

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 15-ALJ-30-0246-AP
Appellate Case No. 2016-000034

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SC Court of Appeals

John Elkin.....Respondent,

vs.

South Carolina Criminal Justice Academy..... Appellant,

v.

FINAL BRIEF OF RESPONDENT

C. Bradley Hutto
WILLIAMS & WILLIAMS
Post Office Box 1084
Orangeburg, S. C. 29116-1084
(803) 534-5218
(803) 536-6544 (fax)
Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

1. Did the ALC properly conclude that Council's decision was not supported by substantial evidence?
2. Did the ALC err in finding that the Respondent's lie amounted to dishonesty with respect to his employer? (Respondent argues this in argument I as an additional ground to affirm the decision of the ALC.) [SCACR, Rule208(b)(2) and Rule 220)(c)].
3. Did the ALC err in concluding that the Council did not exceed its statutory authority in promulgating Regulation 38-004?
4. Did the ALC properly conclude that a review of the mitigating circumstances as allowed by Regulation 38-004 (B) would have been appropriate under the circumstances in this case?

STATEMENT OF THE CASE

Respondent, John Elkin, was employed by the Pelion Police Department as a law enforcement officer. (R 45-46). On October 13, 2013 while he was off-duty, his estranged wife asked him to come over to her house so that they could discuss custody of their daughter. (R 90-91). Their conversation turned into an argument. (R 92). At that time, Respondent left his estranged wife's home knowing that she was going to call law enforcement and report their non-physical, verbal altercation. (R 94). After leaving, Respondent called his superior, Chief Chris Garner, and informed him that law enforcement had been called to his wife's address. (R 94). Respondent admits that in a panic, he lied to Chief Garner and told him he had not been at his wife's home. (R 95). Only hours later, Respondent met with Chief Garner in person and admitted he had been at his estranged wife's house at the time of the argument. (R 95). Other than being false, the location of Respondent at the time of the argument with his wife was immaterial to his employment. Respondent resigned from the Pelion Police Department at that time. (R 96).

On October 23, 2013, Chief Garner submitted a Personnel Change in Status Separation Report on behalf of the Pelion Police Department alleging the Respondent engaged in dishonesty/untruthfulness with respect to his employer. (R 135).

On September 4, 2014, Appellant received a letter from Pelion Police Department stating that they had rehired Respondent as a law enforcement officer. (R 157). In an attached letter Chief Garner requested to "retract the original PCS [of separation] and misconduct report." (R 143). This report was submitted to the Law Enforcement Training Council for determination. (R 155-156). On July 30, 2014, the Council members voted that a contested case hearing was needed. *Id.*

The contested case hearing was held on November 5, 2014, before Chief Mark Keel, Chairman of the Training Council. (R 40). Testimony was received on behalf of Respondent from Chief Chris Garner, Cpl. Edward Richardson, Daniel R. Bledsoe, Capt. Mike Crider, and Lt. Darren Norris. No testimony was given stating that Respondent should not be allowed to return to law enforcement. During the hearing Chief Keel suspected he had a conflict, and after the hearing, confirmed that a conflict existed, and recused himself from Respondent's case. (R 164). Chief Keel appointed Council Member Sheriff Bruce Bryant of York County to serve as the hearing officer. Subsequently, Sheriff Bryant appointed Kristie H. Jordan, General Counsel for York County Sheriff's Office, as the hearing officer for the second contested case hearing. (R 168). Respondent's case as ultimately heard by a lawyer instead of a law enforcement officer.

The second contested case hearing was held on February 4, 2015. Prior to this hearing, it was agreed to by the parties that the evidence and full transcript from the prior hearing could be used by the Training Council for their determination. (R 149).

On April 23, 2015, John O'Leary, attorney for Respondent at that time, submitted a formal objection letter to Hubert Harrell, Director, SCCJA, taking the position that the Training Council was without power or authority to delegate the hearing on a matter of certification to a non-council member

The Law Enforcement Training Council voted to adopt Ms. Jordan's recommendation as their Final Agency Decision on April 28, 2015, and thereby denied Respondent's request for reissuance of his law enforcement certification. (R 170-182). This decision was based on dishonesty with respect to his/her employer and untruthfulness with respect to his/her employer. (R 178)

On May 28, 2015, Respondent submitted his request for an Appeal of the Final Agency Decision to the Administrative Law Court (“ALC”). (R 37)

The denial by Appellant of Respondent’s law enforcement certification has the effect of forever barring him from employment as a law enforcement officer in South Carolina. (S.C. Code Ann. § 23-23-40 (Supp. 2014)).

