

ORIGINAL

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
John D. McLeod, Presiding Judge

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ALC Case No.: 2015-ALJ-30-0515-AP  
Appellate Case No. 2016-000785

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MAY 31 2016

SC Court of Appeals

Robert Wayne Batchelor,

Appellant,

v.

South Carolina Department of Public Safety,

Respondent.

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**INITIAL BRIEF OF RESPONDENT**

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### STATEMENT OF ISSUES ON APPEAL

- I. Did the State Employee Grievance Committee (“SEGC” or “Committee”) properly uphold the decision of the South Carolina Department of Public Safety to terminate the employment of Robert Wayne Batchelor (hereinafter the “Appellant”)?
- II. Did the Committee Attorney properly overrule the objection of Appellant to the inclusion of evidence in Committee Exhibit I related to a polygraph examination?
- III. If the Committee Attorney was mistaken in overruling Appellant’s objection, was it harmless error?

### STATEMENT OF THE CASE

Appellant is a former Trooper who SCDPS terminated from employment on February 23, 2015. In his termination letter, he was cited for “Negligence in the Performance of Duty” and “Failure to Provide Truthful and Complete Information.” (ROA, pp. 125-126). SCDPS could have fired Appellant for either of these offenses alone. (ROA, pp. 33-35).

The SEGC unanimously found that the “Appellant’s actions, by his own admission, constituted Negligence in the Performance of Duty,” and separately found that “Appellant committed the offense of Failure to Provide Truthful and Complete Information.” (ROA, pp. 8, 28-29). Specifically, in support of its findings, the SEGC considered the following:

- Appellant was the responding Trooper of a one-car accident on the evening of Friday, February 19, 2015, in which the driver of the car was missing. (ROA, p. 3). SCDPS policy required the Appellant to check the registered owner’s residence during his investigation of the accident. (ROA, p. 163). Appellant failed to check the residence. (ROA, p. 8).
- On Sunday, February 22, 2015, members of the driver’s family visited the scene, conducted their own search of the area, and found the drivers’ deceased body in a nearby deer stand. (ROA, pp. 3-4, 148-149).

- Following the discovery of the deceased, First Sergeant Causey spoke with Appellant concerning the matter on February 22, 2015. (ROA, pp. 3-4, 152). **During this conversation, Appellant told First Sergeant Causey that the hospital and the residence had been checked.** (ROA, pp. 4, 152).
- When Appellant's comment was relayed to the deceased's family, they denied that Appellant – or anyone else – had visited the residence. (ROA, pp. 4, 154-155). Because of Appellant's untruthfulness, SCDPS disseminated incorrect information to the grieving family and the media. (ROA, p. 161).
- Later, Appellant admitted that he failed to check the residence of the vehicle's registered owner, as required by SCDPS policy. However, he denied that he told First Sergeant Causey that he had done so. (ROA, pp. 154-155, 158-159).
- On March 3, 2015, SCDPS issued its termination notice to Appellant. The termination was retroactive to Appellant's suspension, which began on February 23, 2015. (ROA, pp. 125-126).

In finding that there was “substantial evidence to support the SCDPS's decision to terminate Appellant,” the SEGC ruled that:

Appellant admits that he was negligent in the performance of his duties because he did not check Ms. Callahan's residence as required as part of his investigation of the collision on February 19, 2015. The Committee was not persuaded by Appellant's explanation that he failed to check the residence because he believed the procedures did not apply because a collision had occurred. The applicable procedures clearly refer to vehicles involved in collisions. Further...Appellant's assumptions did not negate his responsibility to fully carry out the requirements of the applicable procedures. Therefore, the Committee finds that Appellant's actions, by his own admission, constituted Negligence in the Performance of Duty.

(ROA, pp. 7-8).

With regard to Appellant's allegation that he was truthful when he spoke with First Sergeant Causey on February 22, 2015, the SEGC ruled as follows:

Given the inconsistencies of Appellant's testimony regarding the phone conversation with First Sergeant Causey 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 Causey 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.

(ROA, p. 8). The SEGC also specifically addressed its view of the evidence related to the polygraph examination:

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.**

(ROA, p. 8) (emphasis added).

Appellant appealed the decision of the SEGC to the South Carolina Administrative Law Court ("ALC"), and on April 7, 2016, the ALC affirmed the SEGC's decision. Specifically, the ALC adopted the three grounds set forth by SCDPS in support of the SEGC's decision: (1) that the SEGC's decision had to be affirmed under the "Two Issue Rule," (2) that the Committee Attorney properly ruled on the Appellant's objections to document included in "Committee Exhibit I," and (3) that the Appellant failed to file a timely objection to the inclusion of the Polygraph Report, and that the SEGC specifically excluded consideration of the Polygraph Report from its Order.

This appeal followed, but the exact nature of Appellant's argument is, frankly, uncertain. For instance, in his brief, Appellant does not address the "Two Issue Rule" in any way. He also does not address the untimeliness of his objections before the SEGC. Rather, his first two arguments restate his opinion that the SEGC inevitably "commingled" evidence related to the failed polygraph examination with other –

presumably admissible – evidence, and relied on the “commingled” evidence to support its decision. (Brief of Appellant, pp. 4-6).<sup>1</sup>

Moreover, the object of this appeal is uncertain. While Appellant has argued that there was “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” (Brief of Appellant, p. 9), it is clear that Appellant’s argument fails because of his own admissions. Indeed, at the hearing, Appellant himself agreed that he “readily admit[s] that he was negligent in the performance of his duties by failing to follow [] policy and procedure.” (ROA, p. 65-66). In fact, in his closing argument, his own counsel noted that Appellant “readily admits the first violation, that he was negligent in failing that duty.” (ROA, pp. 96-97).

It appears, therefore, that Appellant is only challenging the section of the SEGC’s determination that Appellant also failed to “provide truthful and complete information.” In fact, Appellant appears to have stated as much in his brief. (Brief of Appellant, pp. 4-5) (“It is this determination made by the Committee that is being challenged in this appeal before this Administrative Court” [*sic*]).

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<sup>1</sup> As was the case before the ALC, Appellant curiously fails to cite to *State v. Council*, 335 S.C. 1, 24, 515 S.E.2d 508, 520 (1999), in which the South Carolina Supreme Court rejected *per se* inadmissibility of polygraph evidence, and ruled that “in light of the adoption of the SCRE, admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the *Jones* factors.” Instead, the only South Carolina cases cited by Appellant are pre-*Council*, and therefore no longer articulate the current evidentiary standard. In any event, Appellant failed utterly at the hearing to challenge the admissibility of this evidence under Rules 702 and 403, SCRE and the *Jones* factors.

## ARGUMENT

### **I. THE SEGC'S DECISION MUST BE AFFIRMED IN ITS ENTIRETY UNDER THE "TWO ISSUE RULE."**

It is clear that the SEGC's decision to uphold Appellant's termination must be affirmed, in part because it is unappealed and is not even referenced in the Appellant's Brief. Appellant has admitted that his conduct was negligent, and it is undisