

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case # 2015-000797

Deonta Brinston Respondent

v.

South Carolina Department of Criminal Justice Appellant

INITIAL BRIEF OF RESPONDENT

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I. ISSUES ON APPEAL

- A. SHOULD THE ALC'S DETERMINATION THAT THE RESPONDENT'S NOTICE OF APPEAL WAS TIMELY FILED BE AFFIRMED BECAUSE ALC COMMITTED NO CLEAR ERROR OF LAW OR AN ABUSE OF DISCRETION?
- B. SHOULD THE FINAL DECISION OF THE ALC BE AFFIRMED BECAUSE THE ALC'S DETERMINATION THAT THE FINAL AGENCY DECISION OF THE S.C. DEPARTMENT OF CRIMINAL JUSTICE WAS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD AND WAS THE FINAL AGENCY DECISION OF THE S.C. DEPARTMENT OF CRIMINAL JUSTICE AN ABUSE OF DISCRETION BASED ON AN ERROR OF LAW BECAUSE IT WAS GROUNDED IN FACTUAL CONCLUSIONS WITHOUT EVIDENTIARY SUPPORT WAS NOT A CLEAR ERROR OF LAW OR AN ABUSE OF DISCRETION?

II. STATEMENT OF THE CASE

A. **Procedural Posture of the Case**

Respondent successfully appealed the final agency decision of the Criminal Justice Academy Training Council (CJATC) dated October 14, 2014, and served upon Respondent by letter dated October 15, 2014, permanently denying Respondent certification as a law enforcement officer in South Carolina (**Final Agency Decision, Email from Brandy Duncan, Esq. dated 10/15/2014**). The ALC found that the CJATC made erroneous medical conclusions and in the absence of any medical expert testimony, (**ALC Final Decision, p. 11**), improper factual findings to support its erroneous and speculative medical conclusions (**ALC Final Decision, p. 12**), and other medical findings in the absence of any medical testimony or expert medical opinions and contrary to the testimony of the witnesses advocating for the denial of Respondent's certification. (**Id., Tr. pp. 26-27**). As such, the Administrative Law Judge found that the CJATC's "decision cannot stand because the decision resulted, at least in part, from an abuse of discretion, and it is not supported by substantial evidence. (**ALC Final Decision, p. 12**). This appeal by the S.C. Department of Criminal Justice followed.

B. Background Facts

Respondent has been a law enforcement officer in the State of South Carolina continuously since 2008 – a total of approximately seven (7) years. (Tr. p. 38) Respondent is a K9 officer who has used his K9 for narcotics detection, apprehension of felons, chases on foot, and as backup in tense and difficult situations. (Tr. pp. 46-47) Respondent comes from a family of law enforcement officers, one of whom was killed in the line of duty. (Tr. p. 46).

In or about the Spring of 2014, Respondent and his wife were embroiled in a contested divorce and custody action involving Respondent's young daughter. (Tr. p. 47) Around March 2, 2014, Respondent's estranged wife made a verbal report to the Anderson County Sheriff's Office alleging that Respondent and another officer (who was Respondent's then roommate) had allegedly used steroids. (Tr. pp. 6, 14).

Anderson County General Order 111 requires that "All formal complaints will be taken *in writing on an Employee Complaint Form* and *should be signed by the complainant* (unless received anonymously) to document receipt of the complaint." (Tr. pp. 15-16)(Emphasis added). In violation of this policy, ACSO's Internal Affairs investigator, Lt. Steve Reeves, failed to take a written complaint from Respondent's estranged wife and failed to have her sign any such complaint, despite knowing the parties were in the midst of a hotly contested family court matter. (Tr. p. 15). The estranged Mrs. Brinston's complaint was the only indication of alleged illegal steroid use by the Respondent. (Tr. p. 27, Ins. 3-5).

Specifically, Lt. Reeves testified that:

3 Q: At the time that you all undertook this
4 evaluation, was there any outside evidence
5 other than this complaint by Mr. Brinston's
6 ex-wife, who he was engaged in litigation with,
7 about the fact that he was under the influence
8 of any drugs during work?
9 A: Not other than her, no, ma'am.
10 Q: That he in any way had a physical impairment?
11 A: Mr. Brinston?
12 Q: Yes, sir.
13 A: No, ma'am.
14 Q: A loss of judgment?
15 A: No, ma'am.

16 Q: That he committed any safety violations?
17 A: Not safety violations, no, ma'am.
18 Q: That he had engaged in activity that caused
19 risk of injury or possibility of death to
20 himself or anyone else?
21 A: No, ma'am.
22 Q: And under General Order 107 did he appear to be
23 under the influence of anything that would be
24 an intoxicating substance or other substance
25 that would cause him an inability to perform
1 the duties of his job?
2 A: Not at any time that I've seen him.
3 Q: So the sole suspicion that you had was based on
4 this allegation by Mrs. Brinston?
5 A: Yes, ma'am.

(Tr. pp. 26-27)

Furthermore, if the ACSO were “notified of conduct or behavior that causes immediate and direct concern for the job fitness of an employee or if there is concern an employee may be a threat to himself/herself or others” or the “supervisor believes an employee needs evaluation for job fitness” they should have made a mandatory referral to the County’s Employee Assistance

Program rather than terminate Respondent's employment. **ACSO GENERAL ORDER 138, EMPLOYEE ASSISTANCE PROGRAM.** However, by Lt. Reeves' own testimony, there was no evidence that Respondent met either criteria. (Tr. pp. 26-27)

Anderson County Sheriff's Office (ACSO)'s actions in testing Respondent for the alleged steroid use without reasonable cause violated Respondent's Fourteenth Amendment due process rights and Anderson County's own personnel ordinances. Specifically, as an employee of Anderson County, and, pursuant to the Drug-Free Workplace Act of 1988, only three types of drug and alcohol testing are permitted – 1) pre-employment testing, 2) reasonable suspicion testing, and 3) random testing under a bona fide random testing program. **ANDERSON COUNTY CODE, §55-52(e).** "Reasonable suspicion" is defined as:

- (a) Any employee whose work performance or behavior creates a reasonable suspicion that he/she is unfit for duty and possibly abusing alcohol and drugs.*
- (b) Any employee who is responsible for an accident on county property or involving county property where there is no reasonable explanation as to the cause or where negligence or carelessness appears to be the cause.*
- (c) Any employee who is involved in an accident where the county has a reasonable belief that alcohol and/or drug use may have contributed to the employee's involvement in the accident.*
- (d) Any employee who is responsible for an accident resulting in damage to county property in excess of \$100.00 or injury to other persons where there is not reasonable explanation as to the cause or where negligence or carelessness appears to be the cause.*

ANDERSON COUNTY CODE, §55-52(e)(2)(a-d)

Again, none of those conditions were present. (Tr. pp. 26-27). However, even if they were (which they were not) Respondent would have been entitled to have further testing performed to eliminate a falsely positive test. Despite Respondent's request for a blood test, ACSO failed to do any of the following:

(7) ... Those samples that test positive on the first screen will be tested more extensively by means of gas chromatography/mass spectrometry (GC/MS) analysis to eliminate any false positive tests.

(8) The laboratory will ensure that the chain-of-custody procedures are adhered to from the time of receipt of urine samples until testing is completed and results are reported. Samples that test positive will be stored by the laboratory for a minimum of one year.

(9) An individual who tests positive may request a second analysis of the original sample. That test will be conducted at the same laboratory used by the county at the individual's expense. The individual can also request a separate retest at another SAMSHA-certified laboratory. In such instances, the laboratory used by the county will send a portion of the original sample to a laboratory designated by the individual. The cost of the retest shall be paid for by the individual.

(10) All individuals required to submit to a test under this policy will receive written notification of drug test results.

ANDERSON COUNTY CODE, §55-52(F)(7-10)

When asked about this at the hearing, Lt. Reeves admitted at the hearing he didn't know if they ever performed gas chromatography on the sample (Tr. p. 19, 33-34). Reeves also testified that he does not know if gas chromatography/mass spectrometry (GC/MS) was the only way to differentiate between over the counter supplements and actual illegal steroids. (Tr. p. 19) Anderson County witnesses admitted they "have no idea" how GC/MS even works. (Tr. p. 34).¹ They also didn't know (or follow) what the Anderson County Personnel Policy requirements were for drug testing. (Tr. p. 25).

¹ Appellant asserts for the first time on appeal that Gas Chromatography was actually performed on the urine sample of Respondent. (App. Br. p. 7, fn. 3). However, Respondent objected to the admission of the testing results at the hearing at the CJATC and the interpretation of these acronyms, etc. are not supported by any factual or expert medical testimony (In fact, the record is totally devoid of ANY testimony as the same was never addressed at the hearing below). Accordingly, the same should be barred from consideration by this Court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") Further, counsel's own interpretation of what acronyms mean on a drug test by web research is as strained as the original medical conclusions inappropriately made by the CJATC.

