THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Administrative Law Judge

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Appellate Case No.: 2020-00849

Kristin Cosby

Appellant,

v.

South Carolina Criminal Justice Academy

Respondent.

FINAL BRIEF OF APPELLANT

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FINAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal of the administrative law court's Order dated May 6, 2020, affirming the final decision of the Respondent Agency to permanently deny Appellant's law enforcement certification for the State of South Carolina. R. 18.

Appellant is a South Carolina resident who has worked in law enforcement the entirety of her adult life after serving in the U.S. Air Force and then graduating from the University of South Carolina with a degree in criminal justice. R. 360, ll. 24-25, R. 361, ll. 4-24, R. 381, ll. 23. She was originally hired by the South Carolina Department of Probation, Parole and Pardon Services ("the Department") in 2006 before leaving in 2010 to work for the Greenville County Sheriff's Office. R. 361, ll. 14-19, R. 362, ll. 1-3. Appellant reapplied to work for the Department in 2012, but was not selected for rehire and was told the Department wanted to hire a male. R. 362, ll. 6-12. Appellant then filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission, contending the Department's actions violated Title VII of the Civil Rights Act of 1964. She was successful and the Department was forced to rehire Appellant in 2012. R. 362, ll. 16-20. Following that time, and until being forced to resign in 2018, Appellant was an exemplary employee who rose through the ranks, with positive reviews and various accolades, to become a supervisor. R. 363, ll. 2-16. In fact, Appellant was nominated for "supervisor of the year" the same year she was forced to resign following an investigation instituted in retaliation for Appellant having engaged in protected activity, including reporting discrimination by her agent in charge (AIC) and assistant agent in charge (AAIC) and filing her previous charge of discrimination. R. 233, ll. 15-25, R. 234, ll. 1-19, R. 246, ll. 13-25, R. 247, ll. 1-20, R. 363, ll. 13-16.

Appellant's AIC, the same who was forced to rehire Appellant following her successful

charge of discrimination in 2012, and AAIC began investigating Appellant in the fall of 2018 for various matters, which allegations Appellant denied. R. 364, ll. 9-25, R. 365, ll. 1-25. Regardless, the AIC and AAIC continued to question and harass Appellant about the allegations and engaged in a course of hostile conduct not similarly directed at male agents or female agents who had not filed a charge of discrimination against the Department. R. 247, ll. 2-20, R. 366, ll. 9-15. Appellant reported the harassment to the Department and, thereafter, the AIC and AAIC were advised there was no evidence Appellant had engaged in misconduct, that no action was to be taken against her, and that nothing was to be placed in her file. R. 344, ll. 10-25, R.345, ll.1-12. Regardless, the AIC and AAIC continued to harass Appellant. Accordingly, Appellant made another complaint on October 19, 2018, claiming she was being subjected to a hostile work environment and other retaliatory and discriminatory conduct, which the AIC was advised of in November of 2018. R. 366, ll. 16-19, R. 418. Just days later, the AIC instituted yet another investigation regarding an incident that allegedly occurred between Appellant and a subordinate more than three and a half years prior. R. 247, ll. 2-8, R.366, ll. 20-25, R. 367, ll. 1-14. Specifically, it was alleged that Appellant and a subordinate had engaged in sexual relations at an off-duty party in May of 2015. Regardless, the allegations, even if true, were not a violation of any Department rule or policy and Appellant had reported the incident to her previous AIC three years prior, at which time the Department had chosen to take no action. R. 250, ll. 16-25, R. 271, ll. 19-24, R. 274, l.25, and R. 275, ll. 1-2.

During the course of the November 2018 investigation, Appellant was repeatedly questioned about whether or not she engaged in a sexual relationship with a subordinate. R. 194, ll. 7-18, R. 244, ll. 22-25, R. 245, ll. 1-7, R. 319, l.25, R. 320, ll. 1-11. She maintained that she had no such relationship with her former subordinate, but did disclose that the subordinate had

attempted to engage in sexual activity with her at a party in May of 2015, which incident Appellant had reported to her previous AIC in 2015. R. 210, ll. 22-25, R. 211, ll. 1-4, R. R. 369, ll. 9-25. Notwithstanding, and despite the fact that it was not a violation of any policy to engage in such activity or relationship, which Appellant denied as she neither voluntarily engaged in sexual activity nor had any such relationship with the subordinate, the Department forced Appellant to take a polygraph in December of 2018 about the incident and required Appellant, who suffers from PTSD for which she is medicated, to ride to Columbia for the polygraph with the AIC and AAIC of whom she had complained of being afraid. R. 210, ll.6-21, R. 356, ll. 7-13, R. 372, ll. 4-10, R. 457-458. Following the polygraph, the administering agent told Appellant that he felt she had not been honest and encouraged her to write a statement acknowledging sexual activity had occurred to "help herself." R. 304, ll. 10-20, R. 374, ll. 13-25, R. 375, ll.1-24. Accordingly, Appellant wrote a statement, again acknowledging the sexual activity that her former subordinate had attempted to engage in back in May of 2015, the same activity she previously disclosed to the Department on two prior occasions. R. 416. Thereafter, the Department advised Appellant that it did not "look good" and that she could either resign or be subject to unspecified disciplinary action. Understanding she had no choice and that her AIC would only continue to retaliate against her, Appellant submitted her resignation on December 19, 2018, which was accepted by the Department. R. 462

