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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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Appellate Case No.: 2020-00849

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Kristin Cosby,

*Appellant*

v.

South Carolina Criminal Justice Academy,

*Respondent*

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# FINAL REPLY BRIEF OF APPELLANT

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## FINAL REPLY BRIEF OF APPELLANT

## REPLY ARGUMENT

Appellant hereby responds to the arguments set forth in Respondent's initial brief as follows and would argue that for the reasons set forth herein, as well as those set forth more fully in Appellant's initial brief, the Court should grant Appellant's appeal and reverse the administrative law court's Order affirming Respondent's October 11, 2019 decision to permanently deny law enforcement certification to Appellant.

### I. There is No Evidence, Let Alone Substantial Evidence, That Appellant Made Incorrect or Incomplete Statements or That She Did So Intentionally.

Respondent first argues that the ALC correctly found that the Agency's final decision was supported by substantial evidence. In support thereof that argument, Respondent details the different answers Appellant provided in response to the different questions she was asked by the South Carolina Department of Probation, Parole and Pardon Services ("the Department"), claiming without support or reason, that each such answer was "incorrect and/or incomplete" and arguing that the answers Appellant provided to the different questions demonstrate that "(o)vertime, Appellant's story began to change." Respondent also makes various representations regarding the evidence and testimony in the record, arguing same as further "substantial evidence" to support its final decision. Those arguments are unavailing for multiple reasons.

As a first matter, and in support of its narrative about the "evolution of Appellant's story regarding her conduct with a subordinate," Respondent details the specific and different answers Appellant provided to the Department in response to the <u>different questions</u> she was asked in the course of the Department's investigation and claims that each such answer was "incorrect or incomplete" for various reasons. Notably, however, Respondent cites to no substantial evidence to demonstrate that each such cited response was incorrect or incomplete and/or how each such cited response was allegedly incorrect or incomplete. By way of example, Respondent cites to

the fact that Appellant answered "no" when asked whether she "had a sexual relationship with a subordinate" and claims that said answer was "incorrect or incomplete" without citing to any specific evidence in the record, let alone substantial evidence, to demonstrate either that (1) Appellant had a sexual relationship with a subordinate or (2) her understanding of the question she was being asked[1] was unreasonable such that her answer was either incorrect or incomplete. That same failure is evident in regard to each and every answer that Respondent argues were "incorrect or incomplete."

Instead of citing to specific evidence that Appellant's various responses were incorrect and/or incomplete, Respondent appears to rely on the fact that Appellant provided different answers to different questions to support its claim that Respondent intentionally changed her story about the May 2015 incident. However, and as argued in Appellant's initial brief, the fact that Appellant provided different answers to different questions asked of her over time does not provide substantial evidence that her answers were incorrect or incomplete, especially in light of the fact that all of those answers were consistent with the account she provided to the Department after the polygraph. While Respondent discounts the specific wording used by the Department in the questions asked on Appellant, Respondent apparently believes it is appropriate to parse the exact wording used by Appellant in the answers and the written statement she provided to the Department as evidence that she engaged in the misconduct alleged. Regardless, wording of the questions asked on Appellant matter just as much as the wording of her response.

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[1] As previously noted in Appellant's initial brief, Appellant answered "no" when asked if she had a sexual relationship with a subordinate because she had no such relationship with a subordinate. R. 392, ll. 6-12, R. 368, ll.6-18, R. 376, ll. 3-14, R. 392, ll. 10-23. Likewise, Appellant answered "no" when asked if she engaged in sexual conduct with a subordinate, believing she was being asked is she affirmatively engaged in sexual activity with the subordinate, which she had not. R. 297, ll. 7-9 and R. 390 ll. 8-17.

