

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Katrina Garcia,

Appellant,

vs.

South Carolina Criminal Justice Academy,

Respondent.

Docket No. 20-ALJ-30-0134-AP

ORDER **RECEIVED**
NOV 12 2020
SC Court of Appeals

STATEMENT OF CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed by Katrina Garcia (Appellant). Appellant seeks review of a final agency decision issued by the Law Enforcement Training Council (Council) of Respondent South Carolina Criminal Justice Academy (Academy) permanently denying Appellant's law enforcement certification. Upon consideration of the arguments raised in the parties' briefs, and a review of the record and the law, the Court affirms the Final Decision.

BACKGROUND

Appellant was employed with the Summerville Police Department (Department). From approximately June 2019 through early August 2019, Appellant made unwanted advances toward another female officer. In early August of 2019, Appellant requested a transfer from night shift to day shift on the basis that her mother had attempted suicide and it would make things easier for Appellant to work during the day. The Department accommodated Appellant's request and transferred her to Team 3. Appellant later expressed displeasure with the team to which she had been transferred stating that she had made plans to visit her mother around her original team's days off and Team 2's schedule would facilitate her ability to visit her mother. The Department left Appellant with Team 3.

Appellant continued to initiate contact with the officer who had previously rejected her advances. During one of their interactions, Appellant relayed that the reason she requested the transfer was not because of her mother but rather, because she wanted separation from the female officer who had rejected her advances. In September and early October, Appellant continued to contact the female officer who did not respond. Also, in September, Appellant told a third officer

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that the female officer toward whom Appellant had made advances, had actually made advances toward Appellant. The female officer was concerned that Appellant was spreading erroneous information about her and began to feel uncomfortable at work and made a complaint.

On October 3, 2019, an internal affairs investigation ensued. During the investigation, Appellant reported that the reason she requested the transfer was because she wanted separation from the female officer and admitted that she had provided false information to command staff regarding the basis for her transfer. The investigating officer's report noted several possible policy violations by Appellant. On October 7, 2019, the Academy received a "PCS¹ Separation Due to Misconduct" from the Department alleging that Appellant had willfully made a false, misleading, incomplete, deceitful, or incorrect statement.

On October 9, 2019, Appellant was served with the misconduct allegation. Appellant resigned in lieu of being terminated. On November 19, 2019, a contested case hearing was conducted on the allegations of misconduct. Appellant was represented by counsel. On February 11, 2020, the hearing officer made the following available to the parties: his findings and recommendations, the transcript, and the exhibits. The hearing officer found that Appellant had violated Section 23-23-150 of the South Carolina Code by willfully making misleading, incomplete, deceitful, or incorrect statements about the reason that she wanted a transfer. S.C. Code Ann. § 23-23-150 (Supp. 2019). The hearing officer recommended that Appellant be denied eligibility for certification as a law enforcement officer either permanently or for a specified period of time. On March 25, 2020, Appellant's attorney filed a motion in opposition to the hearing officer's recommendation.

On April 22, 2020 and after notice to all parties, the Council met to discuss Appellant's case and render a final agency decision. Appellant attended the meeting with her attorney via Webex and addressed the Council. On April 28, 2020, the Council executed a final agency determination concluding that substantial evidence existed to support a finding of misconduct and permanently denying Appellant a law enforcement certification in South Carolina. The decision was mailed on April 30, 2020. On May 4, 2020, Appellant's new attorney sent a letter to Council along with a request to review more adequately expressed mitigating evidence. On May 9, 2020,

¹ "PCS" stands for "Personnel Change in Status."

Appellant filed a Motion to Supplement Record and for Reconsideration. Council did not rule on the motion. This appeal followed.

ISSUE ON APPEAL

Whether the Academy's final decision is supported by substantial evidence or affected by other error of law.

STANDARD OF REVIEW

The South Carolina Criminal Justice Academy is governed by the Law Enforcement Training Council. S.C. Code Ann. § 23-23-20 (Supp. 2019). The Council has the power 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) (Supp. 2019). The Court has jurisdiction to hear appeals of the Council's decisions pursuant to Section 1-23-600(D). S.C. Code Ann. § 1-23-600 (Supp. 2019).

Pursuant to the Administrative Procedures Act, this Court sits in its appellate capacity in this matter rather than an independent fact finder. S.C. Code Ann. § 1-23-600(E) (Supp. 2019). The Court's review is limited to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2019). According to Section 1-23-600(E), when acting in an appellate capacity, the Court must apply the criteria of Section 1-23-380(5):

- (5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
- (a) in violation of constitutional or statutory provisions;
 - (b) in excess of the statutory authority of the agency;
 - (c) made upon unlawful procedure;
 - (d) affected by other error of law;
 - (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.

