THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2016-000034

John Elkin, Respondent,

v.

South Carolina Criminal Justice Academy, Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In this case, Appellant, John Elkin, was employed as a law enforcement officer with the Pelion Police Department until October 14, 2013, when Appellant resigned his law enforcement position. (Elkin's Exhibit #3). On October 23, 2013, the South Carolina Criminal Justice Academy (hereinafter, "CJA" or "Academy") received a Personnel Change in Status (hereinafter, "PCS") of Separation Report from the Pelion Police Department alleging that Appellant engaged in dishonesty/untruthfulness with respect to his employer. (Elkin's Exhibit #3). On September 4, 2014, the Academy received a PCS of Hire form from the Pelion Police Department stating that they had rehired Appellant as a law enforcement officer. (PCS of Hire dated received Sept. 4, 2014). Attached to the PCS of Hire was a letter from Police Chief Chris Garner and an amended PCS of Separation form. (Elkin's Exhibit #3). These documents requested to change "the status" of Appellant's PCS filed on October 23, 2013 and "retract the original PCS [of Separation] and misconduct report." (Elkin's Exhibit #3). Chief Garner's request, amended PCS and original PCS were submitted to the Law Enforcement Training Council (hereinafter, "LETC") for a determination of whether Appellant would need a contested case hearing with regard to the information on file. (LETC meeting minutes dated July 30, 2014). On July 30, 2014, at a regularly scheduled meeting, the LETC members present unanimously voted that a contested case hearing was needed. (LETC meeting minutes dated July 30, 2014).

On September 5, 2014, CJA notified Respondent's counsel that Respondent would need a contested case hearing to resolve the allegations of misconduct. (Harrell letter dated Sept. 5, 2014). On September 10, 2014, CJA received a request for a contested

case hearing. (Request dated Sept. 10, 2014). A hearing notice was sent to all parties on September 30, 2014. (Hearing notice dated Sept. 30, 2014). The contested case hearing was held on November 5, 2014 before Chief Mark Keel, Chairman of LETC. (Hr. Tr. Dated Nov. 5, 2014). During the hearing, Chief Keel began to suspect that he had a connection with Appellant that would require his recusal from the case. (Hr. Tr. Dated Nov. 5, 2014). After concluding the hearing and upon a review of additional records on file with the Academy's certification unit, Chief Keel determined that he did need to recuse himself from Appellant's case. (Keel letter dated Nov. 20, 2014). Because of the need for this recusal, Appellant's attorney, John O'Leary, Esquire, was contacted. (Keel letter dated Nov. 20, 2014). The nature of the conflict and the need for recusal were explained to Mr. O'Leary, and he was advised that Appellant may decide how to proceed based on this development. (Keel letter dated Nov. 20, 2014). Mr. O'Leary was told that a new contested case hearing could be held before a new hearing officer or the previously held hearing could be sent to LETC with no recommendation from Chief Keel. (Keel letter dated Nov. 20, 2014).

Mr. O'Leary was notified that the second contested case hearing would be held on January 7, 2015 at 10:00 a.m. by correspondence dated November 24, 2014. (Duncan Letter dated Nov. 24, 2014). This hearing was rescheduled for February 4, 2015. (Duncan Letter dated Dec. 29, 2014). This notice included an enclosed subpoena form for Mr. O'Leary's use, indicating that the designated hearing officer was Kris Jordan, as designee for Sheriff Bruce Bryant of York County, a member of LETC. (Duncan Letter dated Dec. 29, 2014). When the hearing began, Mr. O'Leary requested that the new hearing officer simply use the transcript and evidence from the initial contested case

hearing to draft a recommendation for the full LETC rather than proceeding with a second hearing. (Hr. Tr. Dated Feb. 4, 2015). Chief Garner of the Pelion Police Department consented to this procedure, and the agreement to proceed in this manner was placed on the record. (Hr. Tr. Dated Feb. 4, 2015).

The non-binding written recommendation of the hearing officer was forwarded via U.S. mail to LETC Members on April 8, 2015, along with copies of the transcripts from both hearings and a CD containing electronic copies of all exhibits entered into evidence at the hearings. (Hearing officer recommendation dated April 7, 2015) (Duncan letter to LETC dated April 8, 2015). Members of LETC were advised that a final decision was on the agenda for the LETC meeting scheduled for April 28, 2015. (Hearing officer recommendation dated April 7, 2015). At this meeting, LETC unanimously voted to adopt the recommendation of the hearing officer and therefore, denied Appellant's request for reissuance of his law enforcement certification. (Final Agency Decision dated April 28, 2015).

