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.

# REPLY BRIEF OF APPELLANT

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## REPLY

The Appellant, South Carolina Criminal Justice Academy, by and through counsel, files this Reply in response to the Brief of Respondent.

I. THE DECISION OF THE ALC THAT RESPONDENT'S LIE WAS "WITH RESPECT TO HIS EMPLOYER, ALTHOUGH MADE OFF DUTY, IS CLEARLY SUPPORTED BY NUMEROUS WITNESS' ADMISSIONS, INCLUDING THE RESPONDENT, THAT RESPONDENT WAS DISHONEST AND UNTRUTHFUL WITH RESPECT TO HIS EMPLOYER.

The Respondent argues that the actions of Respondent do not constitute misconduct since the language of the regulation "with respect to" is to be interpreted as dishonesty or untruthfulness regarding matters of employment. S.C. Reg. 38-004 states that the Council may deny certification based on evidence satisfactory to the Council that the candidate has engaged in misconduct. This regulation further defines misconduct, in part, as "Dishonesty with respect to his/her employer" and/or "Untruthfulness with respect to his/her employer."

The interpretation of Respondent of said regulation is absurd. If this interpretation is applied, law enforcement officers could be dishonest or untruthful to their employers involving any matter other than one involving their employment or information which is not "relevant" to the law enforcement profession. For example, an officer who committed a criminal offense in another jurisdiction while off-duty could be deceitful to his employer when asked about the incident, and said actions would not constitute misconduct. Additionally, if an officer was required to reside in the jurisdiction in which he worked, he could be falsify the address on his application with no consequence since this issue does not directly involve the performance of law enforcement responsibilities while on duty. Further, if using this logic, other provisions of S.C. Reg. 38-004 like "physical/psychological abuse of members of the public" would be inconsequential if it occurred while the officer was off-duty. Lastly, Respondent states that had

he been truthful about the matter initially, no material matter would have changed. While it appears that Respondent believes his dishonesty to be trivial, his actions are anything but. Had Respondent immediately been truthful to the officers investigating the incident as well as his employer, the dishonesty and untruthfulness on which the denial of his certification were based would not exist and these proceedings would have been unnecessary.

To follow are statements made during the contested case hearing that unequivocally establish that Respondent engaged in misconduct by being dishonest and/or untruthful with respect to his employer:

i. Testimony of Chief Garner on direct examination (Contested case hearing of November 5, 2014)

   a. R. p.34, lines 2-6: "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."

   b. R. p.35, lines 16-19: "I asked him did you go to the residence with Kristy... He said he did not."

   c. R. p.36, lines 9-12: "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."

   d. R. p.37, lines 21-24: Chief Garner testified that Appellant clearly told him he had been untruthful and resigned his position immediately. 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."

e. R. p.38, line 7: Chief Garner testified that Appellant had violated his department's policy regarding "honesty."

f. R. p.42, lines 11-12: Appellant's attorney states in questioning to Chief Garner, "And so he readily accepted his responsibility, told you he lied."

g. R. p. 44, lines 11-13: Appellant'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."

ii. Testimony of Cpl. Richardson on direct examination (Contested case hearing of November 5, 2014)

a. R. p. 55: Cpl. Richardson testified that Appellant "pretty much" explained to him that he was resigning because he had lied about his whereabouts during the incident.

b. R. p. 56, lines 9-10, 13-17: After initially stating that Appellant 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."

c. R. p. 57, lines 23-25 and p. 58, lines 2-4: Cpl. Richardson stated, in response to questioning by the hearing officer, that Appellant admitted after the incident that he had actually been at the location at which he had previously denied being. Additionally, he stated that Appellant had apologized for being deceptive at the beginning of the situation.

iii. Testimony of Captain Crider on direct examination (Contested case hearing of November 4, 2014

a. R. p. 64, lines 9-12: 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."

iv. Testimony of Appellant on direct examination (Contested case hearing of November 4, 2014

a. R. p. 81, lines 9-13: Appellant admitted to lying not only to his employer, but the officers investigating the allegation of domestic violence, thereby impeding their investigation.

b. R. p. 82, lines 2-6: Appellant testified that he denied being at his ex-wife's home. Appellant responded "I did, yes" in response to the question "Basically, you lied?"

c. R. pp. 82-85: Appellant admits on numerous occasions that he lied to officers in response to their questioning about the incident at his ex-wife's home. He further testifies that he lied because there were only 2 witnesses present at the scene.

d. R. p. 90, lines 22-25, p. 93, lines 15-17: 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." Additionally, he conceded that, "Integrity for the rest of my life is going to be questioned. I know that." By these statements, Appellant admits that any and all testimony he would ever present if granted

certification would be called into question because of his dishonesty and untruthfulness during this incident.

Based on the foregoing, Responent's argument that the lie/dishonesty was not "with respect to his employer" should denied and the ALC's decision to deny his argument should be affirmed.

II. THE DECISION OF THE ALC THAT RESPONDENT DID NOT PRESERVE FOR APPEAL THE ISSUE THAT THE COUNCIL EXCEEDED ITS STATUTORY AUTHORITY IN PROMULGATING REGLUATION 38-004.

The Respondent argues that "The ALC erred in concluding that the Council did not exceed its statutory authority in promulgating Regulation 38-004." (*Brief of Respondent*). Appellant, however, **never** raised any of these issues to the Council. It is a fundamental principle of appellate practice that the appellate court has a limited scope of review of the final decisions of administrative agencies and cannot ordinarily consider issues not raised to and ruled on by the agency from which an appeal is taken. See Young v. S.C. Dept. of Health and Environmental Control, 383 S.C. 452, 680 S.E.2d 784 (S.C. App. 2009).[1] Moreover, South Carolina appellant courts do not recognize the "plain error rule."[2]

By not raising these issues prior to or during the contested case hearing, Respondent waived all of these issues. See State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (failure to raise issues at trial results in waiver on appeal). In fact, Respondent never raised **any** objections prior

[1] State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (S.C. 2003) (Issues not raised and ruled upon in the trial court will not be considered on appeal.)

[2] See South Carolina Department of Motor Vehicles v. Haddock, 2006 WL 2224705 (S.C. Admin. Law Ct. 2006)(South Carolina appellate courts do not recognized the "plain error rule," under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party.); and State v. Beekman, 405 S.C. 225, 746 S.E.2d 483 (S.C. App. 2013) (Party asked "court to apply the plain error doctrine by combing the record for unpreserved issues and arguing the cumulative effect of these unpreserved matters deprived him of a fair trial. However our appellate courts do not apply the plain error rule.")

to or during the contested case hearing. As a result, this issue is not properly before this Court. Id. This concept is so firmly grounded in South Carolina jurisprudence that Respondent's arguments on this point should be denied in full on this basis alone.

Respondent contends the Council exceeded its statutory authority by permanently denying his request for law enforcement certification because he argues permanent denial of a law enforcement certification is not authorized by S.C. Code §23-23-80(6). Interpretation of a statutory term must support the statute, and cannot lead to an absurd result. Miller v. Lawrence Robinson Trucking, 510 S.E.2d 431 (S.C. App. 1998) (Emphasis added). The most fundamental guide to statutory construction is common sense. First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862 (4th Cir. 1989).

S.C. Code §23-23-80 provides:

> 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;...

(Emphasis added). Contrary to mandatory terms such as "shall" or "must," the phrase "is authorized to" is a permissive phrase. Basic common sense dictates if the Council has permission from the State Legislature to do a certain thing ("...certify and train qualified candidates and applicants..."), then the State Legislature also gave the Council permission to permanently deny certification and training for candidates and applicants that are not qualified. Moreover, this interpretation of the statute does not lead to an absurd result.

As outlined in Preston B. Bethea v. South Carolina Criminal Justice Academy (15-ALJ-30-0116-AP), "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. Accordingly, the Council **must** be able to permanently deny certification to those who do not meet the standards or everyone would be certified and the standards would be rendered meaningless.

Based on the foregoing, Respondent's argument that the permanent denial of his certification should denied.

## III. THE ALC'S DECISION THAT THE COUNCIL DID NOT ERR IN NOT CONSIDERING ISSUES OF SERIOUSNESS, REMOTENESS IN TIME, OR MITIGATING CIRCUMSTANCES, SHOULD BE AFFIRMED.

The ALC held "the Council did no err in not considering these factors; however, the Court agrees with [Respondent] that review of these factors would have been appropriate under the circumstances in this case." (ALC Order pages 16-17) (emphasis added).

It is well known that "the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (S.C. 2000). Additionally, "[u]nder the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Id. When the "statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. Finally, "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Id.

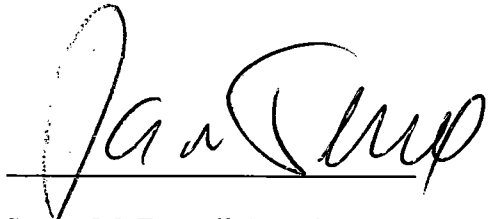
Regulation 38-004 (B) states that: "In considering whether to deny certification based on misconduct, the Council **may** consider the seriousness, the remoteness in time and any mitigating circumstances surrounding the act or omission constituting or alleged to constitute misconduct." (Emphasis added.) The plain language of this regulation clearly states that Council is not mandated to consider these issues. The Training Council is not required to engage in the application of these factors, but may merely do so, within its discretion, when considering whether law enforcement certification should be denied.