Respondent testified that he took over the counter supplements that he had purchased from Complete Nutrition at the instruction of his personal trainer and submitted into evidence the labels from the three supplements which he “stacked” for maximum beneficial results. (Tr. pp. 41-43, Labels from Test PSI, MassX and ADT). Specifically, Respondent was advised that some of these supplements could falsely test positive as steroids and that he should ask for a blood test to differentiate between these legal, over the counter supplements and illegal steroids, if ever challenged about them. (Tr. p. 43). Respondent testified that he made such a request after the falsely positive urine screen, but ACSO refused to do so. (Tr. pp. 43-44). After all these violations of Respondent’s rights, when SLED and ACSO questioned Respondent, Respondent invoked his right to an attorney, but even that Constitutionally protected request wasn’t honored. (Tr. pp. 21-22). Despite the request for an attorney, Lt. Reeves gave Respondent *Garrity* warnings and continued to question him despite knowing he had invoked his right to an attorney. (Id.) When Respondent wouldn’t sign a statement, despite having already invoked his right to an attorney, Chief Smith was finally called in to meet with Respondent and terminated his employment with ACSO. (Tr. pp. 21, 27, 31). The ACSO thereafter filed a separation notice with the Criminal Justice Academy alleging cause for its termination of Respondent and then challenged Respondent’s certification request when he was later hired by the Calhoun Falls Police Department.

The timeline of important events is as follows:

3/2/14 – Oral complaint from the estranged Mrs. Brinston to ACSO

4/9/14 – Urine test taken by Respondent

4/24/14 – Urine results reported to ACSO

4/29/14 – Meeting with Respondent regarding urine results

5/13/14 – ACSO sent a personnel change form (PCF) to CJA alleging Respondent engaged in unlawful use of a controlled substance

5/20/14 – Copy of the PCF filed by the ACSO was sent to Respondent pursuant to S.C. Code of Regulations, §38-009. Respondent had private testing performed by a sports medicine doctor who evaluated it using liquid chromatography/mass spectrometry (LC/MS) and **confirmed no illegal steroid use**

6/19/14 – Calhoun Falls PD hires Respondent

7/1/14 – PCF received by CJA from Calhoun Falls

8/26/14 – Contested case hearing held by CJA regarding certification of Respondent for Calhoun Falls

The CJATC hearing officer, Robin E. Morse, Director of the Clinton Department of Public Safety, who observed the witnesses and took the testimony at the hearing, made his recommendation to the CJA Training Council as follows:

Given Mr. Brinston's contention that his positive test results came from taking three (3) over-the-counter supplements and Anderson County Sheriff's Office's failure to contest that contention via expert testimony or testimony from qualified medical personnel from AnMed or Lab Corp, I recommend Mr. Brinston be recertified as a law enforcement officer with two (2) years of probation.

I further recommend that this probationary period include random drug testing, including specific testing for steroid use, at least every three (3) months on dates selected by the Academy. These testing dates will be

communicated to Mr. Brinston's employer on the day testing is to occur. Failure to complete the testing on the dates required by the Academy may be grounds for reopening this case. Testing positive for any controlled substance during the probationary period may be grounds for reopening this case. All drug testing done during this probationary period shall include specific testing for steroid use and, if a test is positive for steroid use, the sample shall be further tested using gas chromatography to determine if the result is from anabolic steroids or over-the-counter supplements. Prior to all drug testing Mr. Brinston shall provide to his employer, in a sealed and initialed over the seal envelope, a written list of any prescriptions, over-the-counter medications and/or supplements he is currently taking or has taken during the 45 days prior to testing. This list shall be submitted to the Academy, still in its sealed envelope, should Mr. Brinston test positive for any controlled substance(s) during this probationary period.

(Hearing Officer Robin Morse Recommendation, pp. 2-3)

However, in its October 14, 2014 decision, which was mailed to Respondent on October 15, 2014, the Appellant rejected the Hearing Officer's thorough and reasoned recommendation and the evidence actually presented at the hearing, and, instead, substituted its own determination that:

The unlawful use of controlled substances by an active law enforcement officer is reprehensible. In this case, the use particularly of anabolic steroids during active law enforcement service placed the public at great danger. At any moment Mr. Brinston may have suffered from dangerous side effects of these unlawful substances, for example, a "Roid Rage" incident. For the reasons stated above and due to the great danger Mr. Brinston placed the public in by taking these substances while an active law enforcement officer, Mr. Brinston's request to have law enforcement certification reissued to him is permanently denied. //

(Final Agency Decision, pp. 3-4)

Respondent appealed this finding to the ALC, as it was contrary to **any and all** the evidence submitted by the ACSO and Respondent.