The Final Agency Decision was sent to Respondent's counsel on May 4, 2015. (Duncan letter dated May 4, 2015). Via a letter dated May 29, 2015, C. Bradley Hutto made an appearance on behalf of Respondent and requested the hearing transcript. (Hutto letter dated May 29, 2015). On May 28, 2015, Respondent appealed LETC's decision to the ALC. (Notice of appeal dated May 28, 2015). The parties received a notice of assignment dated June 2, 2015. (Notice of assignment dated June 2, 2015). The ALC sent its Final Order on December 10, 2015. (ALC Final Order).

Appellant filed a Notice of Appeal with this Court on January 7, 2016. (Ct. App. Notice of Appeal) (Proof of Service dated January 7, 2016).

STATEMENT OF FACTS

On approximately October 13, 2013, Respondent and his wife were separated. (Hr. Tr. Page 49, lines 9-14). During this separation, Respondent was living in Forest Acres and his estranged wife lived in Lexington County. (Hr. Tr. Page 49, lines 15-24). They had a child in common. (Hr. Tr. Page 49, line 25, Page 50, line 1). The estranged couple had joint custody of the child. (Hr. Tr. Page 50, lines 6-8).

On October 13, 2013, Respondent began texting his estranged wife to discuss on upcoming deposition. (Hr. Tr. Page 51, lines 4-16). Eventually, he went over to her house that day. (Hr. Tr. Page 51, lines 21-23). Sometime while Respondent was there they began arguing. (Hr. Tr. Page 53, lines 8-25, Page 54, lines 1-12). During the argument, Respondent took her cell phone and put it in his pocket. (Hr. Tr. Page 53, lines 20-25). Although Respondent did not touch or provoke his estranged wife, she grabbed his right elbow to get her cell phone from his front pocket. (Hr. Tr. Page 54, lines 1-17). His estranged wife left to call 911 from her aunt's house. (Hr. Tr. Page 55, lines 3-5).

Later that evening, Respondent called Chief Garner and "told him there was an incident at the house and that I denied being there." (Hr. Tr. Page 56, lines 2-4). Respondent admitted to lying not only to his employer, but the officers investigating the allegation of domestic violence, thereby impeding their investigation. (Hr. Tr. Page 81, lines 9-13). Respondent testified that he denied being at his ex-wife's home. (Hr. Tr. Page 56, lines 2-4). Respondent responded "I did, yes" in response to the question "Basically, you lied?" (Hr. Tr. Page 56, lines 2-6). Furthermore, Respondent testified that when he resigned from Pelion Police Department, he informed the Chief that he lied to him. (Hr. Tr. Page 56, line 25, Page 57 1-2). He was asked "[a]nd you readily

admitted that you lied?" and he answered "yes, sir." (Hr. Tr. Page 59, lines 18-19). He further testifies that he lied because there were only 2 witnesses present at the scene. (Hr. Tr. Page 59, lines 20-23). Appellant testified that he "came forward with full knowledge that anything I said as law enforcement would not be, you know, taken with much weight." (Hr. Tr. Page 64, lines 21-25). Additionally, he conceded that, "Integrity for the rest of my life is going to be questioned. I know that." (Hr. Tr. Page 67, lines 15-17).

Chief Garner, Chief of Police for Pelion Police Department, extensively testified to Respondent's misconduct. "I said did you go back to the property at W.E. Jeffcoat Road, which was the house that he did share with his wife.... He told me he was not there." (Hr. Tr. Page 8, lines 2-6). "I asked him did you go to the residence with Kristy... He said he did not." (Hr. Tr. Page 9, lines 16-19). "And John was very upset when he got there [Pelion Police Department] and broke down and told me that he – he lied to me out of panic and that he indeed was at the residence." (Hr. Tr. Page 10, lines 9-12). Chief Garner testified that Respondent clearly told him he had been untruthful and resigned his position immediately. (Hr. Tr. Page 11, lines 21-24). In response to questioning, "And you said that he then immediately resigned from the department because of – he told you he didn't tell you the truth," Chief Garner responded, "He did." (Hr. Tr. Page 11, lines 21-24). Chief Garner testified that Appellant had violated his department's policy regarding "honesty." (Hr. Tr. Page 12, lines 7-8). Appellant's attorney states in questioning to Chief Garner, "And so he readily accepted his responsibility, told you he lied." (Hr. Tr. Page 16, lines 11-12). Respondent's attorney states in questioning to Chief Garner, "Now this – the lie that he told you, he basically

denied being on the property that day?" Chief Garner responds, "Correct." (Hr. Tr. Page 18, lines 11-13).

