE ALC FAILED TO ADDRESS THE ISSUES RAISED BY THE PARTIES IN THEIR ALC BRIEFS.

a. Respondent Failed to Preserve Any Objections to Agency Process

Respondent failed to preserve any objections to the agency process in this case. In her Brief to the ALC Mrs. Donaldson alleged, violations of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 3 of the South Carolina State Constitution, due process, equal protection, the agency process in general (alleging process is arbitrary and capricious), and the agency process in this specific case (alleging process is arbitrary, capricious, characterized by an abuse of discretion, and/or characterized by a clearly unwarranted exercise of discretion). See *ALC Brief of Appellant*. All of these alleged violations were waived by Respondent due to her failure to raise these issues during the contested case hearing. See *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (failure to raise constitutional issues at trial results in waiver on appeal), discussion under Arguments, section I, above, and ALC Record on Appeal. In fact, **Respondent never raised any objections during the contested case hearing**, including any objections to the Agency process or hearing during the contested case hearing. As a result, these issues were not properly before the ALC, and cannot properly be before the Appellate Court. See *Id.*; *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A plethora of cases from the appellate entities of this state recognize that constitutional rights may be waived.”). Thus, any arguments presented by Respondent regarding alleged violations of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 3 of the South Carolina State Constitution, due process, equal protection, the agency process in general (alleging process is arbitrary

and capricious), and the agency process in this specific case (alleging process is arbitrary, capricious, characterized by an abuse of discretion, and/or characterized by a clearly unwarranted exercise of discretion) should be disregarded in their entirety.

b. Academy Did Not Exceed Its' Statutory Authority in Denying Law Enforcement Certification to Respondent²⁶

In her ALC Brief Respondent contended, the Academy exceeded its statutory authority by denying her request for law enforcement certification under S.C. Reg. 38-004, because S.C. Code §23-23-80(6) “only authorizes the suspension, revocation or restriction of certification.” See *ALC Brief of Appellant, page 1*. Incredibly, Respondent argued denial of a law enforcement certification is not authorized by S.C. Code §23-23-80(6).

Interpretation of a statutory term must support the statute, and cannot lead to an absurd result. See *Miller v. Lawrence Robinson Trucking*, 510 S.E.2d 431 (S.C. App. 1998). The most fundamental guide to statutory construction is common sense. *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862 (4th Cir. 1989).

Taking Respondent’s interpretation of S.C. Code §23-23-80 to its logical conclusion certainly leads to an absurd result. Essentially, Respondent argues the Academy can grant, suspend, revoke, or restrict law enforcement certification, but cannot deny law enforcement certification. Under this argument, the Academy would be well within its statutory authority to grant Respondent law enforcement certification and then, in the very next sentence of the same document granting certification immediately revoke that same certification. Clearly, such would be an absurd result. S.C. Code §23-23-80 states, “The South Carolina Law Enforcement Training Council **is authorized to**...(6) certify

²⁶The Academy again reiterates this issue is not preserved for review by the Appellate Courts.

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...” (Emphasis added). Contrary to mandatory terms such as “shall” or “must,” the phrase “is authorized to” is a permissive phrase. Basic common sense dictates if the Academy has permission from the State Legislature to do a certain thing (“...certify and train qualified candidates and applicants...”), then the State Legislature also gave the Academy permission to deny certification and training for candidates and applicants that are not qualified.

Respondent further argued because certification denial may result in a “lifetime ban” from law enforcement in South Carolina, denial is unconstitutional and violative of due process.²⁷ See *ALC Brief of Appellant*, pages 7. Respondent provides no argument or authority to support this statement. See *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (An issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority).

c. S.C. Reg. 38-004 is Not Arbitrary or Capricious²⁸

In her ALC Brief Respondent argued, S.C. Reg. 38-004 “randomly identif[ies] misconduct that will result in denial of certification,” “[f]or some misconduct, a conviction is required; thereby insuring that due process is afforded,” and there is “no gradation of the misconduct so that a person convicted of murder is subject to denial as is a person who misuses a prescription medication.” See *ALC Brief of Appellant*, page 7. These statements are grossly misleading.

²⁷ The Academy again reiterates this issue is not preserved for review by the Appellate Courts.