ARGUMENTS

I. THE ALC PROPERLY CONCLUDED THAT COUNCIL’S DECISION WAS NOT PROPERLY SUPPORTED BY SUBSTANTIAL EVIDENCE.

The ALC’s conclusion that the Council’s denial of recertification was not supported by substantial evidence on the whole record was an appropriate application of S.C. Reg. 38-004. Therefore, the ALC properly reversed the Academy’s denial of Mr. Elkin’s law enforcement recertification.

Under the Administrative Procedures Act (“APA”), the South Carolina Criminal Justice Academy is an “agency”(see S.C. Code Ann. § 1-23-310), and as such, the South Carolina Administrative Law Court (“ALC”) was required to follow the standard of review contained in S.C. Code Ann. § 1-23-380, which provides:

(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.

Appellant argues that the ALC's final order should be completely disregarded because the ALC substituted its' judgment on the facts of the case for [Council's] judgment. However, "A decision of the administrative law court should be upheld if it is supported by substantial evidence in the record." Risher v. S.C. Dep't of Health & Env'tl. Control, 393 S.C. 198, 204, 712 S.E.2d 428, 431 (2011). Moreover, the ALC acknowledges its' role, or lack thereof, in determining the weight of testimony: "This Court cannot determine the weight to be given testimony as that is the province of the trial court." (Final Order pg. 13, quoting Friends of Earth v. Pub. Serv. Comm'n. of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010)). Further, 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. 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 the findings of fact are not supported by substantial evidence." Risher v. S.C. Dept. of Health and Env'tl. Control, 393 S.C. at 210, 712 S.E.2d at 434 (2011); Be Mi, Inc. v. S.C. Dept. of Revenue, 408 S.C. at 297, 758 S.E.2d at 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. v. S.C. Dept. of Revenue, 408 S.C. at 297, 758 S.E.2d at 741. Furthermore, "[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.” Burse v. S.C. Dept. of Health and Env'tl. 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. at 366, 692 S.E.2d at 913.

In the case at hand, the hearing officer reached a conclusion of law that Respondent “was untruthful and dishonest to his employer”. The statement as to the physical location of an off-duty officer, during a spousal argument regarding the custody of his child, does not prove that Respondent’s actions amounted to a violation of S.C. Regulation 38-004. The relevant portion of Reg. 38-004 expressly addresses: (1) dishonesty with respect to his employer and (2) untruthfulness with respect to his employer. The information Respondent relayed to his superior regarding his location at the time of an off-duty discussion with his wife about custody of their child does not relate to Respondent’s employment. The regulation does not address any and all dishonesty and untruthfulness, but rather it specifically targets dishonesty and untruthfulness with respect to the employer. Respondent’s actions had no relationship to his employment and were not carried out in furtherance of his duties as a police officer. The statements made by Respondent do not constitute a violation that Reg. 38-004 was intended to punish.

Additionally, Appellant argues that all the evidence in the record establishes that Respondent’s actions are in violation of Reg. 38-004, and Respondent is unfit to be a law enforcement officer. There is no evidence in the record that Respondent’s actions

compromised the integrity of the Pelion Police Department. On the other hand, supportive testimony by members of the Pelion Police Department and a positive recommendation from the Mayor of the Town of Pelion support the ALC's reversal of the Council's denial of certification. Mayor Smith detailed her support of Respondent: "Mr. Elkin has repeatedly demonstrated his commitment to the Town of Pelion and the Pelion Police Department." (ROA 133-134).

The substantial evidence in the record, when reviewed as a whole, shows that the actions of Respondent do not violate Reg. 38-004. The statements were made while Respondent was off-duty, and the statements were not about a matter related to Respondent's employment. The statements related to the location of a spousal argument that did not affect Respondent's employment. No testimony was given stating that Respondent should not be allowed to return to law enforcement.

The ALC properly concluded that Council's decision was not properly supported by substantial evidence.

II. THE ALC ERRED IN CONCLUDING THAT THE COUNCIL DID NOT EXCEED ITS STATUTORY AUTHORITY IN PROMULGATING REGULATION 38-004.