Testimony of Cpl. Richardson, of the Lexington County Sheriff's Department, testified to Respondent's admitted misconduct. (Hr. Tr. Page 25, lines 18-21). Additionally, Cpl. Richardson is employed part-time by Respondent's employer, Respondent did admit to him that he lied to his employer. (Hr. Tr. Page 25, lines 18-21). Cpl. Richardson testified that Respondent "pretty much" explained to him that he was resigning because he had lied about his whereabouts during the incident. (Hr. Tr. Page 29, lines 9-19). After initially stating that Respondent has "never been deceptive at any time," he then states that, "he called me back a very short time later to tell me that he had been deceptive with me." (Hr. Tr. Page 30, lines 9-17). Cpl. Richardson stated, in response to questioning by the hearing officer, that Respondent admitted after the incident that he had actually been at the location at which he had previously denied being. (Hr. Tr. Page 31, lines 18-25, Page 32, lines1-4). Additionally, he stated that Respondent had apologized for being deceptive at the beginning of the situation. . (Hr. Tr. Page 31, lines 18-25, Page 32, lines1-4).

Captain Crider, of the Pelion Police Department, testified to Respondent's misconduct. In response to the question, "And are you aware that there was a CDV allegation against [Elkin], and that's what he lied about?" Captain Crider replies "Yes, sir." (Hr. Tr. Page 31, lines 9-12).

ARGUMENT

I. 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.

The substantial evidence in the record showed that Respondent committed misconduct. However, the ALC substituted its' judgment on the facts of the case for LETC's judgment.

The South Carolina Criminal Justice Academy is an "agency" under the Administrative Procedures Act ("APA"). *See* S.C. Code Ann. § 1-23-310 (2) (Supp. 2014). Therefore, the South Carolina Administrative Law Court ("ALC") was required to follow the standard of review found in S.C. Code Ann. § 1-23-380, which states:

> (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:
>
> (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;
> (e) 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.

"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. Dept. of Health and Envtl. Control, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011); Be Mi, Inc. v. S.C. Dept. 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. Additionally, "[s]ubstantial evidence is not a mere scintilla of evidence nor evidence viewed blindly by 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. Dept. of Health and 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. Commn. of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010).

The present case involves a decision LETC made and the ALC reversed based upon S. C. Code Ann. Regulation 38-004[1], which 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:
>
> 7. Dishonesty with respect to his/her employer;

The record only contains evidence that the Respondent did engage in misconduct. There is no evidence, or argument, that he did not. The substantial, in fact only, evidence in the record establishes that Respondent engaged in misconduct when he was dishonest

[1] S.C. Code Ann. Reg. 38-004 is now S.C. Code Ann. Reg. 37-025, as of June 26, 2015, Volume 39 Issue No. 6 of the S.C. State Register. The wording is the same

to his employer. The record does not contain evidence that Respondent did not engage in misconduct. All of the evidence has established that he lied to his employer.

In fact, the record contains at least six admissions from Respondent that he was dishonest to his employer. After these admissions, Respondent acknowledged the importance of integrity to law enforcement and how this dishonesty would follow him throughout his career. Additionally, the record contains at least 6 times Chief Garner testified that Respondent was dishonest to his employer. As a result of this dishonesty, Chief Garner testified that Respondent violated the agency honesty policy.

At several points in his testimony, Cpl. Richardson testified that Respondent admitted to being dishonest to his employer. Finally, Captain Crider testified that Respondent was dishonest to his employer.

Additionally, in its Order, the ALC stated "Although [Respondent] admittedly lied to his employer, I find the evidence in the record as a whole show [Respondent's] one incident of misconduct is dwarfed by the ample evidence presented in his favor such that this Court cannot in good conscience reach the same conclusion as the Academy and the Council." (Order page 12). The ALC went on to say "[i]n this case, [Respondent] made on mistake during a stressful situation."[2] (Order page 13).