The record also does not support Respondent's narrative that Appellant's "story" changed over time and that Appellant was only truthful following her December polygraph. Rather, and as previously detailed in Appellant's initial brief, the substantial evidence in the record demonstrates that Appellant actually reported the incident detailed in the written statement she provided after the polygraph to the Department on multiple occasions prior to the polygraph. Specifically, the evidence demonstrates that Appellant reported the incident to her previous AIC in May of 2015 and again to Agent Harmon in December of 2018 when she affirmatively advised Agent Harmon that the subordinate at issue had attempted to perform oral sex on her at a party in May of 2015, specifically noting that "oral sex didn't happen but she tried.[2]" R. 256, ll.13-24, R. 257, ll.1-11, R. 368, ll.6-18, R. 376, ll. 3-14, and R. 392, ll. 10-23. That disclosure is contained on an audio recording that was presented at the contested case hearing and is part of the record. *Id.* This substantial evidence 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 incident on three separate occasions.

Respondent also makes gross mischaracterizations of the testimony and other evidence in the record, both in its Statement of Facts and Argument, in support of its argument that the ALC properly found that Respondent's final decision is supported by substantial evidence. Specifically, Respondent claims that, following the polygraph in December of 2018, Appellant admitted that she personally engaged in sexual activity with the subordinate. Any such statement is false and misleading as Appellant never admitted to engaging in any affirmative sexual contact with the subordinate – Appellant only admitted that the subordinate had engaged in sexual contact aimed at Appellant without acknowledging any participation or affirmative action on the

[2] The audio recording, which proves Appellant's disclosure of the May 2015 incident prior to the polygraph, is not acknowledged in either Respondent's final decision or the ALC's Order.

part of Appellant. R. 256, ll.13-24, R. 257, ll.1-11, R. 368, ll.6-18, R. 376, ll. 3-14, and R. 392, ll. 10-23. Likewise, Respondent claims that Appellant admitted to having engaged in a sexual relationship with the subordinate. That statement is also false - Appellant never admitted to any such relationship because she never had any such relationship and, as is noted in the record, expressly denied having any such relationship. R. 368, ll.6-18, R. 376, ll. 3-14, R. 392, ll. 10-23. The only thing Appellant admitted was that the subordinate had attempted to engage in sexual contact directed at Appellant during one isolated incident in 2015, which admission is consistent with all statements Appellant provided to the Department. R. 256, ll.13-24, R. 257, ll.1-11, R. 368, ll.6-18, R. 376, ll. 3-14, and R. 392, ll. 10-23.

In a further misleading attempt at supporting its narrative of Appellant's allegedly "evolving" story, Respondent further claims that Appellant "never provided the full story until the very end." However, what Respondent fails to acknowledge is that the Department never asked Appellant for the "full story" until after her polygraph. In specific regard thereto, the testimony in the record from the Department's own representatives evidences the fact that, prior to the polygraph, Appellant was asked only limited and closed questions about whether or not she had a sexual relationship with a subordinate and whether she engaged in sexual conduct with the subordinate, questions she answered truthfully. R. 392, ll. 6-12 and R. 297, ll. 7-9. The first time Appellant was asked to provide a "full story" was when she was asked to provide the written statement after the polygraph about what happened during the May 2015 off-duty incident. Having provided that statement as requested for the first time does not prove that Appellant was "changing her story" or that her previous responses to close-ended questions asked of her by the Department were incorrect or incomplete. The only thing that "evolved"

over time was the Department's questions, each of which Appellant answered truthfully and based on her understanding of what she was being asked.

Finally, and despite Respondent's unsupported argument to the contrary, Respondent fails to point to any evidence, let alone substantial evidence in the record, to demonstrate that even if Appellant provided incorrect or incomplete information to the Department, which Appellant strongly denies, she did so willfully. Instead, Respondent relies solely upon the same arguments it puts forth about why the evidence allegedly supports a finding that Appellant provided incorrect and/or incomplete information to the Department. Those arguments fail for the same reasons set forth above. Additionally, Respondent cites to no evidence in the record to support that Appellant's understanding of the questions she was being asked was unreasonable or that she acted "voluntarily and intentionally" in providing the allegedly incorrect and/or incomplete answers to the Department as required to prove that she did so willfully. *See State v. Garrard*, 390 S.C. 146, 151, 700 S.E.2d 269, 271 (Ct. App. 2010) (noting that finding of willfulness requires evidence that individual acted "voluntarily and intentionally").

