THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No 2015-000797

Deonta Brinston, Respondent,

v

South Carolina Department of Criminal Justice, Appellant

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 13, 2014, the South Carolina Criminal Justice Academy (hereinafter, "Academy") received a Personnel Change in Status Report of Separation for Respondent alleging Respondent engaged misconduct by unlawfully using a controlled substance (Personnel Change in Status Report dated received May 13, 2014). As required by S.C. Reg. 38-009, a copy of this allegation was mailed to Respondent on May 16, 2014 (Letter from Director Hubert F. Harrell to Respondent dated May 16, 2014). On or about May 27, 2014, Respondent filed a response to the allegation of misconduct (Response to Allegation of Misconduct from Respondent). On July 1, 2014, the Academy received a Personnel Change in Status Report of Hire from the Calhoun Falls Police Department for Respondent stating they hired Respondent on June 19, 2014 (Personnel Change in Status – Hire Report dated June 18, 2014 and E-mail from Brenda Scott to Brandy A. Duncan dated July 1, 2014). On August 26, 2014, a contested case hearing was held regarding the allegation filed by Respondent's prior employer, the Anderson County Sheriff's Office (Transcript of Hearing).

Respondent was represented by Candy Kern-Fuller, Esquire in the contested case hearing (Id., page 2). Internal Affairs Investigators Steve Reeves and Investigator Jonathon Brown were present on behalf of the Anderson County Sheriff's Office (Id.). Three (3) witnesses provided testimony: Lt. Reeves, Investigator Brown, and Respondent (Id., pages 6-51).

On September 15, 2014, Robin E. Morse, Director of the Clinton Department of Public Safety, member of the Law Enforcement Training Council (hereinafter, "Council"), and hearing officer for this contested case hearing, issued his written, non-

binding, recommendation to the full Council (Hearing Officer Recommendation). Director Morse recommended the Council grant Respondent's request for re-certification with two (2) years of probation and random drug testing, including specific testing for steroid use, at least every three (3) months on dates selected by the Academy (Id.).

On October 8, 2014, the full Council, after receiving Director Morse's recommendation, the hearing transcript, and all evidence from the hearing and making themselves familiar with the facts of this case, voted and unanimously (including Director Morse) decided that Respondent was no longer able to be certified as a law enforcement officer in the State of South Carolina.[1] Director Leroy Smith, Co-Chairman of the Council, issued the final, written agency decision of the Council on October 14, 2014 (*Final Agency Decision* dated October 14, 2014) and this *Final Agency Decision* was mailed to Respondent's Counsel October 15, 2014 (Letter from Brandy A. Duncan to Candy M. Kern-Fuller dated October 15, 2014). Respondent's Counsel also received this *Final Agency Decision* via e-mail on October 15, 2014 (E-mail from Brandy A. Duncan to Candy M. Kern-Fuller dated October 15, 2014).

According to the Product and Tracking Information provided by the U.S. Postal Service, Respondent mailed his ALC (hereinafter "ALC") Notice of Appeal to the Council on November 20, 2014, one day past the date Respondent was required to serve his ALC notice of appeal (USPS Tracking for 9405511899561099104457 and Envelope from mailing of ALC Notice of Appeal sent to Brandy A. Duncan from Candy M. Kern-Fuller). Due to the late service of the ALC Notice of Appeal, on November 21, 2014

[1] Chief Mark A. Keel, Chairman of the Council, was not present for this vote, as he had not yet arrived at the Training Council meeting. Also, the following Council members voted via their proxy/representative: Attorney General Alan Wilson, Director Bryan P. Stirling, Director Alvin A. Taylor, and Sheriff Bruce M. Bryant.

Council filed a motion to dismiss the ALC appeal (*Motion to Dismiss Appeal as Untimely Served* and Letter from Brandy A. Duncan to Jana E. Cox Shealy, Clerk of Court for the ALC dated November 21, 2014). On December 15, 2014, Respondent filed *Appellant's Reply [sic] to Motion to Dismiss* (*Appellant's Reply [sic] to Motion to Dismiss*). On December 16, 2014, the Council filed *Reply to Appellant's Reply [sic] to Motion to Dismiss* (*Reply to Appellant's Reply [sic] to Motion to Dismiss*, Letter from Brandy A. Duncan to the Honorable Shirley C. Robinson dated December 16, 2014, and E-mail from Brandy A. Duncan to Teckla Henderson dated December 16, 2014). On December 19, 2014, the ALC issued an *Order Denying Motion to Dismiss* and setting deadlines for the filing of the ALC record on appeal, briefs, and reply brief (*Order Denying Motion to Dismiss* filed December 19, 2014 and E-mail from Teckla Henderson to Brandy A. Duncan and Candy M. Kern-Fuller dated December 19, 2014).

