THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM
THE ADMINISTRATIVE LAW COURT
HON. JOHN D. MCLEOD, PRESIDING JUDGE

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SC Court of Appeals

2016-000785

South Carolina Department of Public Safety.....Respondent

v.

Robert W. Batchelor.....Appellant.

INITIAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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III. **WAS THE COMMITTEE'S DECISION IRREPARABLY TAINTED BY ITS RECEPTION AND KNOWLEDGE OF THE INADMISSIBLE RESULTS OF THE OFFICER'S POLYGRAPH TEST?**

STATEMENT OF THE CASE

Appellant, Robert W. Batchelor, was terminated from his employment with the South Carolina Highway Patrol (hereinafter "SCHP") effective 02/23/2015. Appellant begain his employment with SCHP on 01/06/2006.

On 02/19/2015 Appellant was notified of a single car collision in Horry County by SCHP Dispatch. When Appellant arrived at the scene of the single car collision, two local fire fighters informed him that they could not locate the driver of the vehicle. Appellant then conducted a search of the abandoned vehicle and determined that there was no blood

or bodily fluids visible inside the vehicle. Appellant then conducted a search of the immediate area around the vehicle and a flashlight search of the nearby tree lines, but did not locate the driver.

Appellant contacted SCHP and provided the vehicle license information to identify the vehicle owner for the collision reports and Dispatch advised Appellant of the owner's name, specifically one Ms. Stephanie Callahan.

While completing the collision report, Appellant overheard a radio communication from TFC C.F. Colbert advising Dispatch that he would be out of his patrol car at the Loris Hospital. Appellant then, by radio, asked TFC Colbert to check the hospital for the owner of the vehicle, Ms. Callahan, and TFC informed Appellant, after checking, there was no record of a Ms. Callahan at the Loris Hospital. After receiving this information Appellant completed the collision report, had a tow truck secure Ms. Callhan's vehicle, and cleared from the collision scene.

On or about 02/22/2015 Appellant's supervisor, 1st Sgt. C.D. Causey (hereinafter "Causey") was informed by the Horry County Sheriff's Office(hereinafter "HCSO") that Ms. Callahan's body was discovered inside of a deer stand in a wooded area approximately one third to one half a mile from the scene of the collision. After receiving this information, Causey contacted the Appellant by phone to discuss the details of the investigation of the collision. Following this discussion, Causey instructed Sgt. R.D. Trevathian (hereinafter "Trevathian") to assist the HCSO with its investigation following the discovery of Ms. Callahan's body in a tree stand approximately one-third to one-half mile away from the vehicle. Causey informed Trevathian that during a previous conversation that Appellant had

checked the local hospital and, from his recollection of the conversation, that Appellant had likewise checked Ms. Callahan's residence. Both these efforts he believed to be unsuccessful.

Upon arriving at the scene where Ms. Callahan's body was found, Trevathian spoke with Ms. Callahan's mother and offered condolences on behalf of the SCHP. Ms. Callahan's mother asked why no-one from the SCHP had come to the Callahan residence on 02/19/2015 to notify her of the collision. Trevathian informed Ms. Callahan's mother that he had been advised the Appellant had traveled to the residence as part of the investigation, Ms. Callahan's mother stated she had been at the residence the entire evening on 02/19/2015 with the grandchildren and no officer came by the house. Trevathian passed this conversation on to Causey which then became the subject of this investigation.

On 02/23/2015 Causey held a meeting with Trevathian's Corporal, C.F. Costa (hereinafter "Costa"), and had Appellant to clarify what occurred during Appellant's investigation. During this meeting, Causey received the written statement from Appellant outlining the events of the collision investigation. After reviewing the written statement, Causey asked Appellant why he did not indicate that he had visited Ms. Callahan's residence and Appellant replied that he did not visit Ms. Callahan's residence. Causey then asked Appellant why, during their phone conversation on 02/22/2015, had Appellant advised him that both the local hospital and Callahan's residence were checked during the collision investigation. Appellant denied making that statement to Causey during the phone conversation. There was no recording of the phone conversation and no other party privy to that conversation.

Appellant was suspended without pay on 02/23/2015 pending the outcome of internal investigations conducted by SCDPS Office of Professional Responsibility (hereinafter "OPR").

On 02/25/2015 Corporal H.M. Morrell (hereinafter "Morrell"), a Certified Polygrapher with SCDPS met with Appellant and performed a polygraph examination at the request of OPR. During this examination, Morrell determined that Appellant was untruthful in his responses. The responses were incorporated and part of the finding of the Committee (ROA 4-5). Further, the report went on to specify in detail on page 3 (ROA 5) of its finding that Appellant was untruthful in the responses.

