THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 12-ALJ-30-0087-AP
Appellate Case No. 2013-002-612

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

v.

Cassandra Donaldson .....Respondent,

INTIAL BRIEF OF RESPONDENT

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3. Whether S.C. Reg. 38-004 gives the Law Enforcement Training Council authority to indefinitely deny law enforcement certification

4. Whether Appellant's scheme for review is arbitrary, capricious, and constitutionally suspect

STATEMENT OF THE CASE

Respondent was employed by the Sheriff's Department of Barnwell County ("Barnwell Sheriff") as a law enforcement officer and assigned to a local school district as a school resource officer. In addition to her normal duties, she was eligible to work security at football games in Barnwell County. Deputies who worked at football games were compensated for their time by the local school districts. For games held at schools outside the school district to which Appellant was assigned, she was paid an hourly rate by the host school district. For games held within the school district to which she was assigned, Respondent was eligible for compensatory time from the sheriff's office. Over a period of four years, Appellant made twenty six claims to the school district to which she was assigned for payment for 99.5 hours and received compensation of $1,900. For those same hours, Appellant submitted a request for compensatory time to the sheriff's department. Each request for compensatory time was approved by her supervisor. Her compensatory time was taken during the summer months when school was not in session and her services were less needed.

The Barnwell Sheriff terminated Respondent upon learning that the school district had paid her for the same hours that she had used as the basis of her claim for compensatory time. This is alleged to be "double dipping" constituting "dishonesty with respect to her employer" in violation of S.C. Reg. 38-004 (A)(7) and "untruthfulness with respect to her employer" in violation of S.C. Reg. 39-004 (A)(8).

Respondent sought employment with the Orangeburg County Sheriff's Office ("Orangeburg Sheriff"). Upon inquiry of the Orangeburg Sheriff, the

Appellant, through its Director Hubert F. Harrell, 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. Respondent appropriately and timely appealed this decision to the Administrative Law Court ("ALC"). Pursuant to the parties' request, the ALC remanded the case back to Appellant for an agency level contested case hearing. The agency level contested case hearing took place on May 31, 2011. The Law Enforcement Training Council ("Council"), upon recommendation of the contested case hearing officer and decision of the full council, denied Respondent's request for recertification. Respondent timely appealed to Council's final order to the ALC.

Both parties presented initial briefs to the ALC. Respondent's appeal to the ALC asserted the following issues:

1. Did the decision of the Respondent exceed the statutory authority of the agency?
2. Was the decision of the Respondent based on a regulation that is arbitrary or capricious?
3. Was the decision of the Respondent based on the provisions of a regulation that is unconstitutionally vague and overbroad?
4. Was the decision of the Respondent based on the provisions of a regulation that violates due process and equal protection?
5. Did the decision of the Respondent constitute 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?

6. Was the decision of the Respondent arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion?
7. Does the record fail to support the decision of the Respondent in that no misconduct occurred?
8. Did the decision of the Respondent fail to address the issue of mitigating circumstances?

(Brief of Donaldson, September 26, 2012).

In addressing these issues, Respondent argued the following:

1. The Academy (Appellant in this matter) established a scheme for review that is arbitrary capricious, and constitutionally suspect.
2. The denial of a law enforcement certification is subject to constitutional review in that it is draconian when compared to the certifications of other professions.
3. The conclusions of the Academy that the actions of Donaldson (Respondent in this matter) constitute "a blatant act of dishonesty" is not supported by the record.
4. The decision of the Academy failed to address the issue of mitigating circumstances.

(Brief of Donaldson, September 26, 2012).

On November 8, 2013, the ALC issued its Final Order. The ALC made the following findings:

1. Based on irrelevance, the ALC denied Respondent's request to reopen the record to include evidence of examples of individuals whom Respondent argued committed more egregious misconduct in other professions and occupations but were allowed to keep their certifications and continue in their chosen professions. (ALC Final Order dated November 8, 2013, pg. 4-5).
2. The ALC declined to remand the case to the Council for consideration of a videotape Respondent submitted with her Initial Brief on the basis that Respondent failed to properly seek the Council's consideration of the videotape and thus, because the evidence was not considered by Council, then the ALC could not consider the videotapes either. (ALC Final Order dated November 8, 2013, pg. 5).
3. The Council improperly referred to S.C. Code Ann. Regs. 38-004 (2011) in deciding whether to certify Donaldson as a law enforcement officer. (ALC Final Order dated November 8, 2013, pg. 5-8).
4. The Council failed to promulgate regulations for the purpose of suspending, revoking, or restricting the certification of a law enforcement officer, pursuant to S.C. Code Ann. 23-23-80(6) (Supp. 2011), and thus, the Council's decision to revoke Donaldson'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." Donaldson's "right to be employed as a law enforcement officer [has]

been prejudiced as a result of the Council's decision." (ALC Final Order dated November 8, 2013, pg. 9-11).