The ALC *Record on Appeal* was filed on December 23, 2014 (ALC *Record on Appeal* filed December 23, 2014). On January 22, 2015, Respondent filed *Brief of Appellant* in the ALC (*Brief of Appellant*). On February 11, 2015, Appellant filed *Brief of Respondent* in the ALC (*Brief of Respondent* and Letter from Brandy A. Duncan to the Honorable Shirley C. Robinson dated February 9, 2015). Respondent did not file a reply brief in the ALC (E-mail from Brandy A. Duncan to Candy M. Kern-Fuller dated February 27, 2015, E-mail from Brandy A. Duncan to Teckla Henderson dated March 3, 2015, E-mail from Teckla Henderson dated March 3, 2015, and E-mail from Brandy A. Duncan to Teckla Henderson dated March 3, 2015). On March 18, 2015, the ALC issued its final *Order* in this case (*Order* filed March 18, 2015). This *Order* was e-mailed to both attorneys of record on March 18, 2015 (E-mail from Teckla Henderson to Brandy A.

Duncan and Candy M. Kern-Fuller dated March 18, 2015). This *Order* is the order at issue in the current appeal to this Court (*Order* filed March 18, 2015).

On April 10, 2015, the Council served its Notice of Appeal on Respondent and the ALC (*Notice of Appeal* dated April 10, 2015, Letter from Brandy A. Duncan to the Honorable Jenny Abbott Kitchings dated April 10, 2015, and Letter from Brandy A. Duncan to the Honorable Shirley C. Robinson dated April 10, 2015). This Notice of Appeal was filed in the Court of Appeals on April 13, 2015 (*Notice of Appeal* filed in Court of Appeals on April 13, 2015). This Notice of Appeal was also filed in the ALC on April 10, 2015 (*Notice of Appeal* filed in ALC on April 10, 2015). This Notice of Appeal was received in Respondent's Counsel's Office on April 13, 2015 (Return Receipt for Certified Mail to Candy M. Kern-Fuller).

On April 21, 2015, the undersigned received a letter from the Honorable Jenny Abbott Kitchings stating that a proof of service on the ALC had not been provided as required by Rule 203(b)(6), SCACR (Letter from the Honorable Jenny Abbott Kitchings to Brandy A. Duncan dated April 20, 2015). The requested Proof of Service was mailed to the Court, the ALC, and Respondent's Counsel on April 22, 2015 (*Proof of Service* dated April 22, 2015 and Letter to the Honorable Jenny Abbott Kitchings and Shirley C. Robinson dated April 22, 2015).

FACTS

On April 2, 2014, Respondent's soon-to-be ex-wife reported to the Anderson County Sheriff's Office that Respondent and another Anderson County Sheriff's Deputy were taking illegal steroids (Transcript of Hearing, page 6, line 15-page 7, line 3 and page 14, lines 15-18). Based on this report, Respondent and the other deputy were both required to submit to a specialized steroid urine test through AnMed Laboratory Services on April 9, 2014 (Id., page 6, line 24-page 7, line 20). Respondent and the other deputy tested positive for Methandienone (Id., page 7, line 21-page 8, line 1). Respondent also tested positive for Nandrolone (Id.). Methandienone and Nandrolone are both listed as anabolic steroids under S.C. Code §44-53-1510(A) (Id., page 8, lines 1-3).

Respondent contended he tested positive for Methandienone and Nandrolone because he was taking three (3) over-the-counter supplements: Test PSI, Alpha Mass X, and A-D-T (Id., page 39, line 8-page 43, line 1 and Brinston Exhibit #1 to Transcript of Hearing). Respondent did not support his contention regarding the over-the-counter supplements through any sort of expert medical testimony. To support this contention, Respondent did, however, submit a SOAP Note dated May 27, 2014 from Powdersville Internal Medicine (Brinston Exhibit #2 to Transcript of Hearing). This SOAP Note stated Respondent had returned to review his labs from May 20, 2014 (Id.).[2] This SOAP Note did not indicate the presence of any anabolic steroids, but it did note that Respondent's "Total Testosterone... was 116.3 (range 348.0-1197.0)" (Id.).

[2] Appellant notes that the May 20, 2014 visit by Respondent to Powdersville Internal Medicine would have occurred mere days after Respondent received a copy of the allegation of misconduct filed by the Anderson County Sheriff's Office.

In its' *Final Agency Decision* the Council specifically found that "[i]t is well known that the use of anabolic steroids suppresses the naturally occurring testosterone in the body" (*Final Agency Decision* dated October 14, 2014, page 2, lines 5-6). The Council also found that the "significant delay between the original testing performed by Anderson County Sheriff's Office (April 9, 2014) and the follow up testing performed by Powdersville Internal Medicine (May 20, 2014)... [resulted in] the Powdersville Internal Medicine SOAP Note actually support[ing] the allegations put forth by the Anderson County Sheriff's Office against" Respondent (Id., page 2, lines 6-11).

During the contested case hearing, Respondent objected to the admission of the written LabCorp test results (Transcript of Hearing, Court Exhibit #6) on the basis that there was no affidavit of authenticity, the test results didn't show the limits on the pages that confirm positive, there was no medical review process, and there was no gas chromatography performed on the sample (Transcript of Hearing, page 11, lines 12-24).[3] Despite these objections to the LabCorp test results, Respondent never objected to Internal Affairs Investigator Reeves' testimony that Respondent was required to submit to a specialized steroid urine test through AnMed Laboratory Services on April 9, 2014

[3] Upon further review of this exhibit, Respondent's objection that there was no medical review process and there was no gas chromatography performed on the sample can easily been seen to be misleading based on the contents exhibit itself, which shows the medical review process on page 2 of the exhibit (in the middle of the page) and notes that the Nandrolone and Nandrolone metabolites were confirmed by "GCMS," the Methandienone was confirmed by "LCMSMS," and specifically states "Analysis for anabolic steroids is performed by GC/MS. Any positive or abnormal results are confirmed by GC/MS or HPLC/MS/MS." A quick google search reveals that "GCMS" and "GC/MS" are abbreviations for Gas Chromatography-Mass Spectrometry. See http://en.wikipedia.org/wiki/Gas_chromatography%E2%80%93mass_spectrometry, last accessed on February 4, 2015 at 2:32 p.m. Another google search shows that "LCMSMS" and "HPLC/MS/MS" are abbreviations for Liquid Chromatography-Mass Spectrometry. See http://en.wikipedia.org/wiki/Liquid_chromatography%E2%80%93mass_spectrometry, last accessed on February 4, 2015 at 2:34 p.m.

and that Respondent tested positive for Methandienone and Nandrolone (Id., page 6, line 24-page 8, line 1).

ARGUMENT

I. THE NOTICE OF APPEAL TO THE ALC WAS UNTIMELY SERVED IN VIOLATION OF RULES 3 AND 33, SCALCR, THEREFORE, THE ALC HAD NO JURISDICTION TO HEAR OR RULE ON THE MERITS OF RESPONDENT'S APPEAL.

The Council asserts this matter was erroneously considered on the merits by the ALC due to the ALC Notice of Appeal being untimely served on the Council. Rule 33, SCALCR, states:

> The notice of appeal from the final decision of an agency **shall** be filed with the [Administrative Law] Court **and a copy served** on each party **and the agency** whose final decision is the subject of the appeal **within thirty (30) days of receipt of the decision** from which the appeal is taken.

(Emphasis added). Further, Rule 3, SCALCR states:

> In computing any period of time prescribed or allowed by these rules... the day of the act, event, or default after the designated period of time begins to run is not included. The last day of the period so computed is to be included... Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, by e-mail, or upon a person designated by statute to accept service, five days shall be added to the prescribed period.

In this case, Respondent, by and through his attorney, Candy M. Kern-Fuller, was notified of the Council's *Final Agency Decision* regarding Respondent's law enforcement certification via e-mail and U.S. Mail on October 15, 3014 (*Final Agency Decision* dated October 14, 2014, October 15, 2015 Letter from Brandy A. Duncan to Candy M. Kern-Fuller, and E-mail dated October 15, 2015 from Brandy A. Duncan to Candy M. Kern-Fuller). Pursuant to Rules 3 and 33, SCALCR, Respondent was required to serve a copy of his notice of appeal on the Council by no later than November 19, 2014.[4] Thirty (30)

[4] Not counting October 15, 2014, the day of notice of the *Final Agency Decision*, Appellant had thirty (30) days, so until November 14, 2014, (Rule 33, SCALCR), plus

days from October 15, 2014 was November 14, 2014, the date Respondent **claimed** in his Proof of Service and Certificate of Service to mail the notice of appeal. Although the "stamps.com" postage label reflected a stamping date, i.e. the date the stamps.com label was created, of November 14, 2014, the United States Postal Service Tracking reflects that the ALC Notice of Appeal being served on the Council was not actually deposited in the U.S. Mail until November 20, 2014, one day past the date Respondent was required to serve his ALC Notice of Appeal. This error on Respondent's part is fatal to his appeal.

The law in South Carolina regarding the timeliness of service of notice of appeals is abundantly clear Service of the notice of appeal is a **jurisdictional requirement**, and the Court has **no authority** to extend or expand the time in which the notice of appeal must be served *Mears v Mears*, 287 S.C. 168, 337 S.E 2d 206 (1985), *Conner v City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002) (dismissing parties who had not been timely serviced with a notice of appeal); *McCray v State,* 271 S.C. 185, 246 S E 2d 230 (1978) (in absence of a notice of appeal having been given and timely served, the Supreme Court has no jurisdiction over an appeal)

Respondent's response to the Council's ALC motion to dismiss based on this untimely service essentially contained nothing more than wholly unsupported assertions by Respondent's Counsel that she placed the ALC Notice of Appeal in a mailbox near

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five (5) days, so until November 19, 2014 (Rule 3, SCALCR), to serve the notice of appeal. Notably, Appellant's Counsel claims she mailed the Notice of Appeal on November 14, 2014, the last day the Notice of Appeal would have been due to be served without the extra five (5) days allowed for under Rule 3, SCALCR, a rule that in the undersigned's experience is frequently forgotten about by attorneys. Also, notable is that Appellant's Counsel has filed every single pleading in this case, other than the Notice of Appeal to the ALC, on the last possible date allowed for by either rule or Court Order, indicating that it is Appellant's Counsel's normal practice to file pleadings on the last date allowed.

her home in Anderson County on November 14, 2014. Moreover, Respondent tried to bolster the assertion that the ALC Notice of Appeal was mailed on November 14, 2014, by attaching a screen shot of Respondent's Counsel's computer showing Respondent's Counsel's working files and their last "Date Modified." Beyond the fact that the last date modified does not provide any evidence of the last date the documents were printed and/or accessed,[5] the last date of modification is not relevant. The date the ALC Notice of Appeal was **mailed** is the relevant issue before the Court and this information simply cannot be ascertained by the screen shot provided by Respondent's Counsel.

Additionally, the Council fully agrees with Respondent's recountance from *Green v. Green*, 320 S.C. 347, 350 (Ct. App. 1995),

> Rule 5(b)(1), SCRCP, provides that 'service by mail is complete upon **mailing** of all pleadings and papers subsequent to the service of the original summons and complaint.' **Mailing** ordinarily occurs when a documents is **deposited** with the U.S. Postal Service properly addressed with sufficient postage affixed. *Southbridge Prop., Inc. v. Jones*, 292 S.C. 198, 355 S.E.2d 535 (1987). Any designated mail depository box, whether in a building or along a mail route, constitutes a depository authorized for the receipt and delivery of mail. *Rosen v. United States*, 245 U.S. 467, 62 L. Ed. 406, 38 S.Ct. 148 (1918). Although the postmark date on an envelope is compelling evidence in cases where timely service through the mail is at issue, **we are unaware of any authority... indicating the postmark dates is dispositive.**

Emphasis added. The Council notes that the *Green* case, however, was decided nearly 20 years ago, when all mail was still processed by hand.[6] Today, almost all mail is

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[5] As may be seen in Exhibit A to the Council's ALC *Motion to Dismiss*, which shows a date of creation, date last saved, and date last printed.

[6] The U.S. Postal Service first utilized a handwritten address-reading prototype during Christmas 1997. See http://www.livescience.com/32290-how-do-post-office-machines-read-addresses.html, paragraph 3, last accessed December 16, 2014 at 11:35 a.m. (Unable to include a copy in the Record on Appeal as the article will not print correctly from the webpage).

processed by machines that automatically read the mailing address.[7] Additionally, U.S. Postal Service Tracking numbers and bar codes are **automatically** scanned by sorting machines all along the sorting process. So, while the Council fully agrees with the *Green* Court, that "the postmark date on an envelope is compelling evidence in cases where timely service through the mail is at issue," the Council strongly asserts that it is "**unaware of any authority... indicating the postmark dates is dispositive.**" As a result, the ALC was allowed and this Court is allowed to look to other facts to determine if the ALC Notice of Appeal was timely filed. Further, "An affidavit of service is Prima facie evidence of service which may be impeached by extrinsic evidence." *Richardson Construction Company, Inc. v. Meek Engineering and Construction*, 247 S.C. 307, 262 S.E.2d 913, 916 (1980), citing *Laurens Trust Co. v. Copeland*, 154 S.C. 390, 151 S.E. 617 (1930) and *MCC Financial Services, Inc. v. Duffel*, 265 S.C. 519, 220 S.E.2d 127 (1975).

In this case, if Respondent's Counsel had, as she asserts, mailed the Notice of Appeal via a mailbox in Anderson County, the Product and Tracking Information (USPS Tracking for 9405511899561099104457) would have reflected passing through the local Anderson County Post Office, the Greenville County Bulk Mailing center (Statement of Counsel dated December 15, 2014, paragraph 9), and then the Easley Post Office.[8] **The**

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[7] *Id.*, paragraph 6.

[8] The U.S. Postal Service states that packages with USPS Tracking are tracked "End-to-End with up to 11 scan events on shipments – from pick up to the final deliver – with more frequent updates." See https://tools.usps.com/go/TrackConfirmAction%21input.action, last accessed on December 16, 2014 at 11:30 a.m. (USPS Tracking Information printed 12/16/14). End-to-End Tracking is defined as including "The items acceptance by USPS, Processing at and departure from each location as it travels through the network from origin to destination, Arrival at the delivery unit, and departure from the delivery until with the

Product and Tracking Information for the mailing of the ALC Notice of Appeal does not indicate this. The first time any tracking shows up is the day the "stamp" is created on stamps.com, November 14, 2014. Again, however, the relevant issue is not when the stamp is put on the ALC Notice of Appeal, it is the date the ALC Notice of Appeal is placed in the mail depository that is relevant.[9] In fact, **nothing** shows up on the Product and Tracking Information again until the package is noted as "Accepted at USPS Origin Sort Facility" at the Easley Post Office on November 20, 2014.[10] So, Respondent would have the ALC and this Court believe that the U.S. Postal Service is so woefully incompetent that not only did it send the ALC Notice of Appeal to the return address on the package (but only as far as the Easley Post Office and not all the way to the business), but that the U.S. Postal Service also had malfunctions with numerous scanning systems so **NONE** of this erroneous progress was tracked until the ALC Notice of Appeal arrived back in the Easley Post Office. This argument is unbelievable at best.

In this case, the only evidence that the ALC Notice of Appeal was mailed on November 14, 2014 is the wholly unsupported assertion by Respondent's Counsel, which the Council notes was done through a "Statement of Counsel" rather than an Affidavit of Counsel. The Council finds this fact extremely significant due to the differences in

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carrier, If the item was delivered, as well as the date and time of delivery, If the delivery was attempted, but not successful, with the date and time of the attempt." See http://faq.usps.com/adaptivedesktop/faq.jsp?ef+USPSFAQ, last accessed on December 16, 2014 at 11:32 a.m. (What is USPS Tracking? Printed 12/16/14).