## II. The Agency's Decision Failed to Articulate Any Standard of Willfulness or Explain its Finding of Willfulness Thereunder.

Respondent next argues that the ALC correctly found that Respondent's final decision was not based on application of the incorrect standard of "willfulness," a required element of the specific misconduct alleged against Appellant – that she "willfully made false, misleading, incomplete, deceitful, or incorrect statements to a law enforcement officer, a law enforcement agency, or a representative of the agency." *See* S.C. Code Ann. § 23-23-150(A)(3)(g). In specific regard thereto, Respondent argues that (1) "the hearing officer never made a finding regarding willfulness," (2) Respondent was not required to consider or adopt the hearing

officer's recommendation, and (3) Respondent "implicitly applied the appropriate standard for willfulness in its Final Agency Decision." Those arguments fail for various reasons.

First, and despite Respondent's attempt at distinguishing between the hearing officer's "Analysis" and his "Recommended" conclusions, the hearing officer's findings expressly acknowledge the lack of any evidence, let alone substantial evidence, of any willful conduct on the part of Appellant. In his findings of fact, which Respondent admits to having adopted, the hearing officer noted that he did not support a finding of any voluntary or intentional conduct by Appellant, stating unequivocally that "(n)o evidence adduced at the hearing…appears to support that Cosby entertained any 'conscious wrong or evil purpose.'" R. 166. He 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 facts it adopted, it would have been forced to find that Appellant had not engaged in any "willful" conduct since the factual findings expressly acknowledge the lack of evidence of any intentional or conscious conduct by Appellant. *See State v. Garrard*, 390 S.C. 146, 149, 700 S.E.2d 269, 271 (Ct. App. 2010) (noting that willfulness requires knowing, intentional or voluntary action that includes "a showing of a consciousness of wrongdoing"). Respondent's finding otherwise leads to the conclusion that it either arbitrarily and capriciously chose to ignore the substantial evidence or applied the wrong standard for willfulness.

Second, and even if Respondent had total discretion and was not required to defer to the hearing officer's findings, which Appellant denies for those reasons set forth in her initial brief, Respondent still erroneously failed to explain or discuss its basis, both legal and factual, for

finding that Appellant engaged in willful conduct. Respondent attempts to overcome that failure by stating only generally, and without pointing to any specific evidence, that "(a) reading of the record establishes that LETC made a finding that Appellant's (conduct was)...intentional, therefore willful." Regardless, the fact that any such discussion is completely missing from the final decision should have prevented the ALC from finding both (1) that Respondent's finding of willful misconduct on the part of Appellant was supported by substantial evidence or (2) that Respondent applied the proper legal standard for willfulness to the evidence in the record. *See Porter v. Labor Depot*, 372 S.C. 560, 568-569, 643 S.E.2d 96, 101 (Ct. App. 2007) ("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"), *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).

Finally, and in a further attempt at overcoming its failure to explain its finding of willfulness and what standard it applied in making that finding, Respondent argues that it "implicitly applied the appropriate standard for willfulness in its Final Agency Decision." However, such an "implicit" finding, without any explicit 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 Porter v. Labor Depot*, 372 S.C. 560, 568-569, 643 S.E.2d 96, 101 (Ct. App. 2007), *supra; see also Pack v. S.C. DOT,* 381 S.C. 526, 673 S.E.2d 461 (2009) (where agency fails to explain basis for its decision, agency leaves no way for reviewing court to evaluate reasoning and determine if agency's decision is supported by substantial evidence). Since willfulness is a required element of the misconduct alleged and Respondent's final decision includes no explicit discussion of what standard therefore it applied

in determining that Appellant engaged in the alleged misconduct, it was reversible error for the ALC to determine that Respondent applied the correct legal standard for willfulness or that Respondent "implicitly" analyzed the evidence in the record under the correct legal standard.

### III. The Final Decision Failed to Articulate Any Reason for its Disposition or Respondent's Refusal to Consider Mitigating Factors.