On January 3, 2019, and despite having accepted Appellant's letter of resignation, the Department's Director, who also serves as a member of Respondent Agency's Law Enforcement Training Council (LETC), falsely reported to Respondent that the Department had "terminated" Appellant's employment as a result of "MISCONDUCT." R. 406-408. Appellant contends the Department did so intentionally, and in further retaliation for her

previous charge of discrimination against the Department and her complaints against her AIC and AAIC, to have Appellant's law enforcement certification revoked. R. 404-405. Following her receipt of a letter from Respondent on January 7, 2019, notifying Appellant that her law enforcement certification had been conditionally revoked as a result of the Department having had filed an allegation of certification misconduct against her for having willfully made false and/or misleading statements, Appellant requested a contested case hearing on January 28, 2019. R. 169. The contested case hearing was ultimately held on May 3, 2019. The contested care hearing was conducted by hearing officer William C. Smith, serving as Respondent's fact-finder, who took evidence and heard testimony from Appellant and the Department. R. 556.

On July 25, 2019, Respondent's hearing officer issued a recommendation that Respondent find that the allegations of misconduct reported against Appellant were proven by substantial evidence, but also consider the mitigating circumstances, including Appellant's medical condition, the remoteness in time of the underlying incident and the fact that said incident did not involve misconduct. R. 167-168. Based thereon, he also recommended that Respondent grant Appellant eligibility for certification with probation or any other appropriate requirements. R. 168. Appellant filed a motion in opposition on August 8, 2019, arguing that the Department failed to establish misconduct through substantial evidence and asking that Appellant be granted unconditional recertification and that any records referencing misconduct be expunged. R.115-153. On October 3, 2019, Respondent's LETC met and heard argument from Appellant and the Department and, immediately thereafter, voted to adopt its hearing officer's finding that Appellant had engaged in the misconduct alleged. R. 466-491. However, and despite the hearing officer's recommended disposition and without addressing the mitigating factors found to exist and/or Respondent's failure to consider same, Respondent voted to

permanently deny Appellant certification. R. 490-491. Respondent then provided written notice of its decision on October 11, 2019, again refusing to consider or even to address either (1) the recommendation of its hearing officer that mitigating factors existed and should be considered, or (2) his express recommendation that Appellant be granted conditional recertification. R. 49-59 Appellant timely appealed Respondent's decision to the administrative law court (ALC) on November 8, 2019. R. 34-35. After submission of briefs by both Appellant and Respondent, the ALC entered an order on May 6, 2020, affirming Respondent's decision to permanently deny Appellant's law enforcement certification. R. 18-30. Appellant timely appealed that Order to the Court on June 1, 2020. R. 1-2.

STANDARD OF REVIEW

In the appeal of a decision by the ALC, the Administrative Procedures Act (APA) provides the appropriate standard of review. *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 400, 745 S.E.2d 110, 113 (2013). Specifically, the APA provides that, while the Court may not substitute its judgment for the judgment of the ALC, the Court may affirm the decision of the agency or remand the case for further proceedings. S.C. Code §1-23-610(B). The Court may also reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

(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 §1-23-610(B). Thereunder, this Court can reverse the ALC's findings in regard to agency actions if the findings are affected by error of law, are not supported by substantial

evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Schwiers v. Dep't of Health & Envtl. Control,* 429 S.C. 43, 48, 837 S.E.2d 730, 733 (Ct. App. 2019). The Court "can reverse or modify the decision…if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law." *Bartley v. Allendale County School Dist.*, 392 S.C. 300, 306, 709 S.E.2d 619, 621 (2011); *see also Davaut v. University of South Carolina*, 418 S.C. 627, 632, 795 S.E.2d 678, 680-681 (2016). Likewise, the Court may reverse the ALC's findings if those findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Elkins v. S.C. Crim. Justice Acad.*, 2017 S.C. App. Unpub. LEXIS 499 (Ct. App. 2017), *citing* S.C. Code §1-23-610(B)(e).

