STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

John Elkin, Appellant, vs. South Carolina Criminal Justice Academy, Respondents.	Docket No. 15-ALJ-30-0246-AP

ORDER

STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("the ALC" or "the Court") for an administrative appeal pursuant to section 1-23-600(D) of the South Carolina Code (Supp. 2014). In this matter, John Elkin ("Appellant") appeals the South Carolina Criminal Justice Academy's ("the Academy's") final decision denying him certification as a law enforcement officer due to one incident of misconduct. Having reviewed the briefs and the parties' filings, I reverse the Academy's final decision because substantial evidence does/does not support the Academy's determination.

BACKGROUND

Appellant was formerly employed as a law enforcement officer by the Pelion Police Department. On October 13, 2013, Appellant went to his estranged wife's house where he and his wife began arguing in front of their young daughter. As a result of the argument, Appellant's wife called the Lexington County police to report the altercation and Appellant left the premises. Upon leaving the premises, Appellant called his supervisor at the Pelion Police Department, Chief Chris Garner, to inform him law enforcement had been called to his wife's house. During the phone call, Appellant denied being present at his wife's house and asserted the argument took place over the phone. The next morning, October 14, 2013, Appellant met with Chief Garner to admit he had lied to him, and that he had been at his estranged wife's house the night before. Appellant resigned from the Pelion Police Department.

On October 23, 2013, Chief Garner submitted a Personnel Change in Status – Notification of Separation Due to Misconduct to the Academy on behalf of the Pelion Police

Department. The notification indicated Appellant resigned in lieu of termination after engaging in misconduct; specifically, dishonesty/untruthfulness with respect to his employer. The Pelion Police Department policy manual included a provision stating, "Employees of the Department will always display absolute honesty."

On July 21, 2014, Chief Garner issued a letter to the Academy requesting to amend Appellant's Personnel Change in Status form submitted for the October 14, 2013, incident. In the letter, Chief Garner stated: "Through further investigation into the matter I have made the decision to retract the original [Personnel Change in Status] and misconduct report." He further stated:

> Based off the above listed information, previous employment conduct, and his military record, I feel that [Appellant's] certification should be reinstated. I am in the process of completing the re-hiring process with [Appellant] and plan on offering him a position as a Class 1 officer.

Chief Garner included a "corrected" Personnel Change in Status form with the letter, which was entitled Notification of Administrative/Routine Separation. He also included a copy of the re-hire background investigation summary for Appellant. These documents were presented to the Law Enforcement Training Council ("the Council") for review. On September 5, 2014, the Council sent Appellant a letter notifying him that the Council had made a preliminary decision finding Appellant was not qualified to be recertified as a law enforcement officer in South Carolina. On September 9, 2014, Appellant requested a contested case hearing before the Council.

A contested case hearing was held before Hearing Officer Chief Mark Keel, Chairman of the South Carolina Law Enforcement Training Council, on November 5, 2014. Chief Chris Garner, Chief of Police in the Town of Pelion in Lexington County, testified on behalf of Appellant. Chief Garner testified Appellant worked for him for almost a year as a law enforcement officer and night shift supervisor. Additionally, Chief Garner recalled that on October 13, 2013, Appellant called him on his cell phone around 6:00 p.m. and stated he had a heated argument with his wife, Kristy, over the phone with regards to the custody of their daughter. He asserted Appellant wanted to give him a "heads up" that Lexington County Sheriff's Department would be calling him because Appellant's wife had reported the incident to the Lexington County Police. Chief Garner stated he specifically asked Appellant if he had been present at his wife's property, and Appellant denied being at his wife's property.

According to Chief Garner, approximately ten minutes after his conversation with Appellant, the Lexington County Sheriff's Department called him and advised him that Appellant had been involved in a domestic argument with his wife at the wife's house. He recalled the Sheriff's Department stating they would call Appellant the following day to interview him.