²⁸ The Academy again reiterates this issue is not preserved for review by the Appellate Courts.

S.C. Reg. 38-004 states:

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.

(Emphasis added). By definition, a specific list of behaviors is not “randomly identifi[ed].” This is a specific list of behaviors proposed by the Academy (proposed in June 1992 in the S.C. State Register Volume 16, Issue 6 and again, for re-numbering and minor amendments, in June 1997 in the S.C. State Register Volume 21, Issue 6), and

accepted by the State Legislature as behaviors defining “misconduct” for which law enforcement certification denial is justified.

Respondent implies there is no due process afforded if the misconduct does not require a criminal conviction. See *ALC Brief of Appellant*, page 7. On the contrary, consistent with the requirements of the Administrative Procedures Act, the Academy established an agency level appeal procedure, which was afforded to Respondent.²⁹ Moreover, evidenced by this appeal, Respondent is also entitled to appeal the agency appeal decision to higher levels if unsatisfied with the agency level appeal.³⁰ Therefore, any implication that due process is not afforded when law enforcement certification is denied is grossly misleading.

Respondent further contended “that the legislative authority envisioned the promulgation of regulations that would take into account levels of misconduct.” See *ALC Brief of Appellant*, page 8. Respondent put forth no argument or authority to support this argument, other than to argue that “levels” exist in other areas of the law, such as in the drivers’ license system. See *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (An issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting

²⁹ The Agency level appeal, includes a contested case hearing presided over by a member of the Council (the hearing officer). This hearing officer submits a written, non-binding, recommendation to the full Council. The full Council is also provided with a full copy of the hearing transcript and all exhibits entered into evidence at the contested case. See S.C. Code §1-23-340. After familiarizing themselves with the facts of the case, through the transcript, evidence, and recommendation, the full Council makes the final agency decision regarding a candidate’s eligibility to trained and/or certified/re-certified and a final written agency decision is issued to the candidate by the Chairperson of the Council. See S.C. Code §§1-23-340, 1-23-350, 23-23-80(6) and *South Carolina Criminal Justice Academy v. Draper S. Daniels*, 10-ALJ-30-0402-AP Order on Jurisdiction issued December 16, 2010. Candidates are entitled to legal representation throughout the agency level appeal. This process is in clear keeping with the requirements of the Administrative Procedures Act.

³⁰ As provided by the Administrative Procedures Act, Respondent may appeal the final agency decision to the S.C. Administrative Law Court, the S.C. Court of Appeals, and the S.C. Supreme Court.

authority). Just because “levels” exist in other areas of the law, like the drivers’ license system, does not give rise to the implication that “levels” must exist in all areas of the law, or that the absence of “levels” invalidates the applicable regulation.

Respondent also argues the denial of law enforcement certification to her is “draconian” when compared to the certifications of other professions. See *ALC Brief of Appellant*, page 12. Respondent claimed “No other governing body has scheme that calls for the ‘death penalty’ for a minor violation.” *Id.* “We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.” *Chevron v. Ruckelshaus*, 467 U.S. 837, 104 S.Ct. 2778 (1984). Therefore, while other agencies may take a more lenient approach to disciplining those they certify or license, the Academy has been tasked with determining who should, and should not, be certified as law enforcement officers in this State. The only legislative “restriction” placed on the Academy with regard to making these decisions is that it do so in accordance with applicable regulations, which was done in this case. Thus, while Respondent may feel her denial is “draconian,” her belief does not make the decision unlawful or erroneous.

d. S.C. Reg. 38-004 is Not Unconstitutionally Vague or Overbroad³¹

Respondent argued S.C. Reg. 38-004 was unconstitutionally vague or overbroad, but put forth no argument or authority to support this argument. See *ALC Brief of Appellant*, page 1. See *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (An issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority). With no

³¹ The Academy again reiterates this issue is not preserved for review by the Appellate Courts.

argument or authority to further clarify what Respondent meant when she alleged S.C. Reg. 38-004 is unconstitutionally vague or overbroad, the Academy simply cannot respond to this allegation. It was wholly unclear from Respondent's *ALC Brief* what she claimed S.C. Reg. 38-004 does, or does not, do that causes it to be unconstitutionally vague or overbroad.

e. S.C. Reg. 38-004 Does Not Violate Due Process or Equal Protection³²

In her *ALC Brief*, Respondent argued there is “no uniformity of review by [Academy]” in cases of “misconduct,” and that a review by the Academy is only triggered “when an certified officer is terminated from employment for ‘misconduct.’” See *ALC Brief of Appellant, page 9*. This is simply not true. In fact, a cursory review of the statutes and regulations governing Academy demonstrates the plain factual error of this argument.