Based on this, the ALC held that the Council did not err by not considering the factors of subsection (B). It merely stated, it would have been appropriate. For these reasons, Respondent's arguments regarding the factors that the Council may consider, but are clearly not required to consider, should be rejected in its entirety.

## CONCLUSION

For the above reasons, Appellant asks the Court to deny Respondent's arguments.

Respectfully Submitted,



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PROOF OF SERVICE

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I certify that I have served the Reply Brief of Appellant on John Elkin by depositing a copy of it in the United States Mail, postage prepaid, on July 15, 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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July 15, 2016

# South Carolina Criminal Justice Academy

July 15, 2016



The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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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 the Reply Brief of Appellant and Proof of Service in the above case. If you have any questions, please feel free to contact me.

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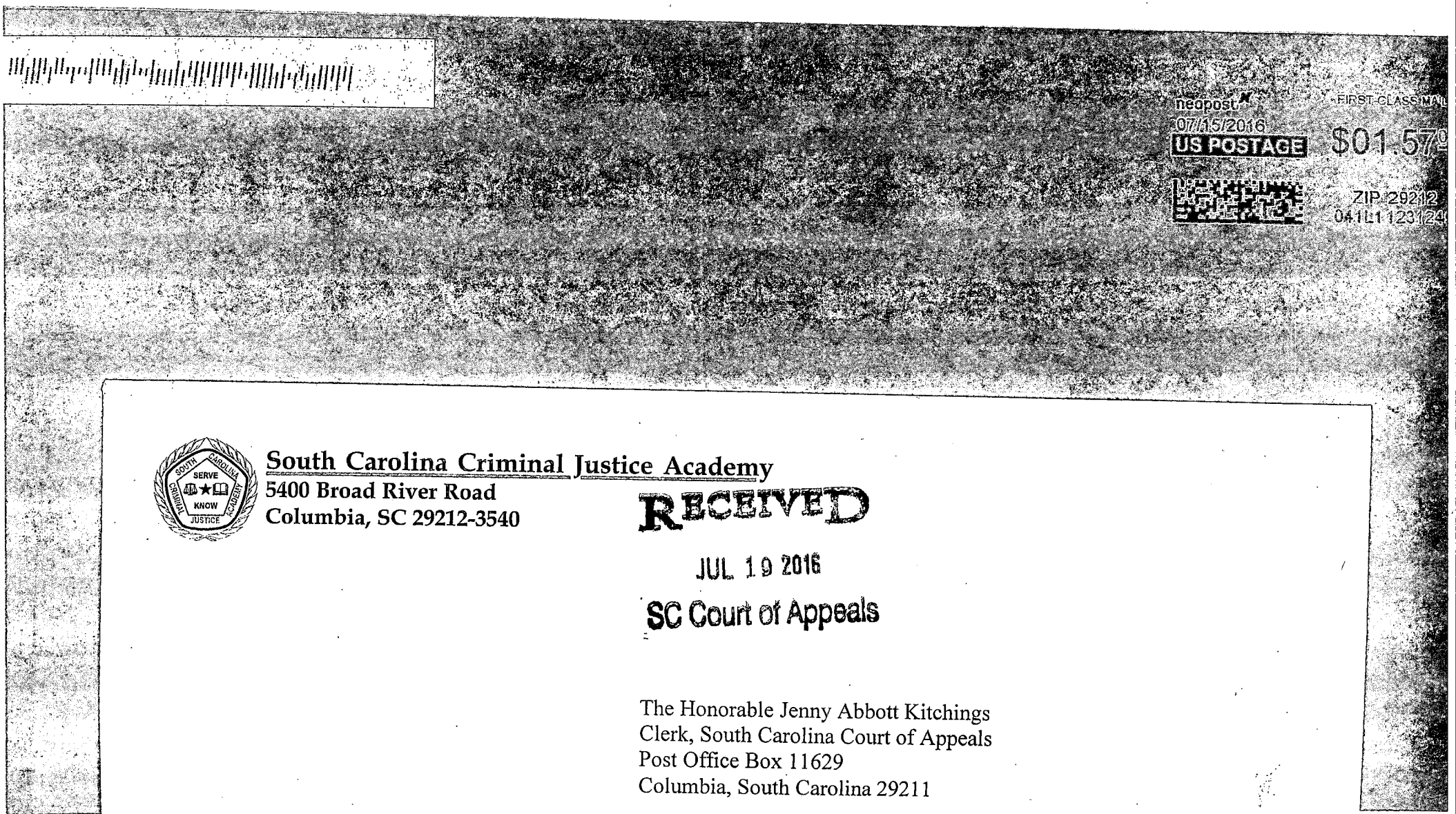

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