S.C. Code Ann. § 1-23-380 and -600 (Supp. 2019).

This section requires the Court to apply the “substantial evidence” rule. *See e.g., Waters v. S.C. Land Res. Conservation Comm’n*, 321 S.C. 219, 467 S.E.2d 913 (1996); *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm’n*, 282 S.C. 430, 319 S.E.2d 695 (1984). Substantial evidence is “not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached ...” *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (citation omitted). A decision is supported by “substantial evidence” when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. *Bilton v. Best W. Royal Motor Lodge*, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984). The possibility of drawing two inconsistent conclusions from the evidence does not mean that the agency’s conclusion was unsupported by substantial evidence. *Id.* *See also, Waters*, 321 S.C. at 227, 467 S.E.2d at 917 (citing *Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm’n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

DISCUSSION

A. The Decision is Supported by Substantial Evidence

The Council’s final decision of April 28, 2020, was based in part upon the transcript of and exhibits from the hearing on November 19, 2019, the hearing officer’s findings and recommendations, and the statements presented by Appellant and her attorney at Council’s meeting on April 22, 2020. On appeal, Appellant questions the sufficiency of the evidence and argues that “there was not even a scintilla of evidence to prove the accusation against [Appellant].” The Court disagrees. While the evidence presented by the Department was scant, the only evidence in the record is that Appellant knowingly misrepresented the basis of her request for transfer and admitted to being untruthful. This evidence was never rebutted.

At the hearing on November 19, 2019, the hearing officer was provided with a copy of the “Personnel Change in Status Report” which included the allegations of misconduct made by the Department against Appellant. The Department presented one witness on its behalf: Captain Rick Gebhardt, Jr. Captain Gebhardt was the officer that was assigned by the Department to investigate the complaint. Captain Gebhardt testified that in August 2019, Appellant requested a transfer from the evening to the day shift on the basis that her mother had attempted suicide and that it would make it easier on her to be on a day shift. He testified that in October, Appellant’s statement changed as to why she wanted to transfer. The reason Appellant provided in October for the

transfer was that she was trying to remove herself from a personal situation with an individual with whom she was assigned to [work] ...” Captain Gephardt testified that Appellant’s original statements regarding the basis for her transfer were false, misleading, incomplete, or deceitful. He said that Appellant admitted to him that she had not been truthful. Appellant did not present any evidence.

On February 3, 2020, the hearing officer issued his findings and recommendations referencing Captain Gebhardt’s testimony. The hearing officer declared that Captain Gephardt’s testimony, the foundation of the Department’s case, was unchallenged and had to be deemed accurate and credible. He noted that while Appellant’s counsel attempted to discern the parameters of the Department’s policy on transfer request during cross-examination of Captain Gebhardt, the inquiry did not challenge or cast doubt upon the substance of his testimony that Appellant admitted to him that she had been untruthful as to the reason for her transfer request in August 2019.

In concluding, the hearing officer said that while additional evidence from the Department may have been desirable, consideration of the record as a whole would allow reasonable minds to reach the conclusion that the Department presented substantial evidence that Appellant willfully made deceitful, false, and misleading statements to Captain Gebhardt in August 2019 when she made her original transfer request in violation of Section 23-23-150(A)(3)(g) of the South Carolina Code. S.C. Code Ann. § 23-23-150 (Supp. 2019).

On April 22, 2020, the Council met to discuss Appellant’s case. Appellant and her attorney were afforded and availed themselves of the opportunity to make statements to the Council. Appellant’s attorney essentially argued that Appellant did not necessarily lie but rather, offered a parallel truth as to why she wanted to change shifts so as not to have to reveal information about her sexual orientation. Appellant stated that “[Y]es, it would’ve just been easier, I suppose, to say the actual reason for my transfer away from the shift.” Captain Gephardt reiterated that Appellant conceded to him that she had provided a false reason for her transfer and that she did not have a relationship with her mother. He added that “[H]er willingness to make a false statement to command staff officers about the reason she wanted a transfer brought her integrity into question, and it affected her credibility with our agency.”

Based upon the Court’s review of the entire record in this case, substantial evidence exists to support the Council’s decision. While Appellant proffered reasons as to why she lied, and her attorney proffered the same as to why she was not forthcoming, the only evidence in the record is

that Appellant was knowingly deceitful. *See* S.C. Code Ann. § 1-23-380(5) (Supp. 2019) (this Court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact); *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) (“Whe[n] the terms of the statute are clear, the court must apply those terms according to their literal meaning.”)

B. The Council Considered Mitigating Evidence but Was Not Required to Do So

At the meeting before Council, Appellant and her attorney offered statements in mitigation against the denial of her law enforcement certification.² Appellant argues that Council failed to consider them as they were not discussed in the final decision. Regulation 37-025(B) of the South Carolina Code of Regulations provides 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.” S.C. Code Ann. Regs. 37-025 (Supp. 2019) (emphasis added).

While the circumstances were not discussed in the Council’s final decision, Council states its factual findings and conclusions of law were rendered based upon “full consideration of ... oral arguments and all factors offered by the Officer and her counsel in mitigation.” Moreover, Regulation 37-025(B) uses the word, “may.” “The use of the word ‘may’ [in a statute] signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute.” *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 352–53, 549 S.E.2d 243, 250 (2001). Thus, Council was not required to consider any factors in mitigation.

C. Council’s Failure to Consider Appellant’s Motion to Reconsider was Harmless Error

On May 9, 2020, Appellant submitted a Motion to Supplement the Record and for Reconsideration to the Council. The motion raised the issue of substantial evidence and mitigating evidence. Appellant’s attorney’s letter of May 4, 2020 to the Council, and four affidavits of character were attached to the motion. The affidavits contained information not presented at the Council meeting. The Council declined to rule on the motion purportedly on the basis that its

² By letter dated May 4, 2020, Appellant’s new attorney sent a letter to the Council further expounding on circumstances he believed would mitigate against the denial of Appellant’s certification. The Council had already rendered its decision on April 28, 2020 and mailed it April 30, 2020.

regulations did not provide a mechanism for reconsideration.^{3,4} Appellant argues that Section 1-23-380(1) expressly provides for post-trial motions and that Appellant's procedural due process rights were violated.

South Carolina appellate courts have held that agencies have inherent authority to reconsider or rehear their decisions in contested matters. *See Bennett v. City of Clemson*, 293 S.C. 64, 66-67, 358 S.E.2d 707, 708-09 (1987) (holding that, unless specifically curtailed by statute or regulation, an administrative agency has the inherent power to reconsider or rehear its decisions where there is justification and good cause). "In cases permitting an agency to reconsider its decision, courts have emphasized that an agency's power to reconsider or rehear a case is not an arbitrary one, and such power should be exercised only when there is justification and good cause; i.e., newly discovered evidence, fraud, surprise, mistake, inadvertence or change in conditions." More specifically, it appears that the South Carolina Supreme Court addressed the issue raised by Appellant in *Rhame v. Charleston Cnty. School Dist.*, 412 S.C. 273, 772 S.E.2d 159 (2015), a workers' compensation matter. After applying rules of statutory construction, the Supreme Court held that Section 1-23-380(1) grants a party the right to file a motion for rehearing before an administrative agency when there is no statute that precludes it. This appears to be the case irrespective of whether an agency has a mechanism for the motion outlined in its regulation. *Cf. McCummings v. S.C. Dep't of Corrections*, 319 S.C. 440, 462 S.E.2d 271 (1995) (court imputed thirty-day time period within a party may file a petition for rehearing in the absence of agency rule specifying a time limit).

The Council's failure to entertain the motion, however, did not deny Appellant due process. Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or

³ Appellant's brief outlines some exchanges that occurred between her attorney and the Council's attorney as to Appellant's motion. While Council's attorney does not dispute that this exchange occurred, there is nothing in the record to evidence the exchange and thus, the Court will not consider it. SCALC Rule 36(G) ("The administrative law judge will not consider any fact which does not appear in the record); *see also Windham v. Honeycutt*, 290 S.C. 60, 348 S.E.2d 185 (Ct. App. 1986) (court will not consider facts that do not appear in the record). Appellant references "Exhibit 6" in her brief and fails to provide a page reference in the record. *See* SCALC Rule 37(B)(3) (a party shall make references to the record); *see also* 66 Am.Jur.2d *References* § 48 (2020) (a litigant must provide specific citations to the record, and the court need not comb the record for evidence to support or refute a statement). The only Exhibit 6 that the Court was able to locate was the Affidavit of Michele Patrao Forsythe which does not correlate to the statement.

⁴ There is a division of authority as to whether the trier of fact's failure to rule on a motion for reconsideration constitutes a denial. *See* 56 Am.Jur.2d *Motions, Rules, and Orders* § 38 (2020).