5. The ALC reversed the Council's decision and remanded the case to Council to promulgate regulations. (ALC Final Order dated November 8, 2013, pg. 11).
6. Because the ALC found that Regulation 38-004 is defunct, all other challenges by Donaldson were moot. (ALC Final Order dated November 8, 2013, pg. 11).

In addition to the forthcoming arguments, Respondent fully incorporates her arguments presented in her Initial Brief to the ALC. *See* Brief of Donaldson, September 26, 2012.

FACTS

Respondent was employed by the Sheriff's Department of Barnwell County as a law enforcement officer and assigned to a local school district as a school resource officer. In addition to her normal duties, she was eligible to work security at football games in Barnwell County. Deputies who worked at football games were compensated for their time by the local school districts. For games held at schools outside the school district to which Respondent was assigned, she was paid an hourly rate by the host school district. For games held within the school district to which she was assigned, Respondent was eligible for compensatory time from the sheriff's office. Over a period of four years, Respondent made twenty six claims to the school district to which she was assigned for payment for 99.5 hours and received compensation of $1,900. For those same hours, Respondent submitted a request for compensatory time to the sheriff's department. Each request for compensatory time was approved by her supervisor. Her compensatory time was taken during the summer months when school was not in session and her services were less needed.

There is no issue as to whether Respondent was entitled to all the compensatory time that was authorized. Respondent's employer did not pay her any money for time that she did not work. In other words, her employer has not paid any money for services that it did not receive. Respondent was paid a salary, and she worked all of the hours for which she was paid. The issue her employer raises is that Respondent received additional compensation from the school

district for working home games. The school district to which she was assigned has raised no issue with regard to payments made to Respondent.

Respondent's employer (the Sheriff of Barnwell County) terminated her upon learning that the school district had paid her for the same hours that she had used as the basis of her claim for compensatory time. This is alleged to be "double dipping" constituting "dishonesty with respect to her employer" in violation of S.C. Reg. 38-004 (A)(7) and "untruthfulness with respect to her employer" in violation of S.C. Reg. 39-004 (A)(8).

The money ($1990 over four years) that Respondent received was paid by the school district and would have been paid by it regardless of who worked security for the games. Presumably, if no compensatory time request had been made to the sheriff's department, Respondent would not have violated the "policy" of the sheriff's department. Conversely, if Respondent had received no payment from the school district and had only taken compensatory time from the sheriff's department, Respondent would not have violated the "policy" of the sheriff's department.

Respondent testified that she was unaware that she was not allowed to request compensatory time for the games she worked security that were held in the district to which she was assigned. (Transcript of Hearing p17, lines 21 through 25). Respondent learned of this "policy" in 2010 when her supervisor advised her that she was not allowed to request compensatory time for home games if she also submitted a request for payment to the school district. (Transcript of Hearing p21, lines 5 through 9). Upon learning that this was the

"policy" of the sheriff's department, Respondent ceased the practice of receiving payment and requesting the compensatory time. (Transcript of Hearing, lines 10 through 16) During the four years in question, each request of Respondent to receive compensatory time was approved by her supervisor. This is the same supervisor that advised Respondent in 2010 that such requests violated the policy of the department. On other occasions, officers of the sheriff's department had been allowed to provide security for a private credit union during Christmas, receive payment from this credit union, and also receive compensatory time. (Transcript of Hearing, p18, line 14 through p19, line 5).

Upon learning that Respondent had received payment from the school district for the same hours for which she had received compensatory time from the sheriff's department, the sheriff terminated Respondent's employment with his department. Thereafter, Respondent's termination was reported to Appellant. Appellant then acted to deny Respondent's law enforcement certification, forever barring her from employment with any law enforcement agency in the State of South Carolina.

There is no evidence in the record that the sheriff's department had any written policy addressing the issue of compensatory time for employee's who provided security within the county for sporting events at area public schools. The only evidence in the record is that for four years, the sheriff's department approved the requests of Respondent without question or concern. Upon learning of the contrary policy, Respondent ceased the activity when she learned this practice was not allowed.