As pointed out by Respondent, S.C. Code §23-23-80 specifically states the Academy can “provide for suspension, revocation, or restriction” of law enforcement certification. “A certificate as a law enforcement officer issued by the department will expire... upon discontinuance of employment by the officer with the employing entity or agency.” S.C. Code §23-23-60(C). Clearly, the Academy cannot “revoke” something that is still in place. Therefore, in the statutes governing the Academy, there is a clear acknowledgement and understanding that from time to time the certification of actively employed and certified law enforcement officers may be necessary. In addition, S.C. Regs. 38-016, 38-017, 38-018, 38-019, and 38-020 also demonstrate that from time to time the certification of actively employed and certified law enforcement officers may be necessary. Therefore, the implication that the only time misconduct is reviewed is when

³² The Academy again reiterates this issue is not preserved for review by the Appellate Courts.

an officer is terminated is simply untrue. To support this allegation, Respondent pointed to three (3) cases wholly unrelated to Respondent's.

First, Respondent discussed Charleston County Sheriff Al Cannon and his alleged assault and battery for striking a handcuffed prisoner in January 2012. See *ALC Brief of Appellant, pages 9-10*. Respondent argued that because Sheriff Cannon "has not been terminated from employment for misconduct, there is no mandatory reporting to [Academy]." Quite to the contrary, S.C. Reg. 38-017 requires "It shall be the responsibility of the sheriff or the chief executive officer of every law enforcement agency or department within the State to report to the Department the occurrence of any event, or series of events, set forth in R.38-016 which requires the withdrawal of certification of a law enforcement officer who is currently or was last employed by his or her agency." Additionally, S.C. Reg. 38-017 requires "Only events which are determined as founded by the department or agency shall be reported as provided herein above." Therefore, if the Charleston County Sheriff's Office has found the alleged assault and battery to be "founded" then they are required to report those events to Academy and proper actions would be taken as needed under Academy's governing regulations and statutes. Respondent fails to recognize, however, that in Sheriff Cannon's case, even if the Academy withdrew Sheriff Cannon's law enforcement certification, he would still be the duly elected Sheriff of Charleston County, and would still have all the rights and privileges of that office. The Academy does not have the authority to remove Sheriff Cannon from office.

Second, Respondent next referenced former Lexington County Magistrate Jamie Thomas Lucas. See *ALC Brief of Appellant, page 10*. Respondent alleged Mr. Lucas

was charged with petit larceny, but she did not state the disposition of this charge. Respondent further stated Mr. Lucas was found in criminal contempt of a Supreme Court Order. The Academy was not advised of any such allegations until it received Respondent's *ALC Brief*. Moreover, Mr. Lucas is currently working at the Richland County Sheriff's Office as a class 3 law enforcement officer, and the Richland County Sheriff's Office, consistent with S.C. Reg. 38-003, certified that in their opinion, Mr. Lucas was a candidate of good character and that he had not "engaged in misconduct as defined in R.38-004." With no evidence in Academy's possession to the contrary, the Academy has no basis to deny Mr. Lucas' and the Richland County Sheriff's Office's request for recertification.

Third, Respondent vaguely referred to "current highway patrolman [sic] who are certified and employed in spite of abuses to citizens and prisoners that have resulted in suspensions by the Highway Patrol (not the Academy) and settlements of lawsuits for thousands of dollars." See *ALC Brief of Appellant, pages 10-11*. With no further information to identify these supposed "current highway patrolman [sic]," the Academy cannot respond to this vague and unrelated allegation beyond reiterating the Academy can only make decisions based on information in its possession. If such incidents have occurred, the S.C. Dept. of Public Safety is obligated to report them to the Academy within fifteen (15) days of their final agency action. See S.C. Reg. 38-017(B). No such incidents have been reported, and the Academy cannot take action on incidents of which it is not aware.