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 the administrative agency reached in order to justify its action. *Frame v. Resort Servs.*, 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct. App. 2004). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 307 (1981). In order for a finding to be upheld as supported by substantial evidence, the "finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." *Houston v. Deloach & Deloach*, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008) (emphasis added). Weighing of evidence and determinations of witness credibility are functions of fact-finders. *DIRECTV, Inc. v. S.C. Dep't of Revenue*, 421 S.C. 59, 80, 804 S.E.2d 633, 644 (Ct. App. 2017), *citing MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 392 S.C. 314, 324, 709 S.E.2d 626, 631 (2011). In fact,

South Carolina law provides that such questions should be left to the agency fact-finder[1]. *Hargrove v. Titan Textile Co.,* 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004).

ARGUMENT

As set forth more fully below, the ALC erred in affirming the agency's decision to permanently deny Appellant's law enforcement certification, which decision was not supported by substantial evidence, was based on application of an incorrect standard as to what constitutes "willful" conduct in South Carolina, and was arbitrary and capricious, as well as an abuse and/or unwarranted discretion of the agency's discretion. For all those reasons, the ALC's decision should be reversed and/or the matter remanded to the agency for further proceedings.

I. The ALC erred in finding that Respondent's final decision was supported by substantial evidence.

The ALC erred in finding that Respondent's final decision was supported by substantial evidence because the substantial evidence in the record as a whole establishes that Appellant did not engage in the willful misconduct alleged and the final decision erroneously failed to give deference to its fact-finder and/or to explain its reasons for not giving such deference.

A. The substantial evidence in the record does not establish that Appellant provided incomplete or incorrect statements to the Department.

The ALC committed clear error in affirming Respondent's final decision as supported by "substantial evidence" that Appellant engaged in the certification misconduct alleged by willfully providing incorrect or incomplete statements to the Department. The ALC's Order, which states that "(t)he evidence in the record reflects that Appellant engaged in a sexual

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[1] In the instant action, the agency fact-finder was Respondent's hearing officer, who conducted the case hearing, heard the testimony of witnesses, received evidence and made recommendations to Respondent thereon. *See Barr's Next of Kin v. Cherokee, Inc.*, 220 S.C. 447, 68 S.E.2d 440 (1951) (acknowledging hearing officer as agency's fact-finder); *see also Baylor v. Bath*, 189 S.C. 269, 279, 1 S.E.2d 139, 143 (1938) (noting that agency hearing officer who heard testimony and took evidence was fact-finder entitled to deference).

relationship with her subordinate and...was thereafter untruthful to her supervisors when asked about the relationship on several occasions," ignores the substantial evidence in the record establishing that there was no such "sexual relationship," that 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.

It is clear from the evidence in the record that Appellant was asked different questions at different times by Respondent throughout its investigation into the May 2015 incident allegedly involving Appellant and the subordinate, Nicole Albany, and that Appellant answered truthfully based on the different questions asked. When Respondent first questioned Appellant about the incident in December of 2018, Agent Harmon specifically asked Appellant if she had ever "had a sexual relationship with a subordinate." R. 392, ll. 6-12. She answered "no" because she had no such relationship with the subordinate, but did disclose to Harmon days later that Albany had attempted to perform oral sex on her during an isolated incident at the party in May of 2015. R. 368, ll.6-18, R. 376, ll. 3-14, R. 392, ll. 10-23. There is evidence of such disclosure in the record. Weeks later, Appellant was asked a different question - whether "she engaged in sexual activity with a subordinate." R. 297, ll. 7-9. She answered "no" to that specific question, believing she was being asked whether she herself actively engaged in sexual activity with Albany, since she had not and because it was Albany who had attempted sexual contact on Appellant. R. 390 ll. 8-17. Following the polygraph[2], Appellant was encouraged to provide a

[2] Evidence of what occurred during the polygraph was not deemed at admissible at the contested case hearing, is not part of the record in this case and was not properly considered by the ALC.

written statement of what had occurred, at which time she again disclosed that Albany had pulled down her pants and attempted to perform oral sex on her at the party in May of 2015, a statement consistent with her previous disclosures to Respondent. R. 416. The use of different wording about Albany "attempting" to perform oral sex and Albany "starting to perform oral sex" before being stopped is insufficient to establish and does not reasonably lead to the conclusion that Appellant made incorrect or incomplete statements. It only establishes that Appellant answered different questions asked of her on different occasions to the best of her understanding. Accordingly, the ALC's finding that the record establishes that Appellant repeatedly changed her answer to the same question to provide false and inaccurate information to Respondent is clearly erroneous and not supported by substantial evidence.