ARGUMENTS

I. THE ALC APPROPRIATELY CONSIDERED THE QUESTION OF WHETHER THE COUNCIL PROPERLY REVOKED RESPONDENT'S LAW ENFORCEMENT CERTIFICATION

Appellant argues that the ALC's final order should be completely disregarded because "the validity, applicability, and/or authority of the Academy to promulgate any of the Chapter 38 regulations" was not challenged by Respondent at the contested case hearing or during the ALC appeal. This argument is made with utter ignorance of the briefs presented to the ALC and the statutory scheme of Administrative Procedures under S.C. Code Ann. §1-23-310 *et al.*

In her initial brief to the ALC, Respondent argued Appellant's scheme for review of Respondent's law enforcement certification was arbitrary, capricious, and constitutionally suspect. (Brief of Donaldson, September 26, 2012). Respondent references S.C. Code Ann. §23-23-30 *et seq* and S.C. Reg. 38-004 in contending that Appellant exceeded "the statutory boundaries" by setting up a scheme to deny certification when it was only given the authority to promulgate regulations to suspend, revoke or restrict certification. There is no question that Respondent has put at issue the interpretation and application of S.C. Code Ann. §23-23-30 *et seq* and S.C. Reg. 38-004.

Indeed, the ALC recognizes this issue raised by Respondent on appeal to the ALC: "[t]urning to the merits of the [Respondent's] appeal, the [Respondent] 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." (ALC Final Order dated November 8, 2013, pg. 5). The next sentence, in direct response to Respondent's argument, the ALC states, "[u]pon 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).

Furthermore, and most telling, Appellant recognized in its Initial Brief to the ALC that the application and interpretation of S.C. Reg. 38-004 was at issue: "[Donaldson] contends that [the Academy] exceeded its statutory authority by denying [Donaldson's] request for law enforcement certification under S.C. Reg. 38-004" because of S.C. Code Ann. §23-23-80(6)" (Brief of Academy, November 7, 2012, pg. 14); "S.C. Reg. 38-004 is not arbitrary or capricious" (Brief of Academy, November 7, 2012, pg. 15); "S.C. Reg. 38-004 is not unconstitutionally vague or overbroad" (Brief of Academy, November 7, 2012, pg. 19); "S.C. Reg 38-004 does not violate due process or equal protection" (Brief of Academy, November 7, 2012, pg. 19); and "Under S.C. Reg. 38-004, Respondent is not required to consider or address issues of mitigation when determining whether to grant or deny law enforcement certification to a candidate" (Brief of Academy, November 7, 2012, pg. 27).

Appellant's attempt to rid of Respondent's questioning and the ALC's ruling on S.C. Reg. 38-004, S.C. Code Ann. §23-23-60, and other relevant provisions, was first presented in its Initial Brief to the ALC. As in Appellant's Initial Brief before this Court, the Appellant before the ALC relied on two criminal cases; this is an administrative agency matter, not a criminal case. Furthermore, the

statutory scheme under S.C. Code Ann. §1-23-310 *et al* for Administrative Procedures and the handling of contested cases before administrative agencies does not require preservation of appealable legal issues by objection at the contested case hearing before the agency. Indeed, section 1-23-380(4) gives the ALC authority to remand a case to the agency for action "in cases of alleged irregularities in procedure...not shown in the record, and established by proof satisfactory to the court." S.C. Code Ann. §1-23-380(4) (emphasis added) ("the review must be conducted by the court and must be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate"). This provision evidences that, when it comes to irregularities in procedure, the ALC is not strictly limited to considering only what is shown in the record. The Academy seeks to wrongly impose a procedure contrary to statutory and case law.

The ALC properly considered the applicability of S.C. Reg. 38-004.

II. THE SOUTH CAROLINA LAW ENFORCEMENT COUNCIL HAS FAILED TO PROMULGATE REGULATIONS GOVERNING THE STATUS OF RESPONDENT'S CERTIFICATION AND THUS CANNOT DENY RESPONDENT'S RECERTIFICATION

Appellant argues Chapter 38 regulations followed Appellant into its new form as a stand-alone agency pursuant to S.C. Code Ann. §23-23-80(6) and §23-23-10(D) and thus, it has the authority to deny Respondent's recertification. This argument on its face is appealing, but it neglects the points astutely made by the ALC and fully supported by South Carolina law.