Finally, Respondent argues that its final decision was neither arbitrary and capricious nor an abuse of discretion because Respondent, not its hearing officer, was the fact-finder and because the applicable regulations, S.C. Code Ann. Regs. 37-108(A)(1) (2015) and S.C. Code Ann. Regs. 37-025(B), grant discretion to Respondent to decide whether or not to consider any mitigating circumstances and to determine which sanctions, including permanent denial of law enforcement certification, to impose on an individual found to have committed misconduct. Based thereon, Respondent, who refused to consider any mitigating factors found to be present and imposed the harshest sanction available, argues that it was not required to consider the mitigating factors found by its hearing officer or to follow the hearing officer's recommended disposition. Accordingly, Respondent argues that it's final decision was neither arbitrary and capricious, nor an abuse of discretion. That argument is also unavailing.

First, and despite Respondent's argument to the contrary, Appellant contends that the hearing officer is, in fact, the fact-finder. South Carolina courts have specifically recognized that an agency officer who conducted the agency hearing and personally heard actual testimony and evidence thereat is an agency fact-finder. *See Baylor v. Bath*, 189 S.C. 269, 279, 1 S.E.2d 139, 143 (1938) (explaining that deference should be given to agency officer who heard actual testimony and evidence from witnesses). Accordingly, 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). In the instant action, and as argued more fully in Appellant's Initial Brief, Respondent's hearing officer was the fact-finder and his findings and recommendations were entitled to deference. Respondent's failure, both to provide such deference and to articulate any basis for not showing such deference, prevents a court from finding that its final decision was based on substantial evidence. *See Pack v. S.C. DOT,* 381 S.C. 526, 673 S.E.2d 461 (2009) (agency who fails to explain disagreement with fact-finder leaves no way for reviewing court to evaluate reasoning and determine if its decision is supported by substantial evidence).

Notwithstanding, and even to the extent Respondent and not its hearing officer is deemed to be the fact-finder, Respondent still cannot overcome the fact that its final decision failed to provide any stated rationale for its decision. Specifically, Respondent refused to consider the mitigating factors found to exist[3] and then imposed the harshest sanction it could without articulating any basis whatsoever for either. R. 490-491. An administrative agency who fails to explain its ultimate findings leaves no way for a reviewing court to evaluate the decision and determine whether or not it is supported by substantial evidence. *See Pack v. S.C. DOT,* 381 S.C. 526, 673 S.E.2d 461 (2009). In the instant action, Respondent's failure to provide any reason for refusing to consider the mitigating factors it found to exist or for imposing the harshest sanction available issues made it impossible for the ALC to determine that Respondent's decision, 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

[3] While Respondent argues in its initial brief that "there are no mitigating circumstances present in this case," any such argument is contrary to its adoption of its hearing officer's factual findings, which include express findings regarding the existence of multiple mitigating factors. R. 167-168.

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). That failure, which evidences the very arbitrary and capricious nature of the final decision, is reversible error.

Finally, and while Respondent argues that its final decision "provided reason for its decision to deviate from the hearing officer's Recommendation," Respondent points to no such articulated rationale. Rather, Respondent cites solely to the statement included in the final decision that it was based "on the Hearing Officer's Recommendation, Hearing Transcripts, Hearing Exhibits, motions and oral arguments." Any such statement alone, however, is insufficient for a reviewing court to determine the basis for Respondent's final decision. Additionally, and to the extent Respondent argues that its final decision was based on "the Hearing Officer's Recommendation," the hearing officer specifically recommended Respondent consider the existing mitigating factors found and grant law enforcement certification. R. 167-168. Accordingly, Respondent's reliance thereon does not support its final decision, again fails to provide a reviewing court with any basis for its final decision and highlights the arbitrary and capricious nature of the final decision.

## CONCLUSION

For all of the reasons set forth above, as well as those already set forth more fully in Appellant's initial brief, Appellant respectfully requests that this Court reverse the decision of the South Carolina Criminal Justice Academy and/or remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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