STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Administrative Law Judge Ralph King Anderson, III

Appellant Case No. 2020-000849
Case No. 19-ALJ-30-0389-AP

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SC Court of Appeals

Kristin Cosby, ...Appellant

v.

South Carolina Criminal Justice Academy, ...Respondent.

FINAL BRIEF OF RESPONDENT

James M. Fennell
Attorney for Respondent
Bar #72576
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29212
(803) 896-7722
jfennell@sccja.sc.gov

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STATEMENT OF THE CASE

On January 3, 2019, the South Carolina Criminal Justice Academy (CJA) received a PCS of Separation (PCS) form for Kristin Cosby (Appellant) from SC Probation, Parole and Pardon Services (PPP). PPP alleged that Appellant committed law enforcement certification misconduct by willfully making false, misleading, incomplete, deceitful, or incorrect statements to a law enforcement officer, a law enforcement agency, or a representative of the agency, except when required by departmental policy or by the law of this State.

On January 7, 2019, Appellant was served the misconduct allegation. Appellant requested a contested case hearing on January 28, 2019. On February 27, 2019, a Contested Case Hearing Notice was sent to Appellant and PPP notifying them of an April 3, 2019 hearing. On April 2, 2019, a Notice of Rescheduled Contested Case Hearing was sent to Appellant and PPP.

The Contested Case Hearing was held on May 15, 2019. The Hearing Officer's Findings and Recommendation, hearing transcript and exhibits were sent to the parties. On August 8, 2019, Appellant's counsel filed a Motion in Opposition of the Hearing Officer's Recommendation. On August 18, 2019, PPP filed a Motion in Support of the Hearing Officer's Recommendation. On September 5, 2019, the parties were notified that the Law Enforcement Training Council (LETC) would meet to render a Final Agency Decision in

the present case on September 16, 2019. On September 16, 2019, LETC met to discuss the present case and vote on a Final Agency Decision. Counsel for the parties were present at this meeting and addressed LETC. LETC voted to permanently deny Appellant a law enforcement certification. On October 3, 2019, a Final Agency Decision was signed. On October 11, 2019, a certified letter was sent, which contained a copy of the Final Agency Decision, to Appellant. Appellant filed a Notice of Appeal on November 9, 2019. The Notice of Assignment was filed on November 14, 2019. On December 19, 2019, Respondent filed the Record on Appeal.

On May 6, 2020, the Honorable Ralph King Anderson, III, Chief Administrative Law Judge, filed a Final Order. On June 1, 2020, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

Jeffrey Harmon (Harmon)testified that he is currently assigned as the Director of the Office of Professional Responsibility for the South Carolina Department of Probation, Parole, and Pardon Services, that he was directed by the Director of the Department to initiate an investigation into allegations that Appellant had a consensual sexual relationship with her subordinate employee, that the Director had provided him specific questions to be asked of Cosby, that after each investigative activity that Harmon conducted the Director of the Department "wanted a follow-up informational session so he could help direct the investigation," that the Department Director couldn't "detach himself from the investigative process… so he could help direct the investigation," and that the Department's Policy 1802 set forth policy guidelines for Office of Professional Responsibility internal investigations and provides that such investigations will address "[c]omplaints of misconduct by the Department employees involving violations of policy, code of ethics, State or federal law, or other recognized standards of conduct." (R. pp. 193 – 197, 200 -passim)

Harmon further testified that he interviewed Appellant after first providing her "Garrity" warnings, that he began his interview with Appellant with a statement from the Department Director who required Harmon to "tell [Appellant] that no one had ever been terminated for an allegation of consensual sexual relationships with a subordinate, and that she should be honest and truthful about the relationship and that if she [was] found to be untruthful and [lied], then she would be subject to disciplinary actions," that he asked Appellant if she had a sexual relationship with a subordinate named Nicole Albany and

that Appellant answered "No," that Appellant was offered a polygraph examination but prior to the polygraph examination Appellant contacted Harmon and stated that Albany had made sexual advances towards her and had sent her photos but that she could not recall if any of the advances were physical, that Appellant stated to Harmon that there was never "any other sexual conduct" with a subordinate but that Appellant subsequently amended her statement to Harmon indicating that Albany had tried to initiate physical contact with her during a cookout and that a friend who was present told Albany that she was "being too aggressive" and that Appellant stated that she was able "to kind of brush off" the physical contact. (R. pp. 205 – 212)