Under S.C. Code Ann. §23-6-450(e) (repealed by 2006 Act no. 317, Section 7, eff. May 30, 2006), the Department of Public Safety, through its Director and the Law Enforcement Training Council ("Council"), was authorized to "*make recommendations* on such regulations as may be necessary for the administration of this chapter, and advise the director to issue orders directing that public law enforcement agencies comply with this chapter and all regulations so promulgated." (emphasis added). Also, it 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 *department*." S.C. Code Ann. §23-6-450(f) (repealed by 2006 Act no. 317, Section 7, eff. May 30, 2006) (emphasis added).

As noted, these statutes were repealed and this authority, as well as who holds the authority, changed. Now, the Council is authorized to: "*make* such regulations as may be necessary for the administration of this chapter, including the issuance of orders directing public law enforcement agencies to comply with this chapter and all regulations so promulgated" and "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(5), (6) (Supp. 2011) (emphasis added). The legislature changed the authority from "make recommendations" to actually "make such regulations;" it also specifically changed who held that authority from the Department of Public Safety, through its Director and the Law Enforcement Training Council, to just the South

Carolina Law Enforcement Training Council. The distinction is clear, as is the legislature's intent.

Appellant argues that S.C. Code §23-23-10(D) essentially is a catch-all to transfer all former functions, etcetera of the South Carolina Criminal Justice Academy Division of the Department of Public Safety to the South Carolina Criminal Justice Academy under the new statutory scheme. More specifically, Appellant contends this statute provides that Chapter 38 regulations follow Appellant in its new form as a stand-alone agency. If it were a catch-all and intended the Department of Public Safety's functions expressed in Section 23-6-450(f) to transfer to the Council then the new law, section 23-23-80, and its new determination of authority and scope of authority would be futile and useless. It can only make sense that section 23-23-80 was intended by the legislature exactly as written – that the Council is authorized to and tasked with making regulations, not just making recommendations as the Department of Public Safety was tasked to do under the former statutory scheme. The new law changed how regulations would be made and required the Council to take action and promulgate regulations. Section 23-23-10(D) cannot be applied to cover-up the Council's failure to follow the new statutory scheme by blanketing the Council with the Department of Public Safety's former function of recommending regulations. Moreover, Appellant even admits that Appellant has attempted to promulgate new regulations, confirming the intent behind the change from section 23-6-450(f) to section 23-23-80.

Regulation 38-004 was promulgated by the Department of Public Safety under the former statutory scheme and not the Council. Thus, the Council erred in relying on this regulation to deny Respondent her recertification.

III. REGULATION 38-004, EVEN IF APPLICABLE, NONETHELESS DOES NOT AUTHORIZE THE COUNCIL TO INDEFINITELY DENY RESPONDENT'S RECERTIFICATION

Respondent agrees with the ALC's reasoning and conclusion that S.C. Reg. 38-004 is impertinent in this dispute, but even if this Court finds it is applicable, the plain reading of the regulation fails to give Appellant to the authority to indefinitely deny Respondent's recertification.

Section 23-23-80 gives the Council authority 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) (emphasis added). The terms "certify and train" are positive, active terms, indicating what the Council is authorized to do in preparing candidates for the role of a law enforcement officer. The terms "suspension, revocation, or restriction of the certification" are negative, active terms, indicating what the Council is authorized to do only if it does so through the promulgation of regulations. Suspension, revocation or restriction are temporary effects on certification. The Council, through its ruling, has *indefinitely* effected Respondent's certification. "Therefore, this Council finds Ms. Donaldson is no longer able to be certified as a law enforcement officer in the State of South Carolina." (Order of Law Enforcement Training Council, January 31, 2012, Donaldson v. South Carolina Criminal Justice Academy).

Appellant argues S.C. Reg. 38-004 is the Council's promulgation of its authority to suspend, revoke, or restrict certification. It too does not give Council the authority to indefinitely deny Respondent's certification. Regulation 38-004 states:

> 38-004. Denial of Certification for Misconduct.
>
> 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. Reg. 38-004 (emphasis added). "Deny certification" is not the same as preventing recertification and forever preventing Respondent from serving as a law enforcement officer.

IV. APPELLANT'S SCHEME FOR REVIEW OF RESPONDENT'S CERTIFICATION IS ARBITRARY, CAPRICIOUS, AND CONSTITUTIONALLY SUSPECT

"A decision is arbitrary if it is without a rational basis, is based on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Trimmier v. S.C. Dep't of Labor, Licensing and Regulation, 405 S.C. 239, 246, 746 S.E.2d 491, 495 (Ct. App. 2013) (quoting Deese v. S.C. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 s.E.2d 539, 541 (Ct. App. 1985). In Ernest M. Smith v. South Carolina Department of Labor, Licensing, and Regulation Board of Funeral Service, Smith failed to disclose to the Board of Funeral Service that he pled guilty to a federal felony. Docket No. 13-ALF-11-0088-AP (Jan. 30, 2014). After a final order hearing, the Board of Funeral Service suspended Smith's license until he obtained a pardon from his conviction. Id. pg. 2. Smith appealed to the ALC, which exercised its authority under S.C. Code Ann. 1-23-380(5), to find that the Board's decision to suspend Smith until a federal pardon is obtained was arbitrary. Id. pg. 5.

> While there is a clear rational basis between suspending [Smith] for a fixed period of time and the conduct of [Smith], there is no rational basis between suspending [Smith] until a federal pardon is granted and his actions. There is nothing that equates obtaining a federal pardon with protecting the health, safety, and public welfare of the citizens of South Carolina...The sentence imposed upon [Smith] has the likely effect of prohibiting him from being a funeral director/embalmer in South Carolina. There is nothing in the record to comprehend the reason for placing this restriction upon [Smith]. While the Board does have broad discretion in imposing a sentence or punishment upon [Smith], such as suspending [Smith] for a period of time, or placing conditions to be met during a suspension, the condition that a federal pardon be obtained is arbitrary and capricious and is an unwarranted exercise of discretion.

Id. The ALC in Smith came to this conclusion even given the Funeral Board's statutory authority under section 40-19-140. See S.C. Code Ann. 40-19-140 ("A

person may not be refused an authorization to practice...solely because of a prior criminal conviction... [h]owever, a board may refuse an authorization to practice if, based upon all information available,...it finds that the applicant is unfit or unsuited to engage in the profession or occupation").

This matter presents a similar situation. Respondent's behavior pales in comparison to Smith intentionally and consistently lying about a federal conviction. Nonetheless, Appellant asserts that regulation 38-004 gives the Council the authority to indefinitely deny Respondent's law enforcement certification based on the language "[The Council] may deny certification [for]...dishonesty with respect to his/her employer [and] untruthfulness with respect to his/her employer." S.C. Reg. 38-004. It takes the dramatic step to interpret "may deny" to mean authority to permanently and indefinitely deny Respondent's certification. Such a drastic punishment, like the federal pardon in Smith, essentially denies Respondent her livelihood forever. Furthermore, Respondent was never informed by her supervisor that requesting compensatory time for home games was impermissible if she also submitted a request for payment to the school district. As soon as she learned of this policy she immediately ceased the practice. Her conduct certainly does not rise to the level of Smith's and in no way threatens the health, safety, and public welfare of the citizens of South Carolina.

Additionally, the liberty taken by the Council to interpret "may deny" to mean indefinitely and permanently deny, violates Respondent's constitutional due process and equal protection rights as well as evidences that the regulation is unconstitutionally vague or overbroad. The regulation is inadequate in giving

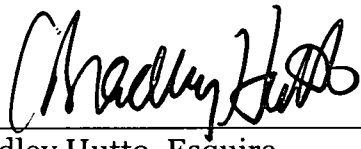
notice to Respondent that she could be forever barred from working as a law enforcement officer because of her supervisor's misrepresentations of and failure to implement the Sheriff Department's "policy." She was up front and honest regarding her request for compensatory time as well as request for payment from the school district, but yet is being robbed of her livelihood because of her employer's actions and inactions.

The Council's decision to indefinitely deny Respondent's law enforcement certification is arbitrary, capricious, constitutionally suspect and an unwarranted exercise of discretion under regulation 38-004.

CONCLUSION

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

Respectfully Submitted,



April 25, 2014

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

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

v.

Cassandra Donaldson .....Respondent,

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent on South Carolina Criminal Justice Academy by depositing a copy of it in the United States Mail, postage prepaid on April 25, 2014, addressed to its attorney of record Brandy A. Duncan, Chief General Counsel, 5400 Broad River Road, Columbia, SC 29212.

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