Section 23-23-80 gives the Council 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 council." S.C. Code Ann. §23-23-80(6). The terms "certify and train" are positive, active terms, indicating what the Council is authorized to do in preparing candidates for the role of a law enforcement officer. The terms "suspension, revocation, or restriction of the certification" indicate the authority given to Council to promulgate regulations related to actions that may be taken after a certification is

issued. Suspension, revocation or restriction are limitations that may be imposed on a law enforcement officer after he is certified. However, there is no statutory authority for the *permanent* denial of an individual's certification. The Council, through its ruling, has *permanently* affected the ability of Respondent to seek a new certification. "I recommend the Training Council deny Mr. Elkin's request for reissuance of his law enforcement certification." (R 178-179).

Appellant argues S.C. Reg. 38-004 is the Council's promulgation of its authority to suspend, revoke, or restrict certification. It too does not give Council the authority to indefinitely deny Respondent's certification. Regulation 38-004 states:

38-004. Denial of Certification for Misconduct.

A. 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:

1. Conviction, plea of guilty, plea of no contest or admission of guilt (regardless of withheld adjudication) to a felony, a crime punishable by a sentence of more than one year (regardless of the sentence actually imposed, if any), or a crime of moral turpitude in this or any other jurisdiction;
2. Unlawful use of a controlled substance;
3. The repeated use of excessive force in dealing with the public and/or prisoners;
4. Dangerous and/or unsafe practices involving firearms, weapons, and/or vehicles which indicate either a willful or wanton disregard for the safety of persons or property;
5. Physical or psychological abuses of members of the public and/or prisoners;
6. Misrepresentation of employment-related information;
7. Dishonesty with respect to his/her employer;
8. Untruthfulness with respect to his/her employer.

B. 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. Reg. 38-004 (emphasis added). By denying Respondent's request for reissuance of his law enforcement certification, the Council is forever preventing Respondent from serving as a law enforcement officer.

Appellant has supreme authority over the regulation of law enforcement certifications. Other licenses and certifications in South Carolina have different governing bodies. The Supreme Court of South Carolina oversees the regulation and discipline of attorneys. Various boards organized under the Department of Labor, Licensing, and Regulation have authority to regulate and discipline other professions and occupations ranging from nurses and pharmacist to foresters and beauticians. No other governing body has a scheme that calls for the "death penalty" for a minor violation. Only Appellant has adopted this draconian approach.

Regarding the legal profession, the Supreme Court has a range of sanctions from private reprimand to disbarment. However, even in the case of disbarment, which is the most severe punishment, there is a mechanism to apply to for reinstatement of a law license. The same type system is in place for all other occupations and professions except law enforcement.

S.C. Code §23-23-80 is the statutory basis for regulation 38-004. The regulation exceeds the statutory authority. The Council is without statutory authority to indefinitely deny Respondent's recertification.

III. THE ALC PROPERLY DETERMINED IT WOULD HAVE BEEN APPROPRIATE FOR APPELLANT TO ADDRESS THE ISSUES OF (1) SERIOUSNESS, (2) REMOTENESS IN TIME, OR (3) MITIGATING CIRCUMSTANCES.

As flawed as it is, the regulation relied on by Appellant allows for consideration of seriousness, remoteness in time, and mitigating circumstances. However, no such

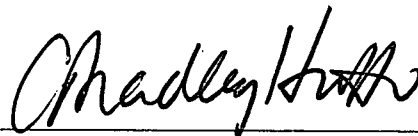
factors appear to have been considered by Appellant. Nothing in the record suggests Appellant took into account the fact that the statements made by Respondent were significantly less serious than instances that involve criminal activity or activity that endangers the public. Mitigating circumstances were evidenced by the testimony of other law enforcement professionals, the retraction of the original report (R 143), performance of a background investigation (R 145-146), and a letter of support from the Mayor of the Town of Pelion. (R 133-134). No consideration appears to have been given to any of this mitigating information. The ALC “agrees with [Respondent] that review of these factors would have been appropriate under the circumstances of this case.” (R 23).

The ALC properly determined it would have been appropriate for Appellant to address the issues of (1) seriousness, (2) remoteness in time, or (3) mitigating circumstances.

CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the Administrative Law Court and reverse the Order of Denial issued by the Council.

Respectfully Submitted,



C. Bradley Hutto, Esquire
PO Box 1084
Orangeburg, SC 29116
803-534-5218
803-536-6544 (fax)
Attorney for Respondent

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