Harmon testified that a polygraph was scheduled and administered for Appellant, that after the polygraph exam concluded Appellant provided a handwritten statement to Harmon, that Harmon then prepared a summary of the findings of the Office of Professional Responsibility investigation of Appellant, that during his investigation Harmon interviewed Appellant on two different occasions and received a written statement from Appellant, that "a pattern developed of [Appellant] not telling the truth and then modifying the truth and then, finally, becoming truthful with the written statement of a consensual relationship with [Albany]," that on October 19, 2018 Appellant had filed a complaint with the Department in which she alleged sexual harassment by her then Agent-in-Charge and Assistant Agent-in-Charge, and that Appellant's harassment allegations were investigated by the Department and determined to be "unfounded." (R. pp. 213 – 219, 233 – 238)

On cross-examination, Harmon testified that he opened an investigation into allegations of Appellant engaging in a sexual relationship with a subordinate because the Department Director indicated to him on November 30, 2018 that Appellant's then Agent-in-Charge had asked that an investigation be opened, that on October 19, 2018 Appellant had reported concerns she had regarding her then Agent-in-Charge and Assistant Agent-in-Charge in which she stated that she was afraid to go to work because of the actions of the two, and that Appellant's then Agent-in-Charge requested that Appellant be investigated for the alleged prior sexual relationship only after Appellant had reported her concerns on October 19, 2018 at which time Harmon initiated the investigation into Appellant's alleged sexual relationship, that the allegations regarding the sexual relationship Harmon was directed to investigate involved conduct alleged to have occurred 3 ½ years prior to the allegations being filed, that at the time Appellant was alleged to have engaged in a sexual relationship with her subordinate such a relationship would not have constituted a violation of Department policy, that on December 7, 2018 Harmon interviewed Appellant who then stated to him that she had not had "a sexual relationship with Nicole Albany," that he advised Appellant "that she could take some time to think about her statement and, if she had further information to offer, she could do that," that on December 12, 2018 Appellant approached Harmon and provided an amended statement in which she stated that Albany had "sexually come onto [Appellant] 3 ½ years prior" and also advised Harmon that she had filed a complaint with her then Agent-in-Charge at that time regarding Albany's advances and asked that Albany be reassigned, that on December 12, 2018 Appellant did not mention to Harmon that Albany had attempted to perform oral

sex on Appellant, and that neither Harmon's "Summary of Findings" from his investigation of Appellant nor information from the summary was ever provided to Appellant. (R. pp. 246 – 254, 262 – 264, passim)

In response to inquiry by the hearing officer to clarify his earlier testimony, Harmon confirmed that the OPR investigation of Appellant which he was directed to initiate was not in regards to any allegation of misconduct by Appellant or in regards to Appellant's violation of Department policy but, instead, in regards to an employment related complaint that Appellant's alleged behavior, which was said to have occurred prior to December 2015, was improper, that on November 30, 2018 Harmon had been advised by the Department Director that an encounter between Appellant and a subordinate employee had allegedly occurred in 2015 and Harmon was directed to engage in a fact finding investigation regarding the same, that Harmon was not provided factual information regarding when and to whom the report regarding the alleged incident between Appellant and the subordinate was made prior to the initiation of his investigation and that he did not address the same in his investigation, and that all he was told was "that an incident occurred, and [he needed] to investigate it." (R. pp. 271 – 281, passim)

Bryan Jones (Jones) testified that he is the lieutenant in charge of the polygraph unit of the South Carolina Law Enforcement Division (SLED) and also the Chief Polygraph Examiner for the State of South Carolina, that he was asked by his Assistant Chief at SLED to assist the Department of Probation, Parole and Pardon Services in conducting a polygraph examination, that he contacted Harmon regarding the same, that on December 18, 2018 he provided Appellant a "Consent to Interview with Polygraph" form which she

reviewed and signed, that prior to the conduct of the polygraph exam he asked Appellant whether she had engaged in sexual activity with a subordinate to which she responded "No,", that after conducting the polygraph exam he asked Appellant the same question in response to which she then admitted to having engaged in sexual activity with Nicole Albany, that Appellant then described a scenario in which she had been at Albany's house in a room near the kitchen and Albany was "coming onto her, trying to pull at her pants and unzip her pants, and [Albany] was able to get [her] zipper down, pulled her pants down slightly and then performed oral sex on [Appellant]" and that a male had come into the room and "pulled out his penis and put it in [Appellant's] hand," and that the encounter was consensual. (R. pp. 286 – 287, 289 – 292)