In addition to ignoring the substantial evidence establishing that Appellant did not answer "the same question" different ways, as the ALC contends supports Respondent's finding that Appellant engaged in the willful misconduct by being untruthful and seeking to hide a sexual relationship with a subordinate, the ALC also erroneously found there was no evidence to establish that Appellant had disclosed the May 2015 incident to Respondent, a fact that is highly relevant to the issue of whether or not Appellant engaged in the alleged misconduct by providing false information to Respondent in an attempt at hiding the incident. In fact, the record includes testimony and other direct evidence that Appellant reported the incident to her previous AIC in May of 2015[3] and again in December of 2018 when Appellant advised Harmon that Albany had tried to perform oral sex on her at a party in May of 2015. While Harmon testified no such disclosure occurred, Harmon's testimony was proven false and Appellant's testimony corroborated by an audio recording in which Appellant can be heard telling Harmon "oral sex

[3] While the ALC's Order states baselessly that in Appellant's testimony she advised her previous AIC about the subordinate's sexual advances back in May of 2015 "was contradicted by the other agents' testimonies," the ALC failed to cite to any such actual testimony in the record.

didn't happen but she tried.[4]" R.256, ll. 13-24, R. 257, ll. 1-11. This substantial evidence, which was completely ignored by Respondent and the ALC, clearly evidences the fact that Appellant did not try to hide the May 2015 incident or provide false information thereabout and, instead, voluntarily told Respondent about the May 2015 incident on three separate occasions. R. 370, ll. 2-13.

Finally, there is no substantial evidence in the record to establish that Appellant had a "sexual relationship" with the subordinate at issue such that her response to the one specific question posed to her thereabout was incorrect or untruthful. While the ALC's Order claims that "the evidence in the record reflects that Appellant engaged in a sexual relationship with her subordinate," the ALC's Order points to absolutely no such "evidence" in the record, let alone substantial evidence to prove the existence of any such "sexual relationship." R. 24. Instead, the only testimony noted by the ALC of any relationship between Appellant and the subordinate, Nicole Albany, came from Albany alone, who claimed only that there was one incident in which "she and Appellant kissed." R. 24. Regardless, such testimony alone, does not establish that Appellant and the subordinate engaged in sexual activity or the existence of any "sexual relationship" between them. Accordingly, the ALC's unsupported finding otherwise was clear error.

B. The substantial evidence in the record does not establish that Appellant acted willfully.

Even if the record could lead to the conclusion that Appellant provided incorrect or incomplete statements to Respondent, which Appellant contends it does not, there is no substantial evidence that Appellant did so willfully, as required for the finding of misconduct

[4] The audio recording, which proves that Harmon's testimony about Appellant not disclosing the May 2015 incident was false, is not acknowledged in either Respondent's final decision or the ALC's Order affirming same.

affirmed by the ALC. Respondent determined that Appellant "had committed misconduct, as defined in S.C. Code Ann. § 23-23-150(A)(3)(g), 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.'" R. 154-155. Notably, such conduct is only deemed misconduct when committed "willfully," which requires conduct exceeding "inexcusable carelessness" and requires "a showing of a consciousness of wrongdoing in order to prove willfulness." *State v. Garrard*, 390 S.C. 146, 149, 700 S.E.2d 269, 271 (Ct. App. 2010). The South Carolina Court of Appeals has defined the term "willful" as "proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary." *Id.* at 149-150 (emphasis added), *quoting Black's Law Dictionary* 1434 (5th edition 1979). A finding of willfulness requires evidence that an individual acted "voluntarily and intentionally." *Id.* at 151.

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 Respondent. 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. In specific regard to her memory of the 2015 incident, Appellant testified that her memory thereof was not good and that she does not "have a very good memory." R. 368, ll. 2-5, R.385, ll. 9-22. In specific regard to her state of mind at the time she took the polygraph, after which she allegedly made incomplete

and/or incorrect statements[5], she testified that she was suffering symptoms from PTSD, for which she was taking medication, and that she was very upset and crying after being driven to the polygraph by the AIC and AAIC whom she had complained of being afraid of just weeks prior. R. 372, ll. 4-24, R. 373, ll. 1-24. Finally, she testified that, when initially asked about the May 2015 incident, she did not initially remember all details thereabout. R. 385, ll. 9-22. Notably, Respondent's hearing officer found such testimony to be so credible that he noted that these were the most likely reasons for any incorrect information provided to by Appellant and that these issues should be considered as mitigating circumstances.

As noted above, and in specific regard to the statements she made to the Department about the May 2015 incident, Appellant testified she provided her former AIC with basic information thereabout in 2015. R. 369, ll. 9-19. When asked by Harmon in December of 2018 if she "had a sexual relationship with a subordinate," she answered "no" because she never had any such relationship with Albany. R. 392, ll. 6-12. Regardless, she later told him that Albany had tried to perform oral sex on her in May of 2015, the same incident she had previously reported to her AIC. R. 368, ll.6-25, R. 370, ll. 2-13. When asked prior to the polygraph, if "she engaged in sexual activity with a subordinate," she answered "no" due to her understanding of that particular question, the fact that she never actively engaged in sexual activity with Albany and because it was Albany who attempted to perform oral sex on her. R. 297, ll. 7-9, R. 390, ll. 8-17. There is no evidence in the record to establish that Appellant's interpretation of the questions she was asked was incorrect or unreasonable. R. 390, ll. 18-25, R. 391, ll. 1-6. Regardless, Appellant testified to her belief that the information she provided in the written statement after the polygraph was substantially the same information she had previously