Respondent, through counsel, timely mailed Respondent's appeal to the ALC, via Certified Mail, after 7:00 p.m. on November 14th, even though the appeal was not due until

November 19, 2014. As the electronic records of the undersigned showed, the briefs and all documents related thereto were completed on the evening of the 14th of November, 2014, which was the date they were served by U.S. Mail and as shown by the postmarks. There would have been no reason for the mailing to have been delayed until the 20th of November, 2014, as was alleged by Appellant, when all the items were completed on November 14, 2014 and, as the Certificate of Service showed, were mailed that same evening. (**Brinston's Reply to Motion to Dismiss and all attachments**).

However, through the wonders of the U.S. Mail, the mail was misplaced by the Post Office and then misrouted for several days. Though mailed at postal box in Anderson County on November 14, 2014, that should have fed directly into the bulk mail center in Greenville, the packages were apparently misrouted, sent to the return address, and received at the post office in Easley, South Carolina. Once received at the Easley Post Office allegedly on November 20, 2014, the packages were then finally routed to the proper addresses.

The USPS error of the mailing was just that – a mailing error over which the Respondent Brinston had no control. The parties to this case are not the only ones who have experienced errors and problems with deliveries and the accuracy of the online tracking system. (*Id.*)

Appellant CJATC raised the mailing issue in a Motion to Dismiss, but the ALC determined that Respondent Brinston's Notice of Appeal was timely filed. (**ALC's Order on Motion to Dismiss**). After considering the merits of the case, the ALC further found the CJATC made erroneous medical conclusions and in the absence of any medical expert testimony. (**ALC Final Decision, p. 11**). The CJATC also made improper factual findings about the time gap between the first urine test in April and the blood test in May (which clearly used gas chromatography) to support its erroneous and speculative medical conclusions (**ALC Final**

Decision, p. 12). Further, the CJATC continued to make medical findings about the dangers of alleged “Roid Rage” in the absence of any medical testimony or expert medical opinions and contrary to the testimony of its own witnesses. Clearly, the conclusion that Respondent allegedly exhibited or placed the general public in danger of “Roid Rage” was flatly denied by the testimony of both the ACSO officers who were advocating for the withdrawal of Respondent’s certification and Respondent. (**Id., Tr. pp. 26-27**). Quite simply, there was absolutely no factual or expert evidence in the entire record to support a finding that Respondent ever placed the public in danger of “Roid Rage.” As such, the Administrative Law Judge found that the CJATC’s “decision cannot stand because the decision resulted, at least in part, from an abuse of discretion, and it is not supported by substantial evidence. (**ALC Final Decision, p. 12**). This appeal by the CJATC followed.

III. STANDARD OF REVIEW

“The court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- € clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. “

S.C. CODE ANN §1-23-380(5)

The appellate courts review cases decided by the ALC in accordance with the Administrative Procedures Act. *Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S.C. Dep't of Health & Env'tl. Control*, 407 S.C. 334, 341, 755 S.E.2d 444, 448 (2014) (citing S.C. Code Ann. § 1-23-610(B) (Supp. 2012)). Thus the appellate court's review is limited "to determining whether the ALC's findings were supported by substantial evidence or were controlled by an error of law." *Id.* An appellate court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-610(B). "In determining whether the [ALC's] decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the [ALC] reached." *Hill v. S.C. Dep't of Health & Env'tl. Control*, 389 S.C. 1, 9—10, 698 S.E.2d 612, 617 (2010).

IV. ARGUMENTS

A. THE ALC'S DETERMINATION THAT THE RESPONDENT'S NOTICE OF APPEAL WAS TIMELY FILED SHOULD BE AFFIRMED BECAUSE ALC COMMITTED NO CLEAR ERROR OF LAW OR AN ABUSE OF DISCRETION.

As stated above, Respondent, through counsel, timely mailed Respondent's appeal to the ALC, via Certified Mail, after 7:00 p.m. on November 14th, even though the appeal was not due until November 19, 2014. As the electronic records of the undersigned showed, the briefs and all documents related thereto were completed on the evening of the 14th of November, 2014, which was the date they were served by U.S. Mail and as shown by the postmarks. There would have been no reason for the mailing to have been delayed until the 20th of November, 2014, as was alleged by Appellant, when all the items were completed on November 14, 2014 and, as the Certificate of Service showed, were mailed that same evening. **(Brinston's Reply to Motion to Dismiss and all attachments).**

However, through the wonders of the U.S. Mail, the mail was misplaced by the Post Office and then misrouted for several days. Though mailed at postal box in Anderson County on November 14, 2014, that should have fed directly into the bulk mail center in Greenville, the packages were apparently misrouted, sent to the return address, and received at the post office in Easley, South Carolina. Once received at the Easley Post Office allegedly on November 20, 2014, the packages were then finally routed to the proper addresses.

The USPS error of the mailing was just that – a mailing error over which the Respondent Brinston had no control. The parties to this case are not the only ones who have experienced errors and problems with deliveries and the accuracy of the online tracking system. (*Id.*) SCALCR 4B defines filing with the ALC as follows:

The date of the filing is the date of delivery or the date of mailing. Any document filed with the Court shall be accompanied by proof of service of such document on all parties, and, if filed by mail, shall be accompanied by a certificate of the date of mailing.

A document is deemed filed with the Court by:

* * *

(2) by depositing the document in the U.S. mail, properly addressed to the Court, with sufficient first class postage attached;

SCALC Rule 4B

Appellant does not deny that the package was deposited in the U.S. Mail, that it was properly addressed and that it contained sufficient postage. Rather, it solely relies on the online tracking information to support its contention that the Appeal was allegedly mailed one day late.

As the Court recounted in *Green v. Green*, 320 S.C. 347, 350 (Ct. App. 1995):

“Rule 5(b)(1), SCRCF, provides that ‘service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.’ Mailing ordinarily occurs when a document 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 date is dispositive. See William B. Johnson, Annot., *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476 (1986). **Such would assume the infallibility of the U.S. Postal Service, an illogical assumption given the volume of letters and packages constantly being processed and the number of human hands any one envelope may pass through.”** *Id.* (emphasis added).

Such an illogical assumption of infallibility would presumably also apply to the online tracking information, which is also the subject of “human hands.”

It is equally illogical that the brief and all accompanying documents, which were completed on November 14, 2014, would be held and not mailed until six (6) days later as argued by Appellant. Respondent produced the electronic data to Appellant and the Administrative Law Court showing the dates the files were created and last saved. All of those dates coincided with the Certificate of Service on November 14, 2014. **(Brinston’s Reply to Motion to Dismiss and all attachments).**

Quite simply, Appellant argues to have this appeal dismissed on a technicality (and an erroneous one) rather than have the matter heard on its merits, which is disfavored by this Court. *Micronics, Inc. v. S.C. Dept. of Rev.*, 345 S.C. 506 (Ct. App. 2001).

B. THE FINAL DECISION OF THE ALC SHOULD BE AFFIRMED BECAUSE THE ALC’S DETERMINATION THAT THE FINAL AGENCY DECISION OF THE S.C. DEPARTMENT OF CRIMINAL JUSTICE WAS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD AND THAT THE FINAL AGENCY DECISION OF THE S.C. DEPARTMENT OF CRIMINAL JUSTICE WAS AN ABUSE OF DISCRETION BASED ON AN ERROR OF LAW BECAUSE IT WAS GROUNDED IN FACTUAL CONCLUSIONS WITHOUT EVIDENTIARY SUPPORT WAS NOT A CLEAR ERROR OF LAW OR AN ABUSE OF DISCRETION?

“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.” S.C. CODE ANN. §23-23-80(6)

“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:
* * * 2. Unlawful use of a controlled substance. In considering whether to deny certification based on misconduct, the Department may consider the seriousness, the remoteness in time and any mitigating circumstances surrounding the act or omission constituting or alleged to constitute misconduct.” S.C. Code of Regulations, §38-004(A)(2)&(B).

In the case at bar, Appellant’s former employer, the Anderson County Sheriff’s Office (ACSO) asserted that its urine screening of April 9, 2014, which allegedly tested positive for two steroids listed on the prohibited list of anabolic steroids. Appellant attempted to have the results confirmed by further testing, but the ACSO refused. (Tr. p. 43-44). The ACSO failed to abide by its own General Orders or County Personnel Policy (*supra pp. 1-5*).

As a threshold matter, had the ACSO complied with its own policies, Appellant would never have been subjected to the illegal testing he was. Regardless, had ACSO followed its own General Orders and Personnel Policy, gas chromatography and mass spectrometry would have been performed on the sample to differentiate illicit substances from over-the-counter agents. The fact that the required procedures under both the County’s own policies and the Sheriff’s own General Orders were not followed was proven by Appellant and admitted by the ACSO’s own witnesses. (Tr. pp. 15-16, 19, 25-27, 34, 43-44).

Our Supreme Court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). “Substantial

evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.” *Tiller v. Nat’l Health Care Ctr. of Sumter*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999).

Further, an abuse of discretion occurs when there is an error of laws grounded in factual conclusions that are without evidentiary support. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

The only evidence presented in support of the Agency’s finding that Appellant actually engaged in misconduct was the unverified lab results (which had no chain of custody, no affidavit of authenticity, no confirming gas chromatography/mass spectrometry testified to (see footnote 1 *supra*), and no other medical review known to be performed or testified about) and ACSO’s witnesses testimony about those results. Appellant had always maintained that the results were “false positives.” Specifically, both officers from the ACSO testified upon cross-examination that Appellant **never** admitted unlawful use of a controlled substance – i.e. illegal anabolic steroids. (Tr. pp. 32-33)

Specifically, the Agency made only four findings of fact:

It is found as a fact:

1. Mr. Brinston tested positive on April 9, 2014, for Methandienone and Nandrolone.
2. Methandienone and Nandrolone are both listed as anabolic steroids under S.C. Code §44-53-1510(A).
3. The SOAP Note dated May 27, 2014, from Powdersville Internal Medicine (Brinston Exhibit #2) noted that Mr. Brinston’s “Total Testosterone... was 116.3 (range 348.0-1197.0).”

4. It is well known that the use of anabolic steroids suppresses the naturally occurring testosterone in the body.

(Agency Final Decision)

The first finding of fact, that Appellant tested positive for two steroids, clearly omits all the evidence Appellant developed about the integrity of those results, absent the required safeguards provided by the Anderson County Code and the Rules of Evidence for the admission of said results and that the estranged Mrs. Brinston's complaint was the only indication of alleged illegal steroid use by the Respondent before said testing was done. (Tr. p. 27, lns. 3-5).

The third finding of fact, omits the physician's other findings of *no steroid use*.

However, the fourth finding of fact is the most legally troubling. There was no expert testimony put forth by the Panel or the ACSO about the relationship between steroids and testosterone levels – clearly a scientific fact which would require medical expertise to establish. Further, 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.

Based upon these four findings of fact, the Agency concluded that:

The unlawful use of controlled substances by an active law enforcement officer is reprehensible. In this case, the use particularly of anabolic steroids during active law enforcement service placed the public at great danger. At any moment Mr. Brinston may have suffered from dangerous side effects of these unlawful substances, for example, a “Roid Rage” incident. For the reasons stated above and due to the great danger Mr. Brinston placed the public in by taking these substances while an active law enforcement officer, Mr. Brinston's request to have law enforcement certification reissued to him is permanently denied. //

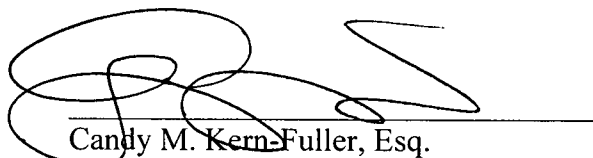
(Final Agency Decision, p.4)

Accordingly, based on the lack of evidence and testimony regarding no evidence of actual use of illicit anabolic steroids, the ONE allegedly positive urine screen that was NEVER verified pursuant to Anderson County's own policies, Appellant's requests and the Rules of Evidence, and the *sua sponte* and improper medical conclusions made by the Hearing Officer and the Panel, there is not substantial evidence when considering the record as a whole that would allow reasonable minds to reach the conclusion the agency reached. Further, the Agency's determination of its sanction is an error of law which is grounded in factual conclusions that are without evidentiary support.