Finally, Respondent vaguely referred to "numerous other examples of misconduct by certified law enforcement officers in South Carolina that have not resulted in denial of

certification.” See *ALC Brief of Appellant, page 11*. Again, with no further information to identify these supposed “numerous other examples,” the Academy cannot respond to this vague and unrelated allegation beyond reiterating the Academy can only make decisions based on information in its possession. If such incidents have occurred, the employing agency or former agency is obligated to report them to the Academy within fifteen (15) days of their final agency action. See S.C. Reg. 38-017(B). The Academy cannot take action on incidents it is not aware of occurring. Additionally, any reported incidents would be evaluated on the individual facts of each case to determine the proper action of the Academy.

Additionally, Respondent alleged that “The determination that the termination of employment is for ‘misconduct’ is a finding that is made by the employer without a hearing or right to due process.” *ALC Brief of Appellant, page 9*. Again, this is simply untrue. The document that is filed by the employer is merely an allegation of misconduct. See S.C. Reg. 38-009. It is not a finding that the officer actually has committed misconduct. The Academy ultimately determines if the allegation is founded or not and if, therefore, the officer has committed misconduct or not. Until the Council makes a determination, the allegation is nothing more than that, an allegation.

f. Denial of Law Enforcement Certification to Respondent was Not an Unconstitutional Taking in Violation of the Fifth Amendment of the United States Constitution, the Fourteenth Amendment of the United States Constitution and/or Article I, Section 3 of the Constitution of South Carolina³³

In her *ALC Brief*, Respondent contended the denial of her application for recertification as a law enforcement officer was an unconstitutional taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I,

³³ The Academy again reiterates this issue is not preserved for review by the Appellate Courts.

Section 3 of the Constitution of South Carolina, but Respondent put forth no argument or authority to specifically support this argument. See *ALC Brief of Appellant, page 2. Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (An issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority). To the extent Respondent put forth this issue for the purpose of attacking the Council's final agency decision for lack of due process and equal protection, please see section III.e., above.

g. Agency Process is Not Unconstitutional, Arbitrary, or Capricious³⁴

In her *ALC Brief*, Respondent asserted the agency process was unconstitutional, arbitrary and/or capricious, but she put forth no argument or authority to support this argument, other than those already addressed in section III.c., above. See *ALC Brief of Appellant, page 2. Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (An issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority).

The agency process used by the Academy is not unconstitutional, arbitrary, or capricious. All candidates for law enforcement certification are reviewed by staff of the Academy to make an initial determination regarding whether they appear to meet the qualifications to be trained and/or certified as law enforcement officers in South Carolina. If there is a question or concern about a candidate's qualifications, that question or concern is brought to the Academy Director's attention, who makes an initial decision as to whether that candidate can be training and/or certified. All of these decisions are reported to the Council and the Council either approves or rejects the Director's initial

³⁴ The Academy again reiterates this issue is not preserved for review by the Appellate Courts.

decision. If the Director's initial decision is unfavorable to the candidate, the candidate has the immediate option of initiating an agency level appeal. If the Council renders a decision that is unfavorable to the candidate, the candidate has the immediate option of initiating an agency level appeal. See footnote 29 for details regarding the agency level appeal process.

h. The Denial of Law Enforcement Certification to Respondent Was Not Arbitrary, Capricious, Characterized by an Abuse of Discretion, or Characterized by a Clearly Unwarranted Exercise of Discretion³⁵

This issue is also addressed, in part, in sections III.c., III.e., and III.g., above. As regards, the allegation that Respondent's denial of law enforcement certification was characterized by an abuse of discretion or a clearly unwarranted exercise of discretion, Respondent puts forth no argument or authority to support these arguments. See *ALC Brief of Appellant, page 2. Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (An issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority).

Moreover, S.C. Reg. 38-004 clearly states:

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:...