[5] Statements made during the actual polygraph were deemed inadmissible at the contested case hearing and are not part of the record in this case.

provided about Albany trying to perform oral sex on her. R. 375, ll. 23-25, R. 376, ll. 1-23, R. 377, ll. 11-14. She also testified that she was not trying to mislead the Department, to hide anything or to provide any incorrect information. R. 376, ll. 24-25, R. 377, ll. 1-4. There is no evidence in the record, whether cited by the ALC or otherwise, to refute that testimony or to show that Appellant intentionally and/or consciously in answering those questions as required to demonstrate willfulness.

The whole record in this matter establishes nothing more than the following: (1) Appellant's memory of an incident more than three and a half years prior was not good, (2) Appellant was highly emotional and laboring under the effects of PTSD, for which she was being medicated, at the time of the polygraph and after being driven there by two individuals of whom she was afraid, and (3) Appellant answered different questions based upon her understanding of what was being asked of her at different times, by different people, using different language. There is absolutely nothing in the record to establish that Appellant acted intentionally in not providing complete and accurate information in response to the different questions asked her by Respondent. In fact, and as expressly acknowledged by the ALC, there was no reason for her to be untruthful given that the 2015 incident she was questioned about in 2018 was not a violation of any policy, was not considered misconduct, and did not warrant disciplinary action[6]. R. 250, ll. 16-25, R. 271, ll. 19-24, R. 274, l. 25, and R. 275, ll. 1-2.

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[6] The fact that Respondent was even investigating Appellant for a matter that was, admittedly, not a violation of any of Respondent's policies and was not considered misconduct calls into serious question the reason Respondent undertook its investigation, especially in light of the fact that Respondent admits that the investigation began at the request of Appellant's AIC, the same who was forced to hire Appellant after her successful EEOC charge against Respondent in 2012, mere days after Appellant filed a complaint with Respondent about her AIC engaging in harassment and other discriminatory conduct. Such retaliatory motivation is a key topic of a discrimination and retaliation action Appellant has against Respondent that is currently pending in the United States District Court for the District of South Carolina – 6:20-cv-00655-HMH-JDA.

Notably, even the ALC acknowledges that Respondent's hearing officer found that "(n)o evidence...appears to support that (Appellant) entertained any 'conscious wrong or evil purpose.'" R. 166. Instead, the hearing officer's findings state that, while Appellant's allegedly "incomplete or incorrect statements could have come about as a result of Appellant's 'inexcusable carelessness,'" any such statements were "more likely, due to her medical afflictions and medication usage during the course of the investigation." R. 166. Regardless, neither "carelessness" nor involuntary action occasioned by "medical afflictions and medication usage" meets the requirement of showing conscious or intentional action by Appellant as required to establish the willful misconduct alleged. This is especially true in light of the fact that no evidence, let alone substantial evidence, was cited by the ALC as demonstrating that Appellant had acted consciously and/or intentionally. *See Houston v. Deloach & Deloach*, 378 S.C. at 551, 663 S.E.2d at 89 (Ct. App. 2008) (in order for agency finding to be upheld as supported by substantial evidence, it "may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance.") Since willfulness is a required element of the misconduct alleged and there is no "evidence of sufficient substance" in the record to support Respondent's final decision, the ALC's affirmation thereof is clear error.

C. Respondent's final decision fails to give deference to its fact-finder's factual findings and/or to even address its basis for doing so.

Appellant also contends it was additional error for the ALC to affirm Respondent's final decision as supported by substantial evidence because the final decision failed to address either (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[7].

[7] While the ALC contends that this argument was not properly raised in Appellant's initial brief, Appellant did make the argument to the ALC both implicitly in its initial brief to the ALC and more explicitly in its reply brief to the ALC. *See State v. Dunbar*, 356 S.C 138, 587 S.E.2d 691

The findings of an agency's hearing officer are entitled to deference and an agency's failure to give such deference is clear error. *See Barr's Next of Kin v. Cherokee, Inc.*, 220 S.C. 447, 68 S.E.2d 440 (1951) (holding it was error to disregard and not give deference to factual findings of agency's hearing officer); *see also Baylor v. Bath*, 189 S.C. 269, 279, 1 S.E.2d 139, 143 (1938) (explaining deference should be given to agency officer who heard actual testimony and evidence from witnesses). It is also error for an agency to not articulate the reason for not deferring to its fact-finder, an error that prevents a court from finding that the agency's decision was based on substantial evidence. *See Pack v. S.C. DOT,* 381 S.C. 526, 673 S.E.2d 461 (2009) (noting that where agency fails to explain disagreement with its fact-finder, agency leaves no way for reviewing court to evaluate reasoning and determine if agency's decision is supported by substantial evidence). Despite the ALC's statement otherwise, Respondent's hearing officer, who heard the actual testimony and evidence presented at the contested case hearing, was Respondent's fact-finder. Accordingly, and 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. Based thereon, there was insufficient basis for the ALC to determine that Respondent's final decision, insofar as it found that Appellant had engaged in willful misconduct, is supported by substantial evidence.

II. The ALC erred in finding that the Agency's final decision did not rely on the incorrect standard of "willful conduct."

The ALC also erred in finding that Respondent's final decision was not based on error of law due to application of the wrong legal standard for willfulness. In connection therewith, the ALC acknowledges both the correct standard for proving willful conduct and the fact that

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(2003) (explaining that party need not use exact name of doctrine in order to preserve it for appeal). The ALC then made a substantive ruling thereon. Accordingly, Appellant contends that issue is ripe for appeal in the in this matter. *Id.*

Respondent's fact-finder specifically found no evidence of conduct rising to the level of willfulness thereunder. Notwithstanding, the ALC discounted the erroneous standard utilized by the hearing officer, ignored the fact that Respondent's final decision contained no analysis of willfulness and discounted the noted lack of evidence of willful conduct in the record. In so doing, the ALC held that Respondent "implicitly found Appellant has willfully made false, misleading and/or incorrect statements" to the Department. R. 13. However, and even if Respondent did not rely on the erroneous standard for willfulness applied by its hearing officer, such unexplained, "implicit" finding by Respondent is insufficient as a matter of law and requires reversal.

A. Respondent relied on the incorrect standard for willfulness.

Appellant contends that Respondent's final decision erroneously relied on the improper standard of what qualifies as "willful" conduct under South Carolina law. This error most certainly resulted in prejudice to Appellant given the fact that a finding of willfulness on the part of Appellant was essential to a finding that Appellant engaged in the misconduct alleged, S.C. Code Ann. § 23-23-150(A)(3)(g). *See* S.C. Code Ann. § 23-23-150(A)(3)(g) (defining as misconduct "willfully making false, misleading, incomplete, deceitful, or incorrect statements to a law enforcement officer, a law enforcement agency, or a representative of the agency…").

In its final decision, Respondent adopted the factual findings set forth in its hearing officer's Findings and Recommendations, the same findings the hearing officer noted did not support a finding of any voluntary or intentional conduct on the part of Appellant. In those findings, the hearing officer defined "willful" conduct as that which "involves conscious wrong or evil purpose on the part of the wrongdoer…or at least inexcusable carelessness." R. 163. However, and as noted above, South Carolina law actually requires conduct that goes beyond

"inexcusable carelessness" and, instead, requires a knowing and intentional action that includes "a showing of a consciousness of wrongdoing in order to prove willfulness." *State v. Garrard*, 390 S.C. 146, 149, 700 S.E.2d 269, 271 (Ct. App. 2010). More specifically, this Court has defined the term "willful" as conduct "proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary." *Id.* at 149-150 (emphasis added), *quoting Black's Law Dictionary* 1434 (5th edition 1979). This requires evidence that an individual acted "voluntarily and intentionally" and not just by way of carelessness. *Id.* at 151.

Respondent's hearing officer, based on the factual findings adopted by Respondent, specifically found that "(n)o evidence adduced at the hearing...appears to support that Cosby entertained any 'conscious wrong or evil purpose.'" R. 166. The hearing officer also found that Appellant's allegedly "incomplete or incorrect statements could have come about as a result of Appellant's 'inexcusable carelessness,'" but were "more likely, due to her medical afflictions and medication usage during the course of the investigation." R. 166. 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 specifically found no evidence of any intentional or conscious action by Appellant. Its finding of misconduct then leads to only one conclusion - that Respondent applied the wrong standard for willfulness, which error resulted in substantial prejudice to the Appellant, including a finding that she had engaged in the certification misconduct alleged.

B. Respondent failed to articulate any standard of willfulness or analysis thereunder.

Rather than acknowledging and appropriately finding that Respondent applied the wrong standard for willfulness, the ALC notes that the incorrect standard for willfulness discussed in

the hearing officer's analysis was not expressly adopted by Respondent and/or discussed in Respondent's final decision. R. 26. Based thereon, the ALC asserts that Respondent did not apply the wrongful standard and, instead, "implicitly found that Appellant had willfully made false, misleading, and/or incorrect statements" to Respondent. R. 27. However, such an "implicit" finding, without appropriate analysis of the facts under the correct legal standard, is insufficient as a matter of law for the ALC to have found that Respondent's final decision was based on substantial evidence. *See Pack v. S.C. DOT,* 381 S.C. 526, 673 S.E.2d 461 (2009), *supra.* As noted above, willfulness is a required element of the misconduct alleged – that Appellant willfully provided incorrect and/or incomplete statements. Regardless, Respondent's final decision includes absolutely no discussion at all as to what standard Respondent applied in determining that Appellant engaged in the misconduct alleged and why it determined that the hearing officer's factual findings supported a finding of willfulness under that standard.