On cross-examination, Jones testified that he completed a pre-polygraph examination sheet for Appellant, that Appellant stated to him that she suffered from PTSD and was taking several medications at the time, and that he went over the questions to be asked of Appellant before the polygraph examination was administered, and that neither the pre-interview nor post-interview questions posed to Appellant were recorded. (R. pp. 294 – 303)

On re-cross examination, Jones testified that Appellant did not mention to him having taken any affirmative action towards Albany on the date of the incident at Albany's house and only described "what Nicole Albany did to her" and that a man "pulled out his penis and put it in [Appellant's] hand." (R. p. 309)

In response to questioning by the hearing officer to clarify his prior testimony, Jones testified that when he was asked to assist in conducting the polygraph examination

he was told by Harmon that the incident regarding which the polygraph exam was to be conducted, and regarding which he asked Appellant both pre-interview and post-interview questions, had occurred outside the workplace. (R. pp. 310 – 311)

Nicole Albany (Albany) testified that she is an agent with the Department of Probation, Parole, and Pardon Services, that Appellant had been her supervisor, that she had a sexual relationship with Appellant, that she told both her Assistant Agent-in-Charge, Chad Gambrell, and Jeff Harmon about the relationship, that the relationship was mutual and consensual, that in or about May 2015 she and Appellant were involved in an encounter described by Appellant as having taken place in Albany's home in which they were mutually touching and kissing each other, that she did not "come on" to Appellant, that after that incident Appellant began "correcting or changing a lot of documents that [Albany] would hand in to her" and was "trying to intimidate and use her authority over [her]" to make Albany feel like a lesser agent, that when she asked Appellant questions Appellant would tell her that Albany needed to do what she was told because Appellant was her supervisor, that she told Appellant she wanted to get off her team, and that eventually she was moved to another team and no longer interacted with Appellant, and that she had been moved to the other team before Chad Gambrell became Agent-in-Charge of the Greenville Office. (R. pp. 313 – 320)

On cross-examination, Albany testified that when the May 2015 incident involving Appellant occurred at her house she had been drinking that evening, that she made a complaint against Appellant based on the May 2015 incident in November 2018, and that only two incidents constituted the sexual relationship between her and Appellant, one in

May 2015 and another incident prior to that time when she and Appellant kissed in public. (R. pp. 320 – 323)

On redirect examination, contrary to her earlier testimony on direct examination, Albany testified that the matter of her relationship with Appellant was brought up by her Agent-in-Charge, Gambrell, not by her. (R. p. 327)

On re-cross examination, again contrary to her earlier testimony on direct examination, Albany acknowledged that she did not actually make the complaint against Appellant in November 2018 as she had previously stated but that she had been approached by Gambrell who asked her for information about her relationship with Appellant "to make a report" because "[Gambrell] knew that [Albany] never reported it officially in the beginning because of [the] environment of the office," but that Albany "chose to… bring light to the situation when [Gambrell] asked [her]" about it on November 18, 2018. (R. pp. 327 – 328)

On redirect examination, Albany testified that when Gambrell spoke with her on November 8, 2018 he stated to her that "he had had other complaints that he was looking into in reference to [Appellant]." (R. p. 328)

In response to questioning by the hearing officer to clarify her prior testimony, Albany testified that after the incident in May of 2015 involving Appellant she had never felt threatened in the workplace or harassed by Cosby. (R. p. 329)

Chadwick Gambrell (Gambrell) testified that he is the Agent-in-Charge of the Greenville County Office of the South Carolina Department of Probation, Parole, and Pardon Services, that in December 2017 he was becoming acclimated to the office and the

staff, that in March 2018 he spoke with Appellant regarding her recommendation for appointment of an agent to a sex offender team, that Appellant made a recommendation and Gambrell stated to her that he felt that Appellant had "more than a professional relationship" with the person she recommended, which Appellant denied, that Gambrell had concerns regarding what he felt were "inappropriate relationships that Appellant was having [with] people in the office under her supervision," that he counselled Appellant regarding those concerns, and that Appellant never told him that she felt that she was being harassed by him or the Assistant Agent-in-Charge, Honeywell. (R. pp. 332 – 337, passim)