On or about 03/03/2015 Appellant was notified that he was terminated from SCDPS effective 02/23/2015 for a violation of SCDPS Policy 400.08 *Disciplinary Action* and 400.08(g) *Negligence in performance of duties* and for *Failure to provide truthful and complete information.* The letter of termination further found that Appellant was misleading and untruthful with Causey during the telephone conversation of 02/22/2015 when he was questioned as to whether he had checked the residence of the driver.

The conclusion of the Committee on (ROA 8) found that Causey's statements were consistent and credible and the Committee found that Appellant committed the offense of failure to provide truthful and complete information. It further found that, while SCDPS provided the Committee result of a polygraph, the Committee "did not consider these results in making their determination," regardless, the offense of *failure to provide truthful and complete information.*

It is this determination made by the Committee that is being challenged in this appeal

before this Administrative Court. The blanket statement made by the Committee and signed by Justin Hancock on 10/13/2015 that the Committee did not consider these results in making their determination is contrary to common sense as well as the wording of the determination itself.

The determination issued by the Committee specifically references and goes into extraordinary detail as to the polygraph and the test as it was run by SCDPS, specifically Morrell. Beginning on page 2 (ROA 4) extending into page 3 (ROA 5) in the paragraphs 15 and 16 it is clear that the examination and results had to have been considered or they would not have been placed into the determination itself.

It is the position of Appellant that the attorney, by allowing the polygraph examination results to be given and presented before the Committee even prior to the hearing itself as well as at the hearing irreparably damaged the Appellant by tainting the determination of the Committee.

It was error to allow any reference to a polygraph to be given over objection to the Committee prior to the hearing for review as well as in writing and verbally at the actual hearing itself. The facts at the hearing show clearly that Appellant admitted that he did not follow the protocol which may, in and of itself been grounds for termination.

The problem that Appellant has had is that he admittedly accepted his responsibility for failing to following the protocol as to checking on the house of the driver who's address was known after the record check, but, more importantly, his conversation with Causey was found to be untruthful in his answers.

Any evidence that is given to the Committee is provided for the purpose of proving

and supporting that party's position. Unquestionably, the polygraph causes irreparable damage to the credibility of Appellant. It is inconceivable that any deliberating body, be it a jury or a committee, that is provided documents, would not have reviewed this evidence, it is their duty. It is irrefutable that once evidence is admitted it is to be considered and reviewed. It is contrary to logic as well as the deliberative process to state in an opinion that we find you to be untruthful, but we really didn't look at the issue of the polygraph which showed that you were deceptive. The two have been intertwined and irreparably damaged the ultimate determination by the Committee.

ARGUMENT

I. THE COMMITTEE ATTORNEY WAS IN ERROR IN ALLOWING THE COMMITTEE TO REVIEW AND HAVE ANY AND ALL DOCUMENTS WITH REFERENCE TO POLYGRAPH EXAM ADMINISTERED TO APPELLANT. OBJECTIONS WERE MADE, BUT THE COMMITTEE WAS PROVIDED WITH THE INTERNAL REPORTS WHICH SET FORTH THE RESULTS OF A POLYGRAPH EXAM TAKE BY THE APPELLANT.

In administrative settings there is a relaxed evidentiary standard; however, the general rule in South Carolina and elsewhere is against the admissibility of polygraph results because of their suspect reliability. *State v. Merriman*, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985). (Lie detectors are generally inadmissible) *State v. Wright*, 322 S.C. 253, 471 S.E.2d 700 (1996). (Trial Judge did not abuse his discretion in prohibiting any mention of a polygraph in a murder prosecution, giving authority against admitting evidence of polygraph examinations generally the results of polygraph examinations are inadmissible because of

the reliability of the polygraph is questionable.)

If polygraph evidence is to be admitted at all it must satisfy the usual requirements for scientific evidence in which event the absence of a polygraph examiner would weigh against its admissibility. In the case now before this Court, the report was admitted and relied upon as referenced in the report of the hearing officer (paragraph 4 where he references the polygraph). Unquestionably the polygraph played a part in the ultimate decision and it is our position that the fact that the report was admitted, absent any proper foundation or person who conducted this test, is not only highly prejudicial but constitutes reversible error.