The ALC found that the CJATC made erroneous medical conclusions and in the absence of any medical expert testimony, (**ALC Final Decision, p. 11**), made improper factual findings to support its erroneous and speculative medical conclusions (**ALC Final Decision, p. 12**), and made other medical findings in the absence of any medical testimony or expert medical opinions and contrary to the testimony of the witnesses advocating for the denial of Respondent's certification. (**ALC Final Decision, p. 12, Tr. pp. 26-27**). As such, the ALC's decision is a correct statement of the facts and law and should be affirmed and Respondent's certification granted.

V. CONCLUSION

For the reasons set forth herein, the ALC's decision was not a clear error of law or an abuse of discretion and should be affirmed and Respondent's certification granted.



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ATTORNEY FOR RESPONDENT

June 3, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case # 2015-000797

RECEIVED

JUN 26 2015

SC Court of Appeals

Deonta Brinston Respondent

v.

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

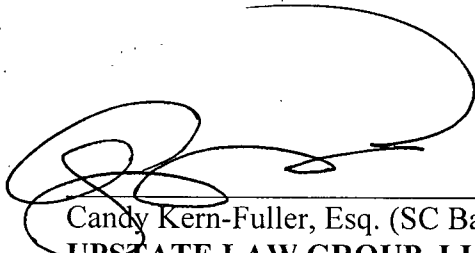
PROOF OF SERVICE

I certify that I have filed an original of the Respondent's Initial Brief and Designation of Matters, and an original and six copies of the Motion to Accept Brief Out of Time along with this Proof Service and filing fee upon the Clerk of the South Carolina Court of Appeals this June 22, 2015 by regular U.S. Mail to:

The Honorable Jenny Abbott Kitchings
P.O. Box 11629
Columbia, SC 29211

I further affirm that I have served one copy of the same upon Counsel for Appellant by regular U.S. Mail to:

Brandy A. Duncan, Chief General Counsel
SC Bar #72052
5400 Broad River Road
Columbia, South Carolina 29212



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June 22, 2015

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June 22, 2015

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
JUN 26 2015
SC Court of Appeals

Re: Brinston v. SC Dept. of Criminal Justice
Appeal # 2015-000797

Dear Ms. Kitchens:

My assistant previously called the Court on or about June 10, 2015 to determine whether the Respondent's brief in this matter had been received by the Court given the prior difficulties in this case.

On Friday, June 19, 2015, we received a letter dated June 11, 2015 asking that we file the brief along with a Motion to file the document out of time.

Enclosed is the Brief we sent on June 3, 2015 and the requested motion with the USPS receipt for the same. We tracked the packages and the USPS can find no record of them. So, it is my assumption that the briefs never reached their destinations despite our efforts.

Please let me know if you require anything further to process this request.

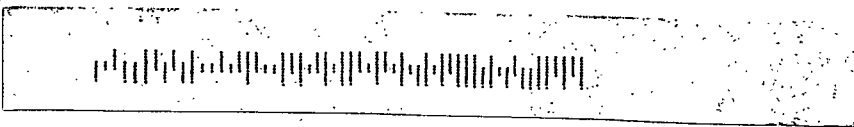
Thank you for your time and consideration of this matter.

With kindest regards,

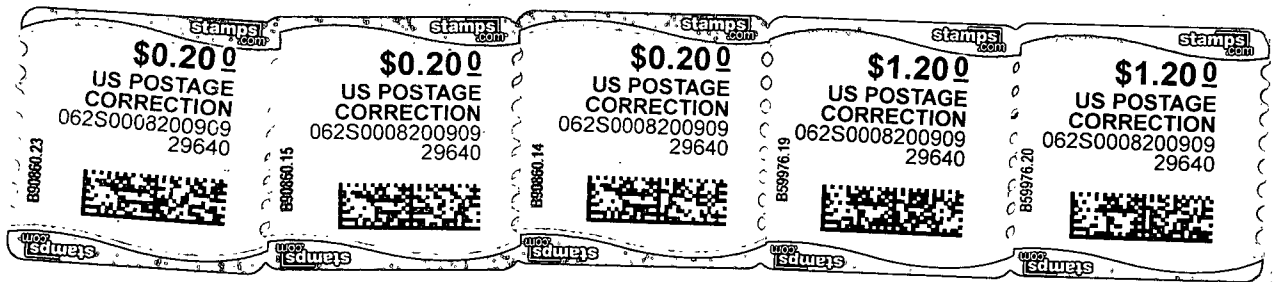

Candy M. Kern-Fuller, Esq.

Encl.

Cc: Brandy Duncan, Esq.



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JUN 26 2015

SC Court of Appeals