Gambrell further testified that he spoke with Albany, that after speaking with Albany he had a concern "that there may have been an inappropriate relationship between [Albany] and [Appellant]," that he typed up his notes from his conversation with Albany and forwarded them to the Regional Director but when he did not hear back he contacted the Department Director, and that he believed Appellant's relationships could be considered "misconduct." (R. pp. 338 -341)

On cross-examination, Gambrell testified that at the time that he had expressed his concerns about relationships with subordinates no departmental policy prohibited such relationships and no policy prohibited what Gambrell described as being misconduct on Appellant's part but that Gambrell considered Appellant's having a sexual relationship with a subordinate to be "immoral" and that in his view the behavior would have been in violation of the Department's "professionalism policy" because Gambrell considered Appellant's behavior to be "morally and ethically improper" although acknowledging that it was not specifically prohibited by policy, that Gambrell went to Albany and asked about

her relationship with Appellant the day after he learned that Appellant had filed a complaint against him, and that on December 19, 2018 Appellant resigned from the Department. (R. pp. 345 – 350, passim)

Appellant testified that she worked for the South Carolina Department of Probation, Parole, and Pardon Services for ten years and seven months, that she served in the Air Force Security Services for five years, that as a result of her service in the military she suffers from Post-Traumatic Stress Disorder (PTSD), anxiety, and depression and receives treatment and takes medication for those conditions, that beginning in 2006 she went to work for the Department but left the Department in 2010 to work for the Greenville County Sheriff's Office, that she applied to return to the Department in 2012 but was not selected and was told at that time that "[The Department] wanted a male for the position and not a female," that the Equal Employment Opportunity Commission (EEOC) filed a gender discrimination lawsuit against the Department on her behalf, that she prevailed in the EEOC lawsuit and in 2012 was rehired by the Department, that in September and October of 2018 she was the subject of an investigation conducted by Gambrell and Honeycutt which ended with a direction from the Department's Deputy Director that no disciplinary action was to be taken against her, that in December 2018 she was the subject of an investigation conducted by Jeff Harmon related to a sexual incident in May 2015 between her and Albany, that she was not engaged in a sexual relationship with Albany, that her memory of the incident referenced in May 2015 was not clear because she does not "have a very good memory," that Harmon did not ask her "specific questions about what [she] did or… details of what had happened" regarding the May 15th incident, that she requested

that Albany be moved to another team because "she was becoming angry and a little bit hostile because [Appellant] was not accepting her advances," that she resigned her position with the Department on December 19, 2018. (R. pp. 361 – 363, 364 – 369, passim)

On cross-examination, Appellant testified that when Harmon first asked her on December 7th if she had a sexual relationship with Nicole Albany she stated "No," that on December 10th she stated to Harmon that Albany had attempted oral sex on her but that Appellant had "stopped it," and that in her pre-polygraph interview she was asked if she had engaged in any sexual relationship with Albany and she stated no "[b]ecause it was asked if [she] engaged in any sexual relationships with [Albany], and [she] wrote in [her] statement that [Albany] is the one that engaged [her] in [sexual conduct]," that in the "Consent to Interview" form provided her before the polygraph examination the purpose of the exam was stated as being to determine "[w]hether or not you engaged in any sexual activity with Nicole Albany," and that she wrote in her statement following the polygraph examination that she engaged in consensual sexual relations with Albany. (R. pp. 384 – 391, passim)

STANDARD OF REVIEW

The Law Enforcement Training Council (LETC) is the governing body of the South Carolina Criminal Justice Academy (Academy). S.C. Code Ann. § 23-23-20 (Supp. 2014). As the governing and adjudicative body of the South Carolina Criminal Justice Academy, an "agency" under the Administrative Procedures Act, the ALC has jurisdiction to hear the appeal of a final decision of the LETC in a contested case. S.C. Code Ann. § l-23-600 (D) (Supp. 2018) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Section 1-23-380 provides, in relevant part:

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.

S.C. Code Ann. § l-23-380(5); see also Todd's lce Cream, Inc. *v.* S.C. Employment Sec. Comm'n, 315 S.E.2d 373, 375 (Ct. App. 1984).