7. Dishonesty with respect to his/her employer;

8. Untruthfulness with respect to his/her employer.

Thus, with no argument or authority to further clarify what Respondent meant in her *ALC Brief* when she alleged the Academy's denial of Respondent's law enforcement

³⁵ The Academy again reiterates this issue is not preserved for review by the Appellate Courts.

certification was characterized by an abuse of discretion or a clearly unwarranted exercise of discretion, Academy simply could not respond to the allegation. It was wholly unclear from Respondent's *ALC Brief* what Respondent claimed Academy did that would constitute an abuse of discretion or a clearly unwarranted exercise of discretion. Clearly, the governing regulations allow for denial of certification for behavior such as Respondent's in this case and apply as outlined in section 2, above.

i. The Record Supports the Denial of Law Enforcement Certification to Respondent

Respondent argued that the "conclusion of Academy that the actions of Respondent constitute 'a blatant act of dishonesty' is not supported by the record." See *ALC Brief of Appellant, page 16*. This contention is blatantly false. Respondent attempted to overcome her dishonesty by arguing "[n]o records were falsified. [n]o signature was forged. [and n]o hours of work were fabricated." See *ALC Brief of Appellant, page 16*. By submitting her requests to accrue compensatory time, Respondent was implicitly representing to the Sheriff's Office that she had worked more than her compensated hours of work via her salary, and that she was not being otherwise compensated for these additional hours. Her representations to the Sheriff's Office were clearly contradictory to the fact she was compensated by the school for those hours.

Respondent attempted to further circumvent this issue by arguing "the Sherriff's [sic] Department lost no money." Again, this is blatantly false. Every time Respondent used compensatory leave she falsely received through her deceptive representations to the Sheriff's Office, she received compensation to which she was not entitled, and the public of Barnwell County had one less Sheriff's Deputy working and were not getting what they paid Respondent for. The public paid for a Sheriff's Deputy to work a certain

number of hours at a certain rate of pay. Respondent took accrued leave that she had not actually earned, and, every time she used that leave, the public was not getting what they paid for.

Further, Respondent argued “There is no evidence in the record that the content of any of the documents is false.” See *ALC Brief of Appellant, page 17*. Perhaps this is the most blatant falsehood in her entire brief. As explained above, Respondent had already been paid by the school at the rate of \$20 per hour for hours Respondent also submitted to the Sheriff’s Office for compensatory time. Therefore, the information contained on each and every one of these requests for compensatory time was false information submitted to her employer to obtain compensatory time to which Respondent knew she was not entitled.

- j. Under S.C. Reg. 38-004, the Academy is Not Required to Consider or Address Issues of Mitigation When Determining Whether to Grant or Deny Law Enforcement Certification to a Candidate³⁶

Finally, Respondent argued the Academy failed to consider mitigating circumstances. See *ALC Brief of Appellant, page 17*. Respondent never stated what these “mitigating circumstances” were in either her ALC brief, or the contested case hearing, but, simply argued mitigating circumstances should have been considered. S.C. Reg. 38-004(B) states, “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.” (Emphasis added). Nothing in the Training Act³⁷ or the corresponding

³⁶ The Academy again reiterates this issue is not preserved for review by the Appellate Courts.

³⁷ S.C. Code §23-23-10 et seq.

regulations³⁸ **requires** the Academy to consider or address issues of mitigation, but the Academy is allowed to consider mitigating circumstances when presented and appropriate. Therefore, Academy's failure to address mitigating factors is not dispositive of this appeal in any way.

Even if consideration of mitigating circumstances was required, Respondent failed to present any such circumstances during the contested case hearing.

³⁸ S.C. Reg. 38-001 et seq.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Administrative Law Court and reinstate the Order of Denial issued by the Council.

Respectfully Submitted,

January 7, 2014



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 2013-002612

Cassandra Donaldson,..... Respondent,

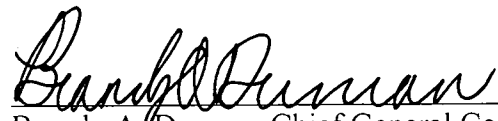
v.

South Carolina Criminal Justice Academy,.....Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Cassandra Donaldson by depositing a copy of it in the United States Mail, postage prepaid, on January 7, 2014, addressed to her attorney of record, C. Bradley Hutto, Esquire, Williams & Williams, Post Office Box 1084, Orangeburg, South Carolina 29116.

January 7, 2014



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