It is well settled that "the findings of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Porter v. Labor Depot*, 372 S.C. 560, 568-569, 643 S.E.2d 96, 101 (Ct. App. 2007) (emphasis added), *quoting Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of S.C.,* 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998). As noted above, Respondent's final decision fails to articulate what standard it applied for willfulness and how it analyzed the factual findings thereunder. That failure made it impossible for the ALC to determine whether Respondent applied the correct legal standard for willfulness and whether Respondent analyzed the evidence in the record under the correct legal standard. That failure was clear error that should have prevented the ALC from finding that Respondent's decision was supported by substantial evidence and mandates reversal.

III. The ALC erred in finding that the Respondent's final decision was neither arbitrary and capricious nor an abuse of discretion.

Finally, Appellant contends it was error for the ALC to find that Respondent's final decision was neither arbitrary and capricious nor an abuse of discretion. The ALC 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. The ALC also found that the LETC and not Respondent's hearing officer was Respondent's fact-finder, which Appellant asserts is clear error as the hearing officer was the fact-finder, his findings were entitled to deference, and, as noted above, Respondent failed to articulate any reason for not giving deference to its fact-finder or for imposing the harshest sanction it could. Such failures should have prevented the ALC from finding that Respondent's final decision was supported by substantial evidence and from determining that the final decision was neither arbitrary and capricious nor an abuse of discretion.

A. Respondent's final decision was arbitrary and capricious, as well as an unwarranted exercise of discretion, because it was not supported by the adopted factual findings of its fact-finder.

Appellant contends that Respondent's final decision was both arbitrary and capricious and an abuse and/or unwarranted exercise of discretion given that Respondent adopted all factual findings of its hearing officer, but failed to adopt his recommendations regarding dispensation of the case based on his factual findings. Specifically, the hearing officer found the existence of various mitigating facts and recommended consideration of those mitigating factors, including the remoteness in time of the underlying incident, Appellant's PTSD for which she was medicated and the fact that the underlying behavior for which Appellant was investigated did not

involve any misconduct. Based thereon, the hearing officer recommended that Appellant be granted eligibility for certification with probation or with any requirements Respondent deemed appropriate. Regardless, Respondent, while adopting all of the hearing officer's factual findings, rejected the recommended disposition, refused to consider the mitigating factors found to exist and, without providing any reason therefore, voted to permanently deny Appellant certification.

An abuse of discretion "occurs when a decision is based on 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 such that it may be deemed arbitrary and capricious." *Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 5, 630 S.E.2d 464, 467 (2006); *see also State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). A decision is arbitrary or capricious when no rational basis for the conclusion exists, when it is based on one's will and not upon any course of reasoning or exercise of judgment. *See Converse Power Corp. v. S.C. Dept. of Health and Envtl. Control*, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002); *Deese v. S.C. Bd. Of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985). Non-uniform, inconsistent, or selective application of authority can indicate arbitrariness. *See Mungo v. Smith*, 289 S.C. 560, 571, 347 S.E.2d 514, 521 (Ct. App. 1986).

Respondent's final decision is and should have been found by the ALC to be an abuse and/or unwarranted exercise of discretion for multiple reasons. First, and as discussed above, the final decision is based on the adoption of factual findings that apply an erroneous legal standard for "willfulness," a key issue in determining that Appellant engaged in the misconduct alleged. Second, and as also discussed above, the final decision is without sufficient evidentiary support.

Beyond the fact that there is not substantial evidence to establish the misconduct alleged, Respondent's fact-finder acknowledged there is no evidence Appellant acted willfully in making any incomplete and/or incorrect statements. Finally, the final decision fails to explain why Respondent accepted the hearing officer's factual findings, but not the recommended disposition based thereon. Although Respondent's fact-finder articulated several factors that should be considered in determining a final disposition, Respondent articulated no basis for its failure to consider the factors or its decision to permanently deny certification to Appellant. Its complete failure to address those issues made it impossible for the ALC to determine whether Respondent's disposition, i.e. permanent denial of law enforcement certification, was supported by substantial evidence. *See Houston v. Deloach & Deloach*, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008) (agency's "finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it); *see also Porter v. Labor Depot*, 372 S.C. 560, 643 S.E.2d 96 (Ct. App. 2007).