The standard to be applied by the reviewing court is that of substantial evidence. A decision is supported by substantial evidence when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub. Serv. Comm'n of SC., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 5.C. 219, 226, 467 S.E.2d 913, 977 (1996). The evidence should not be "viewed blindly from one side of the case." Myers v. S.C. Dept. of HHS, 418 S.C. 608, 616, 795 S.E.2d 301, 305 (Ct. App. 2016) When applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996). In applying the substantial evidence rule, when "determining whether the record contains substantial evidence to support an administrative agency's findings, [the appellate court] cannot substitute its judgment on the weight of the evidence for that of the agency." Myers, 418 S.C. at 615 – 616, 795 S.E.2d at 305.

The reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. S.C. Coastal Council, 3l9 S.C 348, 353, 461 S.E.2d 388, 391 (1995). "[A] reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d

304, 307 (1981)). Finally, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917.

ARGUMENT

1. **THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE LAW ENFORCEMENT TRAINING COUNCIL'S FINAL AGENCY DECISION.**

South Carolina Code Section 23-23-150(A)(3)(g) states that misconduct is "willfully making false, misleading, incomplete, deceitful, or incorrect statements to a law enforcement officer, a law enforcement agency, or a representative of the agency, except when required by departmental policy or by the laws of this State."

In her Brief, Appellant argues that the ALC ignored "the substantial evidence in the record establishing that there was no such 'sexual relationship,' that a Appellant provided truthful answers to different questions she was asked about an incident that occurred three and a half years prior, and that, to the extent Appellant failed to provide complete and/or accurate statements, she did not do so willfully. Additionally, the ALC's Order, noting that 'Appellant was asked the same question multiple times by different supervisors and she changed her answers multiple numerous times,' grossly misstates the actual evidence in the record." (App. Brief p. 9) (emphasis in original)

Appellant also argues that the "ALC erred in concluding that there is substantial evidence proving that Appellant acted willfully given that, considering the record as a whole, there is no evidence, let alone substantial evidence, from which it can be found that Appellant acted voluntarily and intentionally in making any allegedly incomplete or incorrect statements to [Agency]. Rather the evidence establishes only that Appellant believed she was testifying truthfully based on her memory of the incident several years

prior and based on her understanding of the different questions she was asked on different occasions as outlined above." (App. Brief pgs. 12 – 13)

As shown below, these arguments are incorrect. What follows is the evolution of Appellant's story regarding her conduct with a subordinate. At the start of the investigation, Appellant was informed that "no one had ever been terminated for an allegation of consensual sexual relationships with a subordinate, and that she should be honest and truthful about the relationship, and that if she is found to be untruthful about the relationship, and that if she is found to be untruthful and lie, then she would be subject to disciplinary actions." (R. p. 206) After this, Appellant was asked whether she "had a sexual relationship with a subordinate", Nicole Albany, to which Appellant replied "no." (R. p. 207) Appellant's statement was incorrect and/or incomplete. Appellant was asked whether there were any "physical advances" to which she answered "no". (R. p. 211) Appellant's statement was incorrect and/or incomplete. Appellant was asked whether there was "any other sexual conduct with a subordinate" to which she replied "No. Never." (R. p. 211) Appellant's statement was incorrect and/or incomplete.

Over time, Appellant's story began to change. Appellant amended her previous statements that there was no previous contact to Albany "tried to initiate physical contact with her, and that is was during a cookout, and a friend said, 'Hey, you're being too aggressive,' and – and [Appellant] was able to kind of brush off the physical contact with [Albany]." (R. p. 212) Appellant's statement was incorrect and/or incomplete.

Prior to her polygraph exam, Appellant was asked whether she engaged in sexual activity with a subordinate to which she answered "No". (R. p. 203) Appellant's statement

was incorrect and/or incomplete. After her polygraph exam, Appellant changed her answer to admitting that she engaged in sexual activity Albany. (R. p. 291)

Ultimately, Appellant admitted that there was an act of consensual sexual relations between Appellant and Albany. Appellant provided a written statement about the sexual encounter with Albany. (R. p. 416). In her statement, Appellant wrote:

"Regarding the consensual sexual relations w/Nicole Albany, at a barbecue at her house, there was a brief interaction with her and a male friend of hers . . . She started coming onto me and trying to pull at my pants and unzip my pants. She was able to get my zipper down and pull my pants down slightly. Next thing I know, she's either on her knees or crouched down and started performing oral sex. Soon thereafter a male friend of hers came over to where we were and told her to chill out and stop being so aggressive. Not sure what he said after, but he pulled out his penis and put it in my hand . . . The interaction was consensual and never happened again." (R. p. 416) (emphasis added) Appellant admits that she had a sexual relationship with Albany. It is not until this point that Appellant's statements are both truthful and complete.