In South Carolina, court decisions on the issue of using polygraph results usually have arisen in criminal cases although there is some authority in this matter from civil matters. *Miller v. City of W. Columbia*, 322 S.C. 224, 471 S.E.2d 683 (1996). In reviewing case law, South Carolina has little authority on the use of the polygraph in administrative settings as opposed to civil or criminal courts. Nationally, there is a substantial weight of authority which is against the admissibility of such evidence in administrative proceedings for the same reasons as apply to court proceedings. In *People v. Liddell*, 63 Mich. App. 491, 234 N.W.2d 669 (1975) the polygraph is inadmissible in civil as well as administrative proceedings. In State Ex Rel r. *Neb. State Bar Association v. Miller*, 258 Neb. 181, 602 N.W.2d 486 (1999) a decision of a referee in an attorney disciplinary proceeding to exclude exculpatory polygraph results was not error. Results of polygraph examinations are inadmissible in both criminal and administrative proceedings. In *Mathis v. City of Omaha*, 254 Neb. 269, 576 N.W.2d 181 (1998) in this proceeding to review discharge of a police

officer for allegedly shooting a bullet at another motorist's vehicle while off duty, the City Personnel Board improperly admitted testimony of a polygraph examiner to show the officer's deception regarding details of the shooting. The issue of the polygraph in this case should not have been admitted.

In *Department of Public Safety and Corr. Servs v. Scruggs*, 79 MD App. 312, 556 A.2d 736 (1989) the court found that polygraph evidence was not sufficient and reliable and trustworthy as to be competent evidence in an administrative proceeding. The Secretary of Personnel's consideration of female inmates' polygraph results when determining whether to sustain against a correctional officer's charges that he had sexual relations with those inmates was in fact prejudicial error and reversible. In *Gasque v. City of Rockford*, 96 Ill. 2d 298, 450 N.E.2d 314 (1983), the results of a polygraph examination given to police officers was not admissible in disciplinary proceedings before a Board of Police and Fire Commissions. *Manias v. Peoria County Sheriff's Department Merit Commission.* 109 Ill. App. 3d 700, 440 N.E.2d 1269 (1982) Polygraph results are not admissible at a hearing before a Sheriff's Merit Commission where a police officer was found guilty of violating rules of the Sheriff's Office Duty manual.

In the case currently before this court, the opinion of the hearing officer, by referencing the polygraph (paragraph 4) shows clearly that there was a reliance upon highly prejudicial and inadmissible evidence. *Hawkins v. Marion Corr. Inst.*, 62 OH App. 3d 863, 577 N.E.2d 720 (1990).

The admission of the polygraph by the hearing officer in this case was not only highly prejudicial, but contrary to the current and existing S.C. Rules of Evidence. To

compound the error, the court allowed an unsubstantiated, unverified report, absent the laying of a proper foundation by a qualified polygrapher subject to cross-examination.

The abuse of power and authority by the hearing officer was egregious in that the Appellant was *pro se* at the actual hearing and it was obvious, by a reading of the record, that he had little or no understanding as to the Rules of Evidence nor admissibility. It would be totally unfair to allow the acceptance of this polygraph based upon the fact that the record was void of any objection. It was clear that the entire process of objections and rulings by the hearing officer was unknown and uncharted water for Appellant at the hearing. In addition, the statements made on the record concerning the polygraph by the representative of the LCSD, Officer Jones, were not only improper and prejudicial, but totally beyond the scope of basic fairness. It was the duty of the hearing officer, recognizing that Appellant was *pro se,* that the court interject, intervene, and not place upon the record documents and evidence that was beyond the scope of the S.C. Rules of Evidence.

Likewise, it is the position of Appellant that, in addition to the polygraph, there is a failure of substantial evidence to support the decision of the hearing officer since all of the evidence cited in his factual determination is hearsay and never subject to cross-examination. There was a complete lack of a proper foundation for the admission of the statements and there were no witnesses who had any personal knowledge of the matter before the Council for cross-examination by either party nor the hearing officer himself. It is our position that the record is void of substantial evidence under the existing laws of South Carolina.

What is most disturbing about the admission of the polygraph is that it was totally

without a factual basis. There was no evidence, substantial or otherwise, as to the reliability of the machine nor the qualifications of its administrator. Also, there was absolutely no foundation laid for its admission. *Bezuneh v. Urlacher*, 149 A.D.2d 944, 540 N.Y.S.2d 76 (1989). In this case, the results of the polygraph were inadmissible in proceedings to revoke a taxi-cab license and hack-plate. The proper foundation did not establish reliability of a particular machine used and its proper function on the day the test was given and the qualifications of the persons who administered the test were never demonstrated nor placed on the record.

In *Ross v. Civil Service Comm.*, 98 Pa. Comm. 565, 511 A.2d 941 (1986), the results of a polygraph test given to a witness were inadmissible at a hearing before the Civil Service Commission absent evidence demonstrating scientific reliability of the test, particularly where the officer who administered the test was not present at the hearing eliminating any possible cross-examination.

The factual determination by the hearing officer with referencing the polygraph irreparably intertwines the issue as to the polygraph and its admissibility before an administrative hearing and taints the opinion, as written, by the Committee.

II. THE DETERMINATION OF THE COMMITTEE ISSUED ON OR ABOUT 10/15/2015 WAS IN ERROR DUE TO THE COMMINGLING OF INADMISSIBLE EVIDENCE, SPECIFICALLY THE POLYGRAPH WHICH HAD BEEN OBJECTED TO BY COUNSEL FOR APPELLANT.

That the determination of the Committee was irreparably damaged by the prejudicial

effect of considering inadmissible evidence as to the polygraph report. In reviewing the Opinion of the Committee from the hearing conducted September 23, 2015 with the Opinion being issued by the Committee on October 13, 2015, a reading of the entire Opinion shows that the findings of fact were irreparably and inconsolably intertwined. Looking at paragraph 15, 15, and 17 of the Opinion:

> *15. On February 25, 2015, Corporal H. M. Morrell (Corporal Morrell), a certified polygrapher with SCDPS, met with Appellant to perform a polygraph examination at the request of OPR. During this examination, Corporal Morrell asked Appellant two questions to determine if Appellant was being untruthful:*
>
> > *a. "Did you tell First Sergeant Causey you went by the subject's house that was involved in the collision?"*
> > *b. "Did you tell First Sergeant Causey you went by the subject's house that was involved in that collision last Sunday?"*
> > *(Committee Exhibit #1, p. 41 - 42.)*
>
> *16. Appellant responded "no" to both of Corporal Morrell's questions. Corporal Morrell stated that the results of the polygraph examination showed "deception indicated" and that it was his determination that Appellant was untruthful in his answers to these two questions. (Committee Exhibit #1, p. 41 - 42)*
>
> *17. At the conclusion of the OPR investigation, a determinaion was made to sustain each of the following allegations:*
>
> > *a. Appellant failed to adhere to the Towing Abandoned Vehicle procedures by not attempting to locate and notify the owner and/or family member at the residence of an abandoned vehicle that was involved in a collision on February 19, 2015;*
> >
> > *b. Appellant was untruthful when he told First Sergeant Causey that he had gone by the residence of the vehicle's owner that was involved in a collision. This untruthful information led to inaccurate information being disseminated to the family and media; and*
> >
> > *c. Appellant was untruthful during an OPR investigation when he*

> *denied telling First Sergeant Causey that he had gone to the residence of the owner of an abandoned vehicle. This allegation was supported by the results of a polygraph examination. (Committee Exhibit #11, p. 47)*

In the Opinion, on page 6 (ROA 8), the written text states:

> *"Appellant contends he was not untruthful to First Sergeant Causey during their phone conversation on February 22, 2015, as well as the inconsistencies of Appellant's statements regarding his adherence to SCDPS policy for towing abandoned vehicles, the Committee found sufficient reason to doubt the credibility of Appellant's claim that he did not tell First Sergeant Cause that he (Appellant) had checked Ms. Callahan's residence during the collision investigation on February 19, 2015. The Committee found First Sergeant Causey's statements to be consistent and credible. Therefore, the Committee finds that Appellant committed the offense of Failure to Provide Truthful and Complete Information.*[1] ***While SCDPS provided the Committee with results of a polygraph examination, the Committee did not consider these results in making their determination regarding the offense of Failure to Provide Truthful and Complete Information."*** *(emphasis added)*

While SCDPS provided the Committee with the results of a polygraph exam the Committee did not consider these results in making their determination regarding the offense of Failure to Provide Truthful and Complete Information. To add this provision shows clearly that the information was utilized either directly or indirectly in arriving at the Committee decision. The fact that the documents and polygraph report were admitted and reported in the actual final Opinion only clouds the issue. There is no way that evidence which is to be reviewed by any trier of fact can be ignored in the consideration. Once the evidence is admitted and before the Committee, the damage has been done.

III. THE COMMITTEE'S DECISION IRREPARABLY TAINTED BY ITS RECEPTION AND KNOWLEDGE OF THE INADMISSIBLE RESULTS OF THE OFFICER'S POLYGRAPH TEST.

Due process requires that an administrative board, or body, when acting in a quasijudicial capacity, must consider *all* the evidence before rendering its decision on any particular question, the body must have the evidence before it and consider such evidence when rendering its decision. *Pettiford v. S.C. State Bd. of Educ.*, 218 S.C. 322, 62 S.E.2d 780 (1950) (in certiorari proceeding, record established that State Board of Education had all evidence before it and considered such evidence when rendering its decision that petitioner's certificate to teach in public schools of state would be revoked for unlawful or fraudulent aid and assistance in taking teacher examinations).

Thus, the Committee was obliged to consider all of the evidence presented to it, and it is presumed to have done so. Having improperly been made aware of the fact that the officer had failed a polygraph test, the results of which were inadmissible but nonetheless before the Committee, the Committee cannot simply undo this error by stating that it did not take the polygraph results into account in making its decision. The polygraph results were especially prejudicial to the officer and destructive of his right to a fair hearing because they essentially branded him as a liar. The effects of this evidence on the Committee's decisionmaking cannot be so easily brushed aside. Simply put, it is not possible to "unring that bell," and the resulting adverse decision itself must be reversed..

There is ample case law to support the officer's position. In *State-Record Co. V. State,* 332 S.C. 346, 504 S.E.2d (1998), the court ruled that a temporary restraining order

prohibiting the media from disseminating the contents of a videotape containing privileged communication between the defendant and his attorney was proper prior restraint. The court stated:

> Were we to hold otherwise, the contents of the videotape in question could have been disclosed and the substance of the privileged communication with his attorney divulged. Once disclosed, although other measure might have alleviated the prejudice to Quattlebaum, his right to a fair trial could not have been guaranteed.[19]
>
> ---
>
> [19]Once a privileged communication has been disclosed to the public, it can never be recalled and the right to a fair trial may have been forever jeopardized. *Accord United States v. David,* 904 F.Supp. 564, 569 (E.D.La. 1995) (*it is difficult, if not impossible, to "unring a bell").*

Id. At 365 & n.19, 504 S.E.2d at 597 & n.19 (emphasis added).

Regarding the prejudicial effects of unreliable polygraph evidence, the court in *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994), ruled that a trial court's finding that prejudice due to the introduction of evidence before a state grand jury of a public corruption defendant's refusal to take a polygraph was sufficient to warrant dismissal of the indictment.

Moreover, in the specific context of disciplinary proceedings against police officers, courts have recognized how badly and irreparably consideration of polygraph results taints the proceedings. In *Quigley v. Philadelphia Civil Service Commission,* 528 Pa. 195, 596 A.2d 144 (1991), numerous references to a polygraph examination taken by a complaining witness, made during hearings on a policeman's appeal of dismissal, tainted the Civil Service Commission's finding as to credibility, even though the test results were not admitted. Resolution of the appeal turned entirely on the assessment of the credibility of the complainant and the dismissed officer, and the Commission began its conclusions by stating

that the complainant's testimony was credible.

Similarly, in *McGowen v. City of Bloomington*, 99 Ill. App. 3d 986, 426 N.E.2d 328 (1981), admission of the results of polygraph examinations of a police officer, as proof in an administrative proceeding and resulted in the police officer's discharge, tainted the entire proceeding and warrant reversal.

CONCLUSION

Appellant asks that this Court reverse the determination of the Committee as to the issue of truthfulness. To allow a verdict that is intertwined with inadmissible evidence to serve as the basis for its decisions is unfair, erroneous, prejudicial, and impacts Appellant in ways far more hurtful for his future than a termination from the agency. The record is not clear nor supported by substantial evidence absent the reference to the polygraph results. We therefore request that the determination of the Committee be reversed as to the charge of *untruthfulness* and either Appellant be reinstated to his position with the SCHP or, in the alternative, that the determination reflect a termination for *Negligence in performance of duties* and **not** for *Failure to provide truthful and complete information.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned employee of O'Leary Associates, P.A., attorneys for Robert W. Batchelor, certify that on May 11, 2016 I have served the foregoing document(s) on the individual(s) listed below by placing a copy of the same in the United States Mail, postage prepaid, and return address clearly affixed to the following address:

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DOCUMENTS:

INITIAL BRIEF OF APPELLANT; AND
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Columbia, South Carolina
May 11, 2016

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O'LEARY ASSOCIATES, P.A.

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May 11, 2016

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Jenny Abbott Kitchings, Clerk of Court
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Columbia, SC 29211

RE: SCDPS vs. Robert W. Batchelor [Case No: 2016-000785]

Dear Ms. Kitchings:

Attached for filing please find the original (unbound) and two (2) copies of our Initial Brief of Appellant. By copy of this letter I am serving the same on Eugene H. Matthews, Warren Ganjehsani, and the ALC.

Thank you for your time and consideration in this matter. If you have any questions or if we may be of assistance, please do not hesitate to call.

Sincerely,

JOHN A. O'LEARY
Attorney At Law

JAO/ffk
Attachments as stated
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