[9] Even Stamps.com does not assert that merely putting postage on a package is sufficient to mail it. The Stamps.com Frequently Asked Questions specifically states that once you "affix your postage to your letter or package" you must "give it to your mail carrier or drop it in the nearest mailbox." See www.stamps.com/postage-online/faqs/, under "How does Stamps.com work." (Stamps.com Frequently Asked Questions).

[10] The Easley Post Office is the local post office for Respondent's Counsel's law firm.

penalties for perjury (which an Affidavit would carry) versus dismissal of case and possible lawyer discipline (which a Statement would carry). The Council also finds the representations made by Respondent's Counsel in her "Statement of Counsel" to be significant due to the extreme personal interest Respondent's Counsel now has in winning this argument, i.e. if Respondent's Counsel loses the argument it is highly probable she will be sued for malpractice. So, there is no doubt Respondent's Counsel is now highly personally invested in the outcome of this part of Respondent's case.

Respondent also used the "Statement of Counsel" to bolster his argument that the ALC Notice of Appeal was mishandled by the U.S. Postal Service. Respondent argued the U.S. Postal Service has committed multiple serious errors in the past (although no evidence of these errors was presented). The "Statement of Counsel" alleges that the U.S. Postal Service "lost an entire bag of mail, which it did not locate for other two months" and that Respondent's Counsel had to cancel and re-issue several checks as a result of this event. Respondent's Counsel did not, however, attached **any** document(s) to her "Statement of Counsel" to back up this baseless allegation: not a cancelled and reissued check, not a letter from the U.S. Postal Service, not a letter to one of her clients explaining the issue. Respondent further tried to bolster his argument that the ALC Notice of Appeal was mishandled by the U.S. Postal Service by attaching a random review of the U.S. Postal Service from a webpage titled http://usps.pissedconsumer.com with no explanation as to how that complaint relates to this case. For these reasons and the high level of personal investment Respondent's Counsel now has in this case, the "Statement of Counsel" was not of any use to the ALC and is not of any use to this Court in determining when the ALC Notice of Appeal was actually placed in the mail.

Moreover, the burden is on Respondent to show that he timely served (i.e. mailed) his ALC Notice of Appeal. Other than the Statement of Counsel, NO evidence has been put forth to show Respondent timely served his ALC Notice of Appeal. Additionally, although Respondent's Counsel asserts "numerous problems" with the U.S. Postal Service in the past, she elected to send the ALC Notice of Appeal only via the U.S. Postal Service. If the issues with the U.S. Postal Service are as severe in Respondent's Counsel's area as has been alleged, she could have used several other modes to serve a copy of the ALC Notice of Appeal. For example, in addition to mailing the ALC Notice of Appeal via the U.S. Postal Service as required by rule, Counsel could have sent the ALC Notice of Appeal via e-mail, fax, personal service, FedEx, UPS, or DHL. In such a case, Respondent's Counsel could have simply stated in her Certificate of Service and Proof of Service that she sent the ALC Notice of Appeal via the U.S. Postal Service and whatever additional method she selected. For example, Council notes that Respondent's Counsel sent *Appellant's Reply* [Sic] *to Motion to Dismiss* via U.S. Postal Service **and** e-mail to both the Court and Council (E-mail from Candy M. Kern-Fuller to Teckla Henderson dated December 16, 2014). Additionally, Council notes that Respondent's Counsel sent *Brief of Appellant* via U.S. Postal Service **and** e-mail to the Court (E-mail from Candy M. Kern-Fuller to Teckla Henderson dated January 23, 2015). This could have easily been done with the ALC Notice of Appeal, but it was not. Given the seriousness and gravity of serving a notice of appeal in a timely manner and the numerous and significant issues Respondent's Counsel alleges she has encountered with the U.S. Postal Service, it seems sending such a document via multiple methods would be most prudent and reasonable.

Despite Respondent's Counsel Statement of Counsel, the only **unbiased** evidence of when the ALC Notice of Appeal was received by the U.S. Postal Service is the Product and Tracking Information (USPS Tracking for 9405511899561099104457), which shows an "Accepted at USPS Origin Sort Facility" at the Easley Post Office date of November 20, 2014. Therefore, the only **unbiased** evidence of the date of **mailing** shows the ALC Notice of Appeal was mailed on November 20, 2014, after the deadline for such service as imposed by the rules.

For these reasons, the ALC was required, by rule and the case law discussed above, to dismiss this appeal with prejudice and not consider the appeal on the merits. The ALC, however, did not do this. Rather, the ALC relied solely on the Statement of Counsel in finding that the ALC Notice of Appeal was mailed on November 14, 2014. Moreover, the ALC stated "this Court can find no plausible reason to question the veracity of the sworn statement of Appellant's counsel." This ruling completely ignored the unbiased evidence submitted by Appellant of the tracking performed by the U.S. Postal Service and, more importantly, ignores the significant and inherent bias' Respondent's Counsel had in making the "Statement of Counsel." Further, by relying solely on the Statement of Counsel, the ALC has placed Respondent's Counsel in the unenviable position of now being a witness in the very case she is presenting, arguably in violation of Rule 3.7, SCRPC. Following the ALC's logic in this regard, an attorney could mail a notice of appeal at any time and, so long as the attorney files a "sworn statement" that they mailed the notice of appeal prior to the expiration of time to file and/or serve the appeal, the Courts in South Carolina should simply accept the attorney's "sworn statement," ignore all other evidence of when the appeal was actually mailed, and

allow the appeal to continue. This argument defies reason and for that reason is in error.

Rather, the ALC should have weighed the evidence before it, including reliability, potential bias, relevance, etc... Once this weighing of evidence was complete, the ALC should have made a decision, including in the written decision its' analysis and/or weighing of the evidence. This was not done. Instead, the ALC entirely ignored the evidence presented by Appellant. In fact, a review of the *Order Denying Motion to Dismiss* shows that at no time did the ALC even acknowledge the evidence presented by Appellant. The ALC's apparent refusal to even consider the evidence presented by Appellant is, in itself, error.

For these reasons, this Court should perform an independent review of the evidence previously presented regarding whether the ALC Notice of Appeal was timely served on the Council or not. If this review determines that the ALC Notice of Appeal was not mailed until November 20, 2014, then the ALC *Order* filed March 18, 2015 should be reversed in its' entirety and the original appeal filed by Respondent dismissed with prejudice.

II. THE ALC'S CONCLUSION THAT THE COUNCIL'S DECISION WAS ARBITRARY AND CHARACTERIZED BY AN ABUSE OF DISCRETION IS IN ERROR AND FAILS TO CONSIDER THE MANY YEARS OF EXPERIENCE THE COUNCIL MEMBERS HAVE IN LAW ENFORCEMENT TO EDUCATE THE COUNCIL'S DECISIONS.

The ALC held that the Council "abused its discretion by relying on its own medical conclusions in the absence of expert medical testimony" (*Order* filed March 18, 2015, page 12). Additionally, the ALC held that the Council's Decision was in "error because it is not well known that anabolic steroids suppress the naturally occurring testosterone." To support this finding, the ALC quoted Watson v. Ford Motor Company, 389 S.C. 434,

445, 699 S.E.2d 169, 175 (2010): "*Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge*" (*Order* filed March 18, 2015, page 11, emphasis in original). This finding blindly fails to acknowledge that S.C. Code §1-23-330(4) specifically states "The agency's *experience, technical competence and* ***specialized knowledge*** may be utilized in the evaluation of the evidence."

The Council is made up of agency heads from eleven (11) different law enforcement agencies, including: the State Law Enforcement Division; the Attorney General's Office; the Department of Corrections; Probation, Pardon, and Parole Services; the Department of Natural Resources; the Department of Public Safety; two (2) Sheriffs; two (2) Police Chiefs; and one (1) Detention Center. See S.C. Code §23-23-30. These agency heads have, between them, hundreds of years of law enforcement experience. Thus, it is not difficult to understand how, based on their hundreds of years of experience in law enforcement, the Council is familiar with at least some of the effects taking anabolic steroids would have on the human body. Moreover, Respondent's *Brief of Appellant* in the ALC claim that "after a thorough search of the largest body of 'well known' data (aka the world wide web) there was nothing of the sort found to support this contention" (Brief of Appellant, page 11). However, a google search shows several articles discussing this very topic.[11]

Moreover, medical testimony was not necessary to resolve any factual issue. The Council already had the uncontested, unobjected to testimony before them that Respondent had tested positive for two (2) anabolic steroids. Just because the

[11] Search term "effects of taking anabolic steroids hypogonadism "

Respondent later testified that he was taking over-the-counter supplements that may have given a false positive, does not raise a factual issue that must be resolved via expert testimony. The Council, as the judge of the facts in the case, maintains its ability to judge which testimony is reliable, trustworthy, and what weight to give that evidence. The Council also maintains its ability to reject all or part of a witness's testimony if they find it to be unreliable and/or untrustworthy. Therefore, only if the Council placed any weight in Respondent's testimony might this then become an issue. There is no evidence, however, that the Council placed any weight in Respondent's testimony. In fact, a review of the *Final Agency Decision* reflects the Council only referred to Respondent's testimony once and that reference indicates they did not find his testimony to be truthful, "Mr. Brinston contends..." (*Final Agency Decision*, page 1).

Additionally, some of the language relied on by the ALC in making its' determination that the Council's *Final Agency Decision* was improper, was language in the "Sanction" section of the Decision. There are clearly separate sections in the *Final Agency Decision* that are titled "Findings of Fact" and "Conclusions of Law," therefore, those matters discussed only in the "Sanction" section are only intended by the Council to be interpreted as part of the "Sanction" for the misconduct the Council had determined Respondent committed. The Council obviously felt it was important to have some amount of a public reprimand in the "Sanction" section in addition to denying Respondent's request for recertification. The Council's authority to issue a public reprimand is clearly within the Council's authority (S.C. Code §23-23-80). If the comments in the "Sanction" section were meant to be part of the "Findings of Fact" or "Conclusions of Law," they would have been placed in those sections.