The substantial evidence in the record established that Appellant's answers were voluntary and intentional. Her story evolved over time. First, she said that she did not have sexual contact, receive physical advances from a subordinate, or engage in sexual conduct with a subordinate, but this was later admitted to be untrue. As Appellant's story evolved she slowly added new facts/admissions, but never provided the full story until the very end. Finally, during the post-polygraph interview did she tell the entire story, which she wrote in a statement. No other inference can be drawn for this substantial evidence

than her answers were voluntarily and intentionally incomplete or incorrect. Her incorrect and/or incomplete statements were not due to excusable carelessness, they very clearly were a result of her being intentional. Although LETC did not expressly address this standard, the evidence clearly established that LETC applied the willful standard, as evidenced by Appellant's evolving story. Therefore, the proper standard was applied.

The substantial evidence in the record established that Appellant's memory did not affect her ability to answer the questions completely and truthfully. When first confronted, Appellant denied any type of physical contact, much less sexual contact, occurred between Appellant and Albany. By the end of the investigation, Appellant's story had drastically changed to there not only being physical contact, but sexual contact, involving multiple people. In fact, a fair reading of Appellant's statement on page 416 of the Record, cited above, shows the level of detail of Appellant's memory from that night. The details she provided were very specific right down to the statements made during the encounter. After reading Appellant's detailed statement, it is logically difficult to believe that her memory of the incident was "not good" when she was initially asked the questions about this incident.

Appellant argues that she did not provide incorrect or incomplete statements because the questions contained different wording. Some of the questions asked about "sexual relationships" and some questions asked about "sexual activity." Prior to her polygraph exam, Appellant understood that the purpose of the exam was to get to the truth of whether "or not [Appellant] engaged in any sexual activity with [Albany]." (R. p. 387) However, prior to her polygraph exam, Appellant was asked whether she engaged in sexual

activity with a subordinate to which she answered "No". (R. p. 291) This statement was incorrect and/or incomplete and was certification misconduct, because after her polygraph exam, Appellant changed her answer to admitting that she engaged in sexual activity Albany. (R. p. 291) The same language for both of these questions was the same, yet Appellant provided an incorrect answer to the first question.

In its Final Order, the Administrative Law Court, correctly found that based "upon the evidence in the Record, a reasonable person could conclude, like the LETC, that Appellant provided incorrect statements to the Department. Therefore, I find substantial evidence supports the LETC's finding that Appellant was untruthful to the Department. *See Friends of the Earth*, 387 S.C. at 366, 692 S.E.2d at 913 (holding a decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency)." (R. p. 11)

The facts, as stated above, establish that Appellant has failed to meet her burden to convincingly prove that LETC's decision is unsupported by substantial evidence. Additionally, the above testimony and evidence in the record establish that Appellant provided incorrect or incomplete statements to a law enforcement officer.

For the reasons hereinabove stated, it has been established by substantial evidence that Appellant committed misconduct, that Agency provided substantial evidence showing that Appellant provided incorrect or incomplete statements to a law enforcement officer and that Appellant has failed to meet her burden of proving convincingly that the Final Agency Decision rendered by LETC is unsupported by substantial evidence.

2. THE LAW ENFORCEMENT TRAINING COUNCIL'S DECISION DID NOT RELY ON AN INCORRECT LEGAL STANDARD.

South Carolina Code Ann. Regs. 37-105(L) states that the "hearing officer shall issue a recommendation to [LETC] based on the evidence accepted during the hearing. The recommendation must include the following: 1) Recommended Findings of Fact; 2) Recommended Conclusions of Law; and 3) If appropriate, recommended sanction pursuant to R.37-108." (emphasis added)

South Carolina Code Ann. Regs. 37-107(D) states that LETC "shall issue a final agency decision based on the evidence accepted during the contested case hearing and the applicable statutes and regulations. [LETC] may consider the hearing officer's recommendation. [LETC's] final decision must include the following:

1. Findings of Fact;
2. Conclusions of Law; and
3. If appropriate, sanction(s) pursuant to R.37-108.

[LETC] may adopt the hearing officer's recommendation as [LETC's]final decision". (emphasis added)