Fourteenth Amendments to the United States Constitution. *Olson v. S.C. Dep't of Health and Envtl. Control*, 379 S.C. 57, 663 S.E.2d 497 (Ct. App. 2008). The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. S.C. Const. art. I, § 22; *Kurschner v. City of Camden Planning Com'n*, 376 S.C. 165, 656 S.E.2d 346 (2008). Here, Appellant was given adequate notice of and opportunity to participate in a meaningful way at the hearing and Council meeting. She was provided with the opportunity to confront and examine witnesses and introduce evidence in mitigation. In fact, she availed herself of all of these opportunities with the assistance of counsel.

Moreover, in this instance, Appellant has not been prejudiced by the Council's failure to act on the motion as this Court provided a full review of the matters raised in the motion.⁵ "[A] motion for reconsideration is nothing more than an invitation to the trier of fact to reexamine the correctness of an order." 56 Am.Jur.2d *Motion, Rules, and Orders* § 40 (2020). It is designed to provide the court rather than a party, with a second bite at the apple to correct errors inherent in a prior ruling. *Id.* Appellant has not cited to any newly discovered facts or evidence, any mistake or inadvertence, fraud, surprise, or any change in conditions to suggest that the findings or conclusions are incorrect. See *Anderson Memorial Hosp. v. Hagen*, 313 S.C. 497, 313 S.E.2d 399 (Ct. App. 1994) (a party cannot use a motion to reconsider or present matters he could have raised prior to judgement but did not). Appellant's own motion states that the mitigation material provided was "newly-provided" rather than "newly discovered."

D. The Council's Final Decision was Neither Arbitrary Nor Characterized by an Abuse of Discretion

Appellant raised several legal issues but it appears that the main crux of her appeal is that the permanent denial of her law enforcement certification based upon a single, remote omission was unduly harsh especially given the circumstances.⁶ She noted that the record is replete with

⁵ Even if there had been a denial of due process, there must be a showing of substantial prejudice to prevail. *Ross v. Medical Univ. of S.C.*, 328 S.C. 51, 492 S.E.2d 62 (1997); *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984). This Court has reviewed the issues raised in the motion which were again raised in Appellant's brief pertaining to substantial evidence and mitigating evidence, the latter of which the Council is not required to consider.

⁶ Appellant discussed the case of *In The Matter of Taylor N. Scruggs*, 2016-CJA-04-02 but did not provide the Court with a copy of the final decision. Regardless, any decision rendered in that matter would not be binding upon the Council in another matter as the agency is not required to exercise discretion identically in every case. *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 185, 332 S.E.2d 539, 541 (1985). "A penalty that is within the authority of the agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases" and

examples of her good deeds and how she overcame significant odds on her path to becoming a law enforcement officer.

Regulation 37-108 of the South Carolina Code grants the Council broad discretion in imposing a sanction if an officer has been found by substantial evidence to have committed misconduct. S.C. Code Ann. Regs. 37-108 (Supp. 2019). Permanent denial or revocation of certification is within the parameters of the Council's authority. *Id.* While this Court may have reached a different decision as to the sanction, the sanction imposed by the Council cannot be said to constitute an abuse of discretion where the misconduct is supported by substantial evidence, and the sanction imposed was within the range of permissible sanctions. *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 5, 630 S.E.2d 464, 467 (2006) ("An abuse of discretion occurs when a decision is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case."). While affirming the Council's final decision, the Court is concerned, however, about the harsh sanction imposed especially given the nature of the misrepresentation and the backdrop against which it was made.⁷

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that the Final Decision of Respondent South Carolina Criminal Justice Academy, is **AFFIRMED**.

AND IT IS SO ORDERED.



SHIRLEY C. ROBINSON
Administrative Law Judge

October 29, 2020
Columbia, South Carolina

'mere unevenness in the application of the sanction does not render its application in a particular case unwarranted in law.'" *Id.*

⁷ As noted in *Ragsdale v. S.C. Criminal Justice Academy*, Docket No. 19-ALJ-30-0344-AP, 2020 WL 804241 *3 n. 1 (S.C.Admin.Law.Judge.Div. Jan. 27, 2020), "[T]his court will not and cannot substitute its judgment for the Council ... but is deeply troubled that Council chose to permanently deny the Appellant eligibility for certification as a law enforcement officer."

CERTIFICATE OF SERVICE

I, Ti'a Smith, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in black ink that reads "Ti'a Smith". The signature is written in a cursive style with a horizontal line underneath it.

Ti'a Smith
Judicial Law Clerk

October 29, 2020
Columbia, South Carolina