For these reasons, the ALC's conclusion that the Council was arbitrary and characterized by an abuse of discretion is in error and should be overturned.

III. THE ALC'S CONCLUSION THAT THE COUNCIL'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IS IN ERROR AND DEMONSTRATES THAT THE ALC SUBSTITUTED ITS' JUDGMENT ON THE FACTS OF THE CASE FOR THE COUNCIL'S JUDGMENT.

S.C. Reg. 38-004 states:

> A. The Council may deny certification **based on evidence satisfactory to the Council** that the candidate has engaged in misconduct. For purposes of this section, misconduct means:...
>
> 2. Unlawful use of a controlled substance;...
>
> B. In considering whether to deny certification based on misconduct, the Council 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). So, if the uncontested, unobjected to testimony of Lt. Reeves was "evidence satisfactory to the Council," as stated in the *Final Agency Decision*, then the ALC had no authority to overrule that **factual finding** of the Council and the denial of Respondent's request for recertification stands. Moreover, the ALC states that the only question about the *reliability* of Lt. Reeves' testimony comes from the Respondent's testimony that a urine analysis cannot always distinguish between anabolic steroids and over-the-counter supplements. Respondent, like Lt. Reeves, is not a medical professional (doctor, lab technician, etc...). So, there is no reason the Council was required to place any greater weight on Respondent's testimony than on Lt. Reeves' testimony. In fact, as discussed earlier, the *Final Agency Decision* indicates that the Council placed very little weight on Respondent's testimony, which was within the Council's authority as the factfinder in this case. Therefore, the ALC's finding that Respondent's testimony

essentially placed Anderson in the position of being required to call an expert medical witness is in error, because such a finding essentially usurps the Council's fact-finding role and disallows the Council from weighing the evidence presented to them In fact, following the ALC's logic, in any case with an allegation of unlawful use of a controlled substance, any time the former officer claims something caused a false positive the Agency would immediately be required to present expert medical testimony no matter how ridiculous the claim. This is not the law in South Carolina Waters v. S C Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence). Finally, there is no question that uncontested testimony that Respondent tested positive for anabolic steroids is, by itself, substantial evidence to support the Council's decision in this case

Additionally, as discussed in depth previously, Respondent made several grossly misleading objections during the contested case hearing regarding to the admissibility of the lab report and, as a direct result of those grossly misleading objections, the lab results were not entered into evidence, they were merely marked as court exhibit in case there was any appeal from the *Final Agency Decision.* It would not be equitable to allow Respondent to benefit from these misrepresentations. Interestingly, if you remove Respondent's grossly misleading objections to the lab results, Respondent's objection gets cut down to the original affidavit of authenticity argument, which undoubtedly would have been defeated by Lt Reeves' testimony that these were the results received by Anderson from LabCorp Thus, without Respondent's grossly misleading objection

during the hearing it is highly likely the written lab results would have been admitted into evidence. Such an admission would, of course, have provided even further evidence for the Council to have considered, evidence that certainly would not have been favorable for Respondent. Therefore, the ALC's decision should have considered the misrepresentations made by Respondent with regarding to his objections to these lab results.

Further, Lt. Reeves, testimony was not the only evidence the Council had before it. The Council also had the SOAP Note from Dr. Walpole. Respondent testified he had an independent blood test performed by Dr. Walpole of Velocity Sports in Anderson and that the results of that blood test showed "raised above normal" testosterone levels (Transcript of Hearing, page 44, lines 9-25). Significantly, the results of this blood test were not offered into evidence. Moreover, Respondent's testimony clearly indicated that this additional test by Dr. Walpole was conduct after the Anderson test and prior to the test by Dr. Walpole that Respondent did place into evidence. These indicators imply that at the time Dr. Walpole first tested Respondent, his testosterone was still elevated above normal due to the anabolic steroids in Respondent's system. Instead, Respondent offered another blood test by Dr. Walpole into evidence (blood draw on 5/20/14) (Transcript of Hearing, Brinston Exhibit #2). This SOAP Note specifically states that Respondent's testosterone levels were "116.3 (range 348.0 – 1197.0). This is hypogonadal range and he qualifies for hormone replacement therapy" (Id.). This SOAP Notes also specifically states, "I have discussed this with him [a]nd recommended that we hold off on starting replacement until this is cleared/accepted data." So, Brinston Exhibit #2 only indicates Dr. Walpole had a discussion with Respondent about his low testosterone, not high

testosterone. This testimony clearly indicates that Dr. Walpole conducted blood tests on Respondent at least two (2) times: once when they discussed his high testosterone (Transcript of Hearing, page 44, 9-25) and a second time when they discussed his low testosterone (Brinston Exhibit #2). It is not unreasonable to believe that the Council also noticed this glaring inconsistency in Respondent's testimony, which could explain, at least in part, why the Council did not place much weight on Respondent's testimony. Additionally, such test results would, of course, support the findings already made by the Council in this case.

Furthermore, in evaluating the evidence, there was conflicting testimony about whether Respondent requested a blood test to confirm the results of the urine test. Respondent testified that he requested such a blood test (Transcript of Hearing, page 43, line 21-page 44, line 8). While Lt. Reeves testified Respondent did not, at any time, ask to take a blood test (Id., page 17, line 18-page 18, line 25). In fact, Lt. Reeves testified that he also would have preferred to have a blood test performed (Id.). Investigator Brown, who was present during Lt. Reeves questioning of Respondent, did not recall Respondent ever requesting a blood test (Id., page 35, lines 13-22). Again, it is not unreasonable to believe that this conflicting testimony could explain, at least in part, why the Council might not place much weight on Respondent's testimony.

In evaluating this case, the ALC stated:

1) "Therefore, the evidence is conflicting as to how *reliable* the urine analysis test results were" (*Order* filed March 18, 2015, page 10, emphasis added);
2) "...the *reliability* of this evidence is *questionable* in light of [Respondent's] uncontroverted assertion that a urine analysis cannot always distinguish

between anabolic steroids and over-the-counter supplements" (Id , page 12, emphasis added), and

3) ". providing a decision may be reversed if it is 'clearly erroneous in view of the *reliable*, probative and substantial evidence on the whole record" (Id., page 12, emphasis added in the *Order* filed March 18, 2015)

These statements and the added emphasis clearly demonstrate that the ALC erroneously engaged in a weighing of the evidence and made determinations about what evidence should be accepted or rejected in making its' ruling that there was not substantial evidence to support the Council's decision. Such a weighing of evidence and determinations about what evidence should be accepted or rejected is not allowed for the ALC in its' appellate capacity. Grant v S.C. Coastal Council, 319 S.C 348, 353, 461 S E 2d 388, 391 (1995) (A reviewing court is prohibited form substituting its judgment for that of the agency as to the weight of the evidence on questions of fact). Moreover, in applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" Sea Pines Ass'n for Prot of Wildlife, Inc v S C Dept. of Natural Res , 345 S C 594, 603-604, 550 S.E.2d 287, 292 (2001) (quoting Lark v Bi-Lo, Inc , 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). To overrule the Council's decision that Respondent is guilty of misconduct by unlawfully using a controlled substance, the ALC would also have to overrule the Council's factual finding that Respondent "tested positive on April 9, 2014, for Mathandienone and Nandrolone" (*Final Agency Decision* dated October 14, 2014) This simply cannot be done in this case because, despite the ALC's concerns about the

reliability of Lt. Reeves' testimony, the Council found the testimony to reliable and placed weight in that testimony. Moreover, there is nothing upon which to base an argument that "there is no reasonable probability that the facts could be as related by [Lt. Reeves] upon whose testimony the finding was based.'" Sea Pines, at 603-604 (quoting Lark, at 136).

IV. THE RECORD SUPPORTS THE DENIAL OF LAW ENFORCEMENT CERTIFICATION TO RESPONDENT.

There was un-objected to testimony from Lt. Reeves that:

1) On April 2, 2014, Respondent's soon-to-be ex-wife reported to the Anderson County Sheriff's Office that Respondent and another Anderson County Sheriff's Deputy were taking illegal steroids (Transcript of Hearing, page 6, line 15-page 7, line 3 and page 14, lines 15-18);
2) Based on this report, Respondent and the other deputy were both required to submit to a specialized steroid urine test through AnMed Laboratory Services on April 9, 2014 (Id., page 6, line 24-page 7, line 20);
3) The test results showed Respondent tested positive for Methandienone and Nandrolone (Id., page 7, line 21-page 8, line 1); and
4) Methandienone and Nandrolone are both listed as anabolic steroids under S.C. Code §44-53-1510(A) (Id., page 8, lines 1-3).

So, there is wholly uncontested testimony that the soon-to-be **ex-wife** (someone that would certainly be privy to more private information about Respondent) reported Respondent was taking illegal steroids. Further, there was evidence from a SOAP Note dated May 27, 2014 from Powdersville Internal Medicine stating Respondent had returned to review his labs from May 20, 2014 and there was no indication of the

presence of any anabolic steroids, but it did note that Respondent's "Total Testosterone... was 116.3 (range 348.0-1197.0)" (Id., Brinston Exhibit #2).

Based solely on these facts and evidence, the decision of the Council is factually supported by the record in this case and the decision of the Council to deny recertification to Respondent should have been upheld by the ALC.

CONCLUSION

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

Respectfully Submitted,

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May 4, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C Robinson, Administrative Law Judge

Case No. 2015-000797

Deonta Brinston,..... .....Respondent,

v

South Carolina Department of Criminal Justice , ... Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Deonta Brinston by depositing a copy of it in the United States Mail, postage prepaid, on May 4, 2015, addressed to his attorney of record, Candy M Kern-Fuller, Esquire,Upstate Law Group, LLC, 200 East Main Street, Easley, South Carolina 29640-2073.

May 4, 2015

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May 4, 2015

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

RE: Deonta Brinston, Respondent v. South Carolina Department of Criminal Justice, Appellant, Case No. 2015-000797

Dear Ms Kitchings

Enclosed for filing in the above referenced case are·

1) Initial Brief of Appellant;
2) Proof of Service of the Initial Brief of Appellant on the Respondent;
3) Designation of Matter to be Included in the Record on Appeal,
4) Proof of Service for the Designation of Matter to be Included in the Record on Appeal on the Respondent.

May 4, 2015

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