"The use of the word 'may' 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." State v. Wilson, 274 S.C. 352, 356, 264 S.E.2d 414, 416

(1980). "The term 'shall' in a statute means that the action is mandatory." Johnston v. S.C. Dept. of LLR, 365 S.C. 293, 296, 617 S.E.2d 363, 364 (2005)

Appellant argues that ALC erred because the Final Agency Decision did not address "(1) Respondent's complete disregard for the factual findings of its hearing officer regarding willfulness or (2) Respondent's failure to articulate its reason for disregarding those findings. (App. Brief pgs. 15 -16) The ALC held that "LETC was the finder of fact in this case and as such, it was not required to adopt the hearing officer's disposition of explain its reasoning in detail for its deviation." (R. p. 29) Respondent's position is that the ALC was correct that the hearing officer does not make factual findings, only factual recommendations; LETC makes factual findings as shown in the applicable Regulations above. The Final Agency's Decision "Findings of Fact" state that "Based on the Hearing Officer's Recommendation, Hearing Transcripts, Hearing Exhibits, motions, and oral arguments we find as a fact …" (emphasis added) The same is said in the "Conclusions of Law" sections except it states "we conclude as a matter of law…" As such, LETC was not required to follow the hearing officers recommendation or explain why it failed to do so.

LETC adopted the Hearing Officer's Recommended Findings of Fact and Recommended Conclusions of Law. The Hearing Officer recommended the following findings of fact: 1) the allegations of misconduct as presented by the Agency are supported by the evidence presented at the contested case hearing; and 2) substantial evidence has been established that Appellant provided incorrect or incomplete statements to the Agency. These were both adopted by LETC in its Final Agency Decision.

The Hearing Officer recommended, among other things, the following conclusions of law: 1) LETC may deny certification and may consider mitigating circumstances; and 2) substantial evidence was established that Appellant was committed misconduct. Therefore, LETC not only gave deference to the hearing officer's recommended factual findings, but actually adopted both his recommended findings of fact and recommended conclusions of law. The only point LETC did not adopt was part of the hearing officer's recommended disposition that mitigating circumstances were present because LETC was not required by Regulation to consider mitigating circumstances.

Appellant argues that "despite the fact that the hearing officer found no evidence of willfulness on the part of Appellant, Respondent completely disregarded that finding without any explanation and/or justification." (App. Brief p. 16) The hearing officer never made a finding regarding willfulness, as can be seen in the Hearing Officer's Recommendation. It is found in his analysis, but was never a finding. As stated above, his findings were that substantial evidence existed that Appellant engaged in misconduct.

Appellant argues that if "Respondent had applied the correct standard for willfulness to the hearing officer's adopted factual findings, it would have been required to find that Appellant had not engaged in any 'willful' conduct since its fact-finder specially found no evidence of any intentional or conscious action by Appellant." (App. Brief p. 18) As shown above, LETC was not required to adopt the hearing officer's recommendation. In fact, LETC was not required to consider the recommendation. However, it not only considered the recommendation, it adopted most of it. However, it implicitly applied the appropriate standard for willfulness in its Final Agency Decision.

LETC based its Findings of Fact and Conclusions of Law on the Hearing Officer's Recommendation, Hearing Transcripts, Hearing Exhibits, motions, and oral arguments. A reading of the record establishes that LETC made a finding that Appellant's incorrect and/or incomplete statements were intentional, therefore, willful. Although LETC did not expressly address this standard, the evidence clearly established that LETC applied the willful standard, as evidenced by Appellant's evolving story. Therefore, the proper standard was applied.

The overwhelming evidence in the Record established Appellant willfully provided incorrect and/or incomplete statements when Appellant's story evolved from she did not have physical contact with Albany, to they had physical contact, to Appellant admitting to having sexual contact with Appellant and a male at a party.

For the reasons stated above, Appellant has failed to meet her burden to establish that LETC relied on an incorrect legal standard.

3. THE LAW ENFORCEMENT TRAINING COUNCIL'S DECISION WAS NOT ARBITRARY AND CAPRICIOUS AND DID NOT REPRESENT AN ABUSE AND/OR UNWARRANTED EXERCISE OF DISCRETION.