Chief Garner testified that the next day, Monday, Appellant called him between 11:00 a.m. and 11:30 a.m. to inform him that he was on his way to speak with him. Appellant arrived around noon at Pelion Town Hall and met with Chief Garner who recalled that Appellant was "very upset" and "broke down" telling him that he had lied about not being at his wife's house out of panic. Chief Garner stated Appellant told him and another deputy in the room, Deputy Richardson, the truth about the domestic argument and immediately resigned.

Chief Garner confirmed he reported the resignation to the Academy indicating Appellant had violated the Pelion Police Department's policy of honesty. He stated that after Appellant resigned from his position as a law enforcement officer, Appellant continued to work for the Pelion Police Department as information technology support, and still works for the department in this capacity. Chief Garner explained Appellant worked on the department's in-car cameras, wired the new police department, and did "a lot of gratis work" for the department. However, a couple months before the hearing, Appellant sought to be re-hired as a police officer, and Chief Garner indicated he supported re-hiring Appellant as a law enforcement officer. Chief Garner stated that he briefed the issue of Appellant's resignation to the Pelion City Council immediately after the fact and "it was long-standing with the council" that if Appellant was acquitted of the criminal domestic violence charges or the charges were dismissed that Appellant would be re-hired. He confirmed Appellant was never charged with criminal domestic violence as a result of the incident, and identified a letter from the Town of Pelion's mayor, Barbara Hartley Smith, which was written in support of Appellant. The letter was admitted into evidence and stated, in part:

> [Appellant's] willingness to give extra hours, often at no compensation, to facilitate the smooth operation of the Town Hall and the Police Department is an indication of his level of commitment to excellence in service.
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> ***

> In my professional opinion, [Appellant] has those qualities of professionalism and integrity which one seeks when hiring an employee. I would definitely hire him again to serve the Town of Pelion in any capacity for which he is qualified.

In addition, Chief Garner stated he would have no hesitation in re-hiring Appellant, although Appellant would be placed on special probation and monitoring consistent with the circumstances, and it would be a part-time position. Chief Garner testified he has no reason to believe Appellant has been untruthful in the year he has worked for the department since his resignation. He also testified that Appellant has gone above and beyond the call of duty in assisting the department with technical issues on weekend and at odd hours during the night. According to Chief Garner, Appellant recently bought a house in the Town of Pelion and he is dedicated to the town. On cross-examination, Chief Garner testified he was not concerned about a Giglio[1] issue or Appellant's ability to testify in court in the future.

Corporal Edward Richardson testified he works for the Lexington County Sheriff's Department, and is also a part-time law enforcement officer for the Town of Pelion. Corporal Richardson stated he has known Appellant for almost eleven years, and was present on the morning Appellant confessed to Chief Garner that he had lied the night before about his whereabouts. Corporal Richardson testified he was aware Appellant and his wife were having marital problems and that a custody hearing was scheduled for a couple days after the incident. He asserted he and Appellant spent many hours talking on the telephone about Appellant's concerns about the custody hearing. Corporal Richardson testified it was his understanding that Appellant was resigning his commission until the investigation into the alleged criminal domestic violence charge could be resolved. He also stated that Appellant is a very truthful person, and he believes Appellant slipped up in this one instance because he was so concerned about the upcoming custody hearing. Corporal Richardson stated he has "been in the trenches" with Appellant and has no reason not to trust him because Appellant has always had his back in difficult situations.

Daniel R. Bledsoe testified on behalf of Appellant. Mr. Bledsoe stated he currently works for the South Carolina Army National Guard and previously worked for the South

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[1] Giglio v. United States, 405 U.S. 150 (1972). In Giglio, the United States Supreme Court held it was reversible error to withhold from the jury evidence of an understanding or agreement as to the potential future prosecution of the government's main witness where the witness's testimony and credibility was essential to the government's case.

Carolina Highway Patrol, and estimated he has known Appellant for five to six years. He shared that Appellant is currently helping the National Guard upgrade its communication system. Mr. Bledsoe testified he believes Appellant would be a good law enforcement officer and believes Appellant would be truthful in his job. He testified Appellant is very dependable, and stated he supported Appellant's reinstatement. When questioned by the hearing officer, Mr. Bledsoe confirmed he had no firsthand knowledge about the incident leading to Appellant's resignation.

Captain George Michael Crider testified he is employed by the Pelion Police Department, and he has been with the department for approximately ten years. Captain Crider stated he has known Appellant for a little over a year, and recalled that he drove Appellant home the day he resigned. In addition, Captain Crider testified he was not present when Appellant spoke with Chief Garner, but he knew Appellant was having marital problems and that an allegation of criminal domestic violence led to Appellant's resignation. He further asserted he never had any problems with Appellant and he believed Appellant was a truthful man.

Lieutenant Darren Lee Norris testified he is employed by the Pelion Police Department. Lieutenant Norris stated he performed the background check on Appellant for re-employment with the department. According to Lieutenant Norris, the background check came back positive. Specifically, he stated Appellant has one non-contributing accident in 2013, had no criminal history, and Appellant's credit report was positive overall. Lieutenant Norris testified he found nothing that would preclude Appellant from being employed with law enforcement, and he had no reason to believe Appellant was untruthful during the background check process. In addition, Lieutenant Norris stated he ran several character references, the majority of whom were in law enforcement, and all the reference checks came back "very positive." Lieutenant Norris confirmed he had no personal knowledge of the incident leading to Appellant resignation.

During Appellant's testimony at the contested hearing, he stated he was thirty-three years old and married at the time, but was in the process of divorce. Appellant described the incident leading to his resignation. He recalled that he went to his estranged wife's house on October 13, 2014. At the time, Appellant was living in Forest Acres and his wife still resided in the marital home in a rural area of Lexington. Appellant also confirmed he and his wife have one child, a five-year-old daughter, who was present the day of the incident. At the time of the incident, Appellant had joint custody of the child with his wife, but anticipated he might receive sole

custody because his wife gave a deposition in which she admitted to upwards of ten affairs during the marriage.

According to Appellant, on the day of the incident he went to his wife's house after they had been texting about the upcoming custody hearing and decided to meet in person to discuss the custody issue. Appellant stated he wanted to explore the possibility of coming to an agreement before involving attorneys. According to Appellant, the child was inside the house and he and his wife were on the porch. He testified that they could not agree on a custody agreement and got into an argument after he asked whether his wife's current boyfriend had been to the house. Appellant stated his wife refused to answer the question so he took her phone to call the boyfriend. He asserted he put the phone into his pocket and began walking away from the residence to leave when his wife grabbed his elbow, attempted to retrieve her phone, and then refused to get out of his way to allow him to leave. Appellant testified he believed his wife was trying to provoke him to become physical, which he did not, and recalled that she eventually walked away, took the child, and walked to her aunt's house where she called 911. In addition, Appellant testified that when his wife finally walked away he got in his car and left.

According to Appellant's testimony, after he left his wife's home, he received a call from the Lexington County Sheriff's Department who wanted to interview him about the incident at his wife's house. Appellant admitted he told the Sheriff's Department he had not been at his wife's house, and also admitted calling Chief Garner to inform him about the incident and that he again denied that he had been at his wife's house. Appellant asserted that he lied because he panicked about how an allegation of criminal domestic violence would affect the custody hearing.

Appellant testified that the day after the incident he called Chief Garner to set up a meeting to tell him the truth about what happened. He confirmed Corporal Richardson was present at the meeting, and he stated that it was during this meeting that he admitted to Chief Garner that he lied and resigned his position. He also stated that the child custody hearing was cancelled as a result of the incident; although, after an investigation into the incident, the criminal domestic charges against him were dropped.

In addition, Appellant testified that after he resigned, he continued to work for the Pelion Police Department by assisting with work on computers, the department's network infrastructure, and the records management system. Appellant testified that he fully accepts

responsibility for his actions on the date of the incident, and asserted he never falsified or lied about anything else; and also stated that he "fully understand[s] where integrity falls in law enforcement" and this was one of the worst mistakes of his life. He explained he was under a lot of stress at the time having to deal with the divorce and his wife sleeping with multiple men. Appellant recalled that during his wife's deposition she stated that if he left her she would make sure he did not have a job or a child, and insinuated that her threat is why he panicked the night of the incident and initially lied about being present.

Additionally, Appellant testified that he has been in law enforcement for ten years, beginning with search and rescue in high school, and moving on to a 911 operator for Lexington County and a volunteer firefighter for the City of Cayce. He stated law enforcement and public safety is the only life he has ever known. Appellant asserted that he could have chosen not to reveal the lie and probably would not have been discovered, but he could not live with a lie because that is not who he is. He acknowledged he has an uphill battle to prove himself if he is re-instated.

Appellant's wife's deposition discussing the incident was admitted into the record. In her deposition, Appellant's wife alleged Appellant has an anger problem. She also testified in the deposition that she was unsure how many men she had slept with during the marriage and times of separation, and admitted lying several times in the marriage. In addition, she admitted willfully preventing Appellant from visiting his daughter in violation of a court order.

Regarding the incident, in her deposition Appellant's wife stated she allowed Appellant to come over to her house after he would not stop texting her. She stated he became agitated after she refused to give him more visitation and threatened to have someone watch the house to see if she did anything wrong. She averred she asked Appellant to leave the property and he would not, so she pulled out her cell phone to call the Lexington County Sheriff's Office. According to the deposition testimony, Appellant took the phone before his wife could complete the call, and she could not get it back so she took the child to her aunt's house and called the Sheriff's Department from there. Appellant's wife admitted she suffered no physical injuries as a result of the encounter with Appellant, and she stated that when she returned from her aunt's house with the police, her cell phone was on the porch railing. However, she alleged the text messages between her and Appellant had been deleted from her cell phone.

Subsequent to the hearing, the Hearing Officer, Chief Keel, determined he had a conflict of interest and notified the parties. The parties decided to have another contested case hearing with a new Hearing Officer. The new contested case hearing took place on February 4, 2015 before Kristie H. Jordan, General Counsel at the York County Sheriff's Department, who was acting as a proxy for Sheriff Bruce Bryant, a member of the Council. At the hearing, the parties agreed to accept the testimony from the previous hearing and submit it to the Hearing Officer without taking further testimony. Attorney for Appellant noted "[i]t was my feeling that maybe the Hearing Officer in this case, since it wasn't actually a member of the Council, may not have been statutorily allowed to do it, but I would agree with that this is the easiest and the fairest way to do it at this time."

On April 7, 2015, following her review of the testimony and documents submitted for the contested case hearing, the Hearing Officer issued a recommendation to the Council that it deny Appellant's request for recertification as a law enforcement officer in South Carolina. The Hearing Officer found that Appellant admittedly lied to his employer on October 13, 2013. She also found that Appellant lied to Lexington County Sheriff's Department Officers and destroyed evidence during a police investigation. Specifically, she found evidence in the record indicated Appellant deleted text messages that would place him at his wife's residence and reveal the lie. The Hearing Officer determined these actions violated South Carolina Regulation 38-004, and the Council had the authority to deny recertification under section 23-23-80(6) of the South Carolina Code.

On April 28, 2015, the Council voted unanimously to adopt the Hearing Officer's April 7, 2015, recommendation and, therefore, denied Appellant's request for recertification. On May 28, 2015, Appellant filed a Notice of Appeal with this Court challenging the Council's decision.

ISSUES

1. Whether substantial evidence supports the Academy's finding of misconduct.
2. Whether the Academy's decision exceeds its statutory authority.
3. Whether South Carolina Regulation 38-004 is unconstitutional, arbitrary or capricious.
4. Whether the Academy erred because it relied on an unconstitutional vague and overbroad regulation.
5. Whether the Academy erred because it relied on a regulation that violates the principles of due process and equal protection.
6. Whether the Academy's decision constituted 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 South Carolina Constitution.

7. Whether the Academy's decision was arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.
8. Whether the Academy erred because it failed to the address the factors of the seriousness of the misconduct, the remoteness in time of the misconduct, and any mitigating circumstances.

STANDARD OF REVIEW

The Academy assumed the powers of the South Carolina Criminal Justice Academy Division of the South Carolina Department of Public Safety. See S.C. Code § 23-23-10(D) (Supp. 2014) ("Upon the signature of the Governor, all functions, duties, responsibilities, accounts, and authority statutorily exercised by the South Carolina Criminal Justice Academy Division of the Department of Public Safety are transferred to and devolved upon the South Carolina Criminal Justice Academy."). Therefore, the Academy is an "agency" under the Administrative Procedures Act ("APA"). See S.C. Code Ann. § 1-23-310(2) (Supp. 2014). Accordingly, the APA's standard of review governs appeals from decisions of the Academy and its Council. See S.C. Code Ann. § 1-23-600(D) (Supp. 2014) (directing administrative law judges to conduct appellate review in the same manner prescribed in section 1-23-380). Section 1-23-380 provides, in relevant part:

> (5) The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
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> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

DISCUSSION

This Court has jurisdiction to hear this appeal pursuant to section 1-23-600(D) of the South Carolina Code (Supp. 2014). The Council is the governing and adjudicative body of the Academy. See S.C. Code Ann. §23-23-80 (Supp. 2014). The Council has the 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 [C]ouncil." S.C. Code Ann. § 23-23-80(6) (Supp. 2014). A potential employer is not allowed to hire a law enforcement officer unless that officer has been certified by the Council. S.C. Code Ann. § 23-23-40 (Supp. 2014).

The Council sets the minimum requirements for certification and hire, but local departments and offices are encouraged to adopt standards higher than the minimum standards. See S.C. Code Ann. § 23-23-10(B) (Supp. 2014) ("It is the intent of this chapter to encourage all law enforcement officers, departments, and agencies within this State to adopt standards which are higher than the minimum standards implemented pursuant to this chapter, and these minimum standards may not be considered sufficient or adequate in cases where higher standards have been adopted or proposed."). One of the requirements for certification is the requirement of good character. S.C. Code Ann. Regs. 38-003 (Supp. 2014). This requirement provides:

> Every agency who requests certification of any class of law enforcement officer shall certify to the Council that, in the opinion of the employing agency, the candidate is of good character and has not engaged in misconduct as defined in R.38-004.

Regulation 38-004 describes how certification can be denied based on misconduct. It provides, in relevant part:

> 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:
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> 7. Dishonesty with respect to his/her employer;
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> 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.

S.C. Code Ann. Regs. 38-004 (Supp. 2014).

1. Whether substantial evidence supports the Academy's finding of misconduct.

Appellant contends that although he lied, he did not lie "with respect to his employer" within the meaning of Regulation 38-004 because his lie related to a personal matter

unconnected with his employment as a law enforcement officer. Additionally, Appellant argues his lie did not rise to a level of seriousness to warrant the denial of his law enforcement certification.

However, Respondent contends Regulation 38-004 does not distinguish between lies that are told when an officer is on-duty or off-duty. Respondent notes that under Appellant's theory, an officer could be deceitful to his employer about a crime he committed while off-duty and it would not constitute misconduct, which is an absurd result. Respondent maintains Appellant lied to his superior and other police officers investigating the October 13, 2013 incident, which qualifies as dishonesty with respect to his employer. In addition, Respondent argues Appellant admitted to lying, and several people, including Chief Garner, Corporal Richardson, and Captain Crider, confirmed Appellant lied.

I disagree with Appellant's argument that his lie was not "with regard to his employer." After the incident at his estranged wife's house occurred, Appellant called his supervisor, Chief Garner, and lied to him about his whereabouts. Chief Garner was a representative of Appellant's employer, the Pelion Police Department. Therefore, whether he was on or off-duty, Appellant involved his employer when he contacted Chief Garner and admittedly lied to him. Accordingly, I find Appellant's lie falls within the meaning of "dishonesty with respect to his/her employer" under Regulation 38-004(A)(7). However, I also note that the Council based its decision in part on Appellant's similar initial dishonesty to law enforcement investigating the incident and a finding that Appellant tampered with evidence in a police investigation. Although lying during a police investigation is not admirable, the police conducting the investigation was the Lexington County Sheriff's Department, which was not Appellant's employer at the time. Therefore, I find any dishonesty towards the Lexington County Sheriff's Office was not dishonesty with regards to Appellant's employer under Regulation 38-004. Further, Appellant was not before the Hearing Officer on a charge of tampering with evidence in a police investigation; therefore, to the extent the Academy relied on this finding, it was error.

"A reviewing court may reverse or modify an administrative decision if the findings of fact are not supported by substantial evidence." Risher v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011); Be Mi, Inc. v. S.C. Dep't of Revenue, 408 S.C. 290, 297, 758 S.E.2d 737, 741 (Ct. App. 2014) ("A reviewing court may reverse or modify an administrative decision if substantial evidence does not support the findings of fact.").

"Substantial evidence is evidence that allows reasonable minds considering the record as a whole to reach the conclusion the administrative agency reached." Be Mi, Inc., 408 S.C. at 297, 758 S.E.2d at 741. Moreover, "[s]ubstantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached." Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004). "In applying a substantial evidence test, an appellate court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, unless its findings or conclusions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Friends of Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010).

Although Appellant admittedly lied to his employer, I find the evidence in the record as a whole shows Appellant's one incident of misconduct is dwarfed by the ample evidence presented in his favor such that this Court cannot in good conscious reach the same conclusion as the Academy and the Council. Since the incident, Appellant has shown his loyalty and trustworthiness through his continued service to his employer, the Pelion Police Department. Chief Garner testified that after Appellant resigned, Appellant remained employed by the department and provided excellent information technology support, which included "a lot of gratis work" and work on weekend and at odd hours. Chief Garner further testified that the Pelion City Council intended to re-hire Appellant as a law enforcement officer, despite the one instance of dishonesty, if the criminal domestic violence charges against Appellant were dropped, which they were. In addition, Chief Garner testified he would have no hesitation in re-hiring Appellant, and indicated Appellant would be placed on special probation and work a part-time position to ensure his reliability. Chief Garner also stated Appellant went above and beyond the call of duty in assisting the Pelion Police Department in the past year and demonstrated his loyalty towards the Town of Pelion and the department.

In addition to the testimony of Chief Garner, several other individuals testified to Appellant's good character and trustworthiness. The Mayor of Pelion submitted a letter attesting to her support for Appellant to be re-hired. Corporal Richardson testified he has known and worked with Appellant in law enforcement for years and has no reason not to trust Appellant, and indicated he believes Appellant's lie was a one-time slip up because Appellant panicked

about the custody hearing. Daniel Bledsoe testified he has known Appellant for years and worked with him in the South Carolina National Guard where Appellant has provided excellent service in his capacity as a National Guardsman. Mr. Bledsoe also stated he trusted Appellant and believed Appellant would be truthful in his job as a law enforcement officer. Lieutenant Norris testified Appellant had a clean background check and his references came back "very positive."

This Court cannot determine the weight to be given testimony as that is the province of the trial court. See Friends of Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. at 366, 692 S.E.2d at 913 ("In applying a substantial evidence test, an appellate court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, unless its findings or conclusions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."). However, when the evidence as a whole prevents this Court from coming to the same conclusion as the trial court, this Court has the authority to reverse. See id.; Be Mi, Inc., 408 S.C. at 297, 758 S.E.2d at 741 ("Substantial evidence is evidence that allows reasonable minds considering the record as a whole to reach the conclusion the administrative agency reached."); Bursey, 360 S.C. at 141, 600 S.E.2d at 84 ("Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached."). In this case, Appellant made one mistake during a stressful situation. Within a short period of time, he admitted his mistake and resigned. Since that time, Appellant has shown his loyalty and trustworthiness to the Pelion Police Department and the Town of Pelion to the extent that practically the entire town supports re-hiring him as a law enforcement officer. Considering this evidence, this Court finds substantial evidence does not support the Council's denial of certification.[2]

2. Whether the Academy's decision exceeds its statutory authority.

Appellant argues the Council did not have the statutory authority to promulgate Regulation 38-004 governing the "denial" of certification because section 23-23-80 of the South

[2] The Court notes that while the Council is not required to consider "the seriousness, the remoteness in time and any mitigating circumstances surrounding the act or omission constituting or alleged to constitute misconduct," the circumstances of this case present an ideal opportunity to consider these factors. S.C. Code Ann. Regs. 38-004(B).

Carolina Code only authorizes the Council to promulgate regulations governing the "suspension, revocation, or restriction" of certification. S.C. Code Ann. § 23-23-80(6) (Supp. 2014).

Section 23-23-80(6) provides that the Council is authorized to:

> certify and train qualified candidates and applicants for law enforcement officers and provide for suspension, revocation, or restriction of the certification, in accordance with regulations promulgated by the council . . . .

In this Court's decision in Preston B. Bethea v. South Carolina Criminal Justice Academy, Docket No. 15-ALJ-30-0116-AP, 2015 WL 5179143, at *6 (Aug. 27, 2015), this Court found that although section 23-23-80(6) is ambiguous as to whether the Council has the authority to deny certification, implicit in the Council's authority to certify officers according to specific standards is its ability not to certify certain candidates who do not meet the standards. See id. Accordingly, this Court found the Council must be able to deny certification to those who do not meet the standards or everyone would be certified and the standards would be rendered meaningless. See id. (citing Bass v. Isochem, 365 S.C. 454, 470, 617 S.E.2d 369, 377 (Ct. App. 2005) ("The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.")). To find the Council does not have the authority to deny certification would lead to an absurd result. See Sloan v. S.C. Bd. of Physical Therapy Examiners, 370 S.C. 452, 487, 636 S.E.2d 598, 616 (2006) (holding "[w]here the plain and ordinary meaning of the words used in a statute would lead to a result so plainly absurd that it could not possibly have been intended by the legislature or would defeat the plain legislative intention," the court will, if possible, "construe the statute so as to escape the absurdity and carry the intention into effect"). Thus, I find the Council did not exceed its statutory authority in denying Appellant certification, even if substantial evidence does not support its denial.

Issues 3-6

I find Appellant's issues 3-6 are not preserved for appellate review because Appellant raised these issues for the first time on appeal. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). The rule that an argument cannot be raised for the first time on appeal includes constitutional arguments. Eagerton v. Eagerton, 265 S.C. 90, 96, 217 S.E.2d 146, 148 (1975) ("It is well settled that a constitutional question not raised or passed upon in the lower court cannot be raised for the first time on appeal."); Grant v. S.C. Coastal Council, 319 S.C.

348, 356, 461 S.E.2d 388, 392 (1995) ("This appeal is Grant's first mention of any deprivation of due process and, therefore, this issue is not preserved.").

Here, Appellant raised the following issues: (3) South Carolina Regulation 38-004 is unconstitutional, arbitrary or capricious; (4) the Academy erred because it relied on an unconstitutional vague and overbroad regulation; (5) the Academy erred because it relied on a regulation that violates the principles of due process and equal protection; and (6) the Academy's decision constituted 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 South Carolina Constitution.