Likewise, the ALC should have found Respondent's final decision to be arbitrary and capricious for multiple reasons. First, there appears to be no rational basis for Respondent's decision to find that Appellant engaged in the misconduct alleged or to permanently deny certification to Appellant, especially in light of the hearing officer's acknowledgement of the absence of evidence of any willful conduct by Appellant. Further, Respondent articulated absolutely no basis for taking the harshest action it could against Appellant, even where its fact-finder noted the lack of evidence of willfulness and the presence of various mitigating factors, which Respondent failed to even address[8], either at the meeting where it voted on its final decision or in the written decision issued thereafter. The applicable regulations provide that "(i)n

[8] Respondent did not discuss and made no mention of the mitigating factors and/or its reasons for not considering same prior to voting to permanently deny certification to Appellant. Such discussion and/or analysis is also not present in Respondent's written decision.

considering whether to deny certification based on misconduct, the [Academy] may consider the seriousness, the remoteness in time and any mitigating circumstance surrounding the act of the omission constituting or alleged to constitute misconduct." S.C. Reg. 37- (B). While Appellant concedes, as noted by the ALC, that Respondent was not required to consider mitigating circumstances, the fact that they were found to exist by Respondent's fact-finder and then discarded without explanation seems to support the arbitrary and capricious nature of Respondent's final decision in taking the harshest action it could against Appellant without articulating any rational basis therefore.

B. Respondent's final decision failed to articulate any reason for not considering the mitigating factors found by its fact-finder and for imposing the harshest penalty available, especially in light of its fact-finder's recommendations.

The ALC further erred in affirming Respondent's final decision, which fails to explain either its rationale for imposing the harshest sanction available or its reason for not giving deference to its hearing officer's findings regarding mitigating factors that should be considered.

An administrative agency's discretion is not unfettered. Rather, an abuse of discretion "occurs when a decision is based on 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 such that it may be deemed arbitrary and capricious." *Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 5, 630 S.E.2d 464, 467 (2006). Further, the deferential standard of review of administrative decisions does not mean that the Court must accept an administrative agency's decision at face value without requiring the agency to explain its reasoning. *See Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C 12, 507 S.E.2d 328 (1998). Rather, and as noted above,

administrative agencies "must make findings which are sufficiently detailed to enable the court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Id. at* 21; *see also Porter v. Labor Depot*, 372 S.C. 560, 568-569, 643 S.E.2d 96, 101 (Ct. App. 2007) (emphasis added), *quoting Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of S.C.,* 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998).

Respondent's final decision is arbitrary and capricious, as well as an abuse of discretion, because it provides no articulated basis for why Respondent imposed the harshest sanction it could. This failure made it impossible for the ALC to determine that Respondent had a legally supported rationale for imposing that sanction under the facts in this case. This failure is especially glaring in light of the fact that Respondent's hearing officer (1) found no evidence of willful conduct by Appellant, (2) found the existence of multiple mitigating factors, including Appellant's medical conditions, the remoteness in time of the incident she was questioned about and the fact that she noted she did not have a good memory and (3) recommended that Appellant be granted recertification based on the evidence and his findings. While Respondent was not required to follow the recommendations of its hearing officer, its abject failure to articulate any reason for exercising its discretion in applying the harshest sanction available, especially in light of the recommendations of its fact-finder, should have prevented the ALC from finding that Respondent's decision was an appropriate use of discretion based on the applicable law and facts. *See Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C 12, 507 S.E.2d 328 (1998).

Beyond its failure to articulate a rational basis for imposing the harshest sanction it could, especially in light of its hearing officer's findings and recommendations, Respondent also erred by failing to articulate why it completely disregarded its hearing officer's recommendations, both as to the presence and consideration of mitigating factors and that Appellant be granted

recertification. As noted above, agency fact-finders, such as Respondent's Hearing Officer, are entitled to deference. *See Barr's Next of Kin v. Cherokee, Inc.*, 220 S.C. 447, 68 S.E.2d 440 (1951); *see also Baylor v. Bath*, 189 S.C. 269, 1 S.E.2d 139 (1938) (explaining that deference should be given to hearing officer). While such deference is not absolute, where an administrative agency fails to explain why it disagrees with its fact-finder's findings and conclusions, the agency leaves no way for a reviewing court to evaluate the reasoning behind its decision and to determine whether or not the decision is supported by the substantial evidence. *See Pack v. S.C. DOT,* 381 S.C. 526, 673 S.E.2d 461 (2009). As noted above, Respondent failed to articulate why it did not defer to its fact-finder, both in regard to factual findings and recommended disposition, which failure is reversible error, supports a finding of Respondent's decision as arbitrary and capricious, and should have prevented the ALC from finding that Respondent's final decision is supported by substantial evidence.

CONCLUSION

For all of the reasons set forth above, Appellant respectfully requests that this Court grant Appellant's appeal and reverse the administrative law court's Order affirming Respondent's October 11, 2019 decision to permanently deny Appellant's law enforcement certification.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Administrative Law Judge

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Appellate Case No.: 2020-00849

Kristin Cosby

Appellant,

v.

South Carolina Criminal Justice Academy

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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November 25, 2020