LETC has the authority to impose any of many different identified sanctions when an individual is found to have committed misconduct; one sanction being permanent denial of a law enforcement certification. S.C. Code Ann. Regs. 37-108(A)(1) (2015) LETC ordered that Appellant be "permanently ineligible for a law enforcement certification in South Carolina." (R. p. 9) S.C. Code Ann. Regs. 37-025(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 use of the word 'may' 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." State v. Wilson, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980). "The term 'shall' in a statute means that the action is mandatory." Johnston v. S.C. Dept. of LLR, 365 S.C. 293, 296, 617 S.E.2d 363, 364 (2005)

Appellant argues that the ALC erred because it found "that Respondent was permitted, but not required, to consider any mitigating factors and/or recommended disposition and that, based thereon, Respondent, even while adopting its hearing officer's factual findings, was not required to consider the mitigating factors found by the hearing officer and was permitted to permanently deny certification to Appellant. Respondent failed to articulate any reason for not giving deference to its fact-finder or for imposing the harshest sanction it could" (App. Brief p. 20) This argument fails because South Carolina Code Ann. Regs. 37-107(D) does not require LETC to adopt the Hearing Officer's Recommendation and S.C. Code Ann. Regs. 37-025(B) does not require LETC to consider mitigating circumstances. Additionally, as the ALC found LETC, not the Hearing Officer, is the fact-finder. Furthermore, LETC has the option to impose one of many sanctions, as shown above.

Respondent asserts there are no mitigating circumstances present in this case. Appellant was asked if she was "aware of any physical or mental condition that would make it difficult to compete the polygraph examination" to which she replied "No". (R. p.

457) She replied "No" even though she admitted to having PTSD and other ailments. (R. p. 457) This question was asked prior to Appellant denying she had any sexual contact with Albany. After the polygraph examination that Appellant admitted she had consensual sexual contact with Albany. Additionally, Appellant did not speak an incorrect and/or incomplete statement on just one occasion, it was multiple occasions over a period of time. Had it only been one occasion, it would at least lend itself to being a mitigating circumstance, but that is not the case.

LETC was not obligated to adopt the Hearing Officer's disposition. Instead, LETC's Recommended Findings of Fact and Conclusions of Law provided reason for its decision to deviate from the Hearing Officer's Recommendation because its decision was based "on the Hearing Officer's Recommendation, Hearing Transcripts, Hearing Exhibits, motions, and oral arguments". (R. p. 14) LETC reviewed the record as a whole and came to a different conclusion, as to the disposition, from the Hearing Officer. There exists no regulatory or statutory authority to require that LETC consider mitigating circumstances. In fact, LETC adhered to the statutes and regulations that pertain to its ability to make a final agency decision, which established that its decision was not arbitrary and capricious.

For the reasons stated above, Appellant has failed to meet her burden to establish that LETC's decision was arbitrary and capricious and/or was an abuse of discretion.

CONCLUSION

For the reasons stated, Respondent asks this Court to affirm the ALC's Final Order that Appellant should be permanently denied eligibility for ~~a~~ law enforcement certification in the State of South Carolina. In the alternative, should this Court find error, Respondent would respectfully request that the case be remanded for a new contested case hearing to comply with this Court's Final Order.

Respectfully Submitted,

James M. Fennell
Attorney for Respondent
South Carolina Criminal Justice Academy

November 23, 2020

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Administrative Law Judge Ralph King Anderson, III

Appellant Case No. 2020-000849
Case No. 19-ALJ-30-0389-AP

Kristin Cosby, ...Appellant

v.

South Carolina Criminal Justice Academy, ...Respondent.

CERTIFICATE OF COUNSEL

The undersigned of the South Carolina Criminal Justice Academy, counsel for Respondent, does hereby certify that Respondent's Final Brief complies with Rule 211(b), SCACR.

James M. Fennell
Attorney for Respondent
Bar #72576
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29212
(803) 896-7722
jfennell@sccja.sc.gov

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PROOF OF SERVICE

The undersigned of the South Carolina Criminal Justice Academy, counsel for Respondent, does hereby certify that service of the CERTIFICATE OF COUNSEL in the above captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this 23rd day of November, 2020.

Courtney C. Atkinson
Metcalfe & Atkinson, LLC
1395 South Church Street
Greenville, South Carolina 29605

James M. Fennell
Attorney for Respondent
Bar #72576
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29212
(803) 896-7722
jfennell@sccja.sc.gov

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