Appellant's issues 3-6 are all constitutional arguments raised for the first time on appeal. Appellant did not raise any issues related to the constitutionality of any of the statutes or regulations at issue in this case before the Hearing Officer. Accordingly, as indicated above, these arguments are unpreserved for this Court's review. See Staubes, 339 S.C. at 412, 529 S.E.2d at 546 ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

7. Whether the Academy's decision was arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Appellant contends the Council's decision was arbitrary and capricious or characterized by an abuse of discretion. Appellant relies primarily on constitutional arguments to support his position. He claims the grounds for denial of certification set forth in Regulation 38-004 "randomly identify misconduct that will result in denial of certification," the regulation is "overbroad and vague," and "there is no graduation of the misconduct" to reflect variations in the seriousness of an offense. Appellant contends such a broad and random regulation is unconstitutional because it provides the Council with unlimited discretion. Appellant also argues the Council abused its discretion when it appointed Kristie H. Jordan, who is not a member of the Council, to preside as Hearing Officer over Appellant's case. Appellant asserts the Council did not have the authority to appoint a non-member as hearing officer, and as a result, Hearing Officer Jordan's decision must be considered void.

A decision is arbitrary and capricious "if it is without a rational basis, is based alone 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 & Regulation, 405 S.C. 239, 246, 746 S.E.2d 491, 495 (Ct. App. 2013). "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." S.C. Dep't of Corrs. v. Mitchell, 377 S.C. 256, 260, 659 S.E.2d 233, 235 (Ct. App. 2008).

Here, Appellant's initial argument does not address whether the Council's decision was made "without a rational basis" or "based alone on one's will and not upon any course of reasoning and exercise of judgment," but rather he argues Regulation 38-004 is unconstitutionally vague and overbroad. This is essentially the same argument Appellant attempted to raise in issue 4. As stated above, Appellant did not preserve this constitutional argument for appellate review, and this Court has no authority to address it.

Next, Appellant contends the Hearing Officer's decision should be declared void because the appointed hearing officer, Kristie H. Jordan, was not a member of the Council, but a proxy for a Council member. This Court notes that at the hearing before Hearing Officer Jordan Appellant noted, "[i]t was my feeling that maybe the Hearing Officer in this case, since it wasn't actually a member of the Council, may not have been statutorily allowed to do it, but I would agree with that this is the easiest and the fairest way to do it at this time." Accordingly, although Hearing Officer Jordan was not a member of the Council, I find Appellant agreed to respect her decision and cannot now complain on appeal about her appointment as a proxy and authority to make a decision in this case.

8. Whether the Academy erred because it failed to the address the factors of the seriousness of the misconduct, the remoteness in time of the misconduct, and any mitigating circumstances.

Appellant contends the Council erred when it failed to consider the factors listed under section B of Regulation 38-004 when deciding whether to deny Appellant recertification.

Regulation 38-004(B) provides:

> 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.

S.C. Code Ann. Regs. 38-004 (Supp. 2014). The language of the regulation provides the Council *may* consider the seriousness, the remoteness in time, and any mitigating circumstances, but it is not *required* to do so. Therefore, the Council did not err in not considering these factors;

however, the Court agrees with Appellant that review of these factors would have been appropriate under the circumstances of this case.

CONCLUSION

Although this case is close, I find substantial evidence does not support the Council's denial of Appellant's request for law enforcement recertification because reasonable minds cannot come to the same conclusion as the Council when reviewing the record as a whole. See Be Mi, Inc., 408 S.C. at 297, 758 S.E.2d at 741 ("Substantial evidence is evidence that allows reasonable minds considering the record as a whole to reach the conclusion the administrative agency reached."); Bursey, 360 S.C. at 141, 600 S.E.2d at 84 ("Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached."); Friends of Earth, 387 S.C. at 366, 692 S.E.2d at 913 ("In applying a substantial evidence test, an appellate court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, unless its findings or conclusions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."). In particular, I find the record as a whole shows Appellant's one incident of brief dishonesty is dwarfed by the testimony of his otherwise spotless record of loyalty and trustworthiness as recounted by members of the Pelion Police Department and the Town of Pelion who wish to re-hire Appellant. Accordingly, I reverse the Academy's decision.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED** that the Academy's decision shall be and hereby is **REVERSED**.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

December 10th, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties in this cause by depositing a copy hereof in the United States mail, postage paid, or the agency Mail Service addressed to the party(ies) or their attorney(s).
This 10 day of December 2015
By Jeebie J. Henderson
Docket Clerk