[2] It must be noted that Respondent called his employer, Chief Garner, and told him a lie; the Chief did not contact him and ask about the situation. This shows that Respondent had time to think of the lie and tell it to his employer. This is unlike a situation where an employee is "ambushed" with a stressful question from an employer and lies under the stress of the situation. Additionally, the stressful situation of law enforcement being called to his estranged wife's house was also created, in part, by him.

The only way the ALC could have reached a different conclusion than LETC is if the ALC used section (B) of Regulation 38-004 and that appears what the ALC did. South Carolina Code of Regulation 38-004 (B), which states:

> 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.

Once again, the ALC stated "Although [Respondent] admittedly lied to his employer, I find the evidence in the record as a whole show [Respondent's] one incident of misconduct is dwarfed by the ample evidence presented in his favor such that this Court cannot in good conscience reach the same conclusion as the Academy and the Council." (Order page 12). The ALC went on to say "[i]n this case, [Respondent] made on mistake during a stressful situation." (Order page 13). This language addresses the concerns in subsection (B). Therefore, it appears that the ALC was using this subsection to reverse LETC's decision.

Although it appears that the ALC was using subsection (B), the ALC ruled that 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 [Respondent] that review of these factors would have been appropriate under the circumstances of this case." (Order pages 16-17) (Emphasis in original).

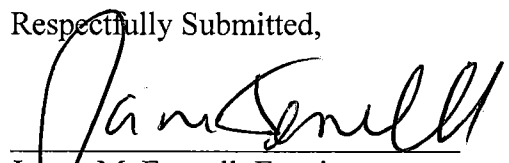
The record only contains evidence that the Respondent did engage in misconduct. There is no evidence that he did not. Furthermore, Respondent has never argued that he was not dishonest to his employer. The substantial, in fact only, evidence in the record

establishes that Respondent engaged in misconduct when he was dishonest to his employer. The record does not contain evidence that Respondent did not engage in misconduct. All of the evidence has established that he was dishonest to his employer. Therefore, the ALC substituted its judgment on the facts of the case for LETC's judgment.

CONCLUSION

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

Respectfully Submitted,



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February 16, 2016

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2016-000034

John Elkin, Respondent,

v.

South Carolina Criminal Justice Academy, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief complies with Rule 211(B), SCACR.

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on John Elkin by depositing a copy of it in the United States Mail, postage prepaid, on February 4, 2016, addressed to his attorney of record, C. Bradley Hutto, Esquire, Williams & Williams, Post Office Box 1084, Orangeburg, South Carolina 29116.

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February 16, 2016

The Honorable Jenny Abbott Kitchings
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RE: John Elkin, Respondent, v. South Carolina Criminal Justice Academy, Appellant,
Appellate Case No. 2016-000034

Dear Ms. Kitchings:

Enclosed for filing is Motion to Extend Time to File Brief Pursuant to Rule 208, an original and six copies, in the above case. Also enclosed are the following:

1. Proof of Service for the Motion to Extend Time to File Brief Pursuant to Rule 208 on the respondent.
2. Initial Brief of Appellant.
3. Proof of Service of the Initial Brief of Appellant on the respondent.
4. Certificate of Counsel for the Initial Brief of Appellant.
5. Designation of Matter to be Included in the Record on Appeal.
6. Proof of service of the Designation of Matter to be Included in the Record on Appeal on respondent.
7. Certificate of Counsel for the Designation of Matter to be Included in the Record on Appeal.

I have not enclosed a filing fee because this appeal is filed on behalf of the State of South Carolina. See Rule 203(d)(2)(B)(iii), SCACR.

I have enclosed a copy of each of the above with a self-addressed stamped envelope. I ask that you stamp each and return them in the enclosed envelope.

Signature on next page.

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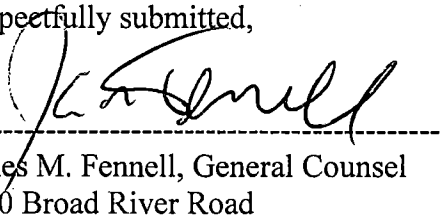
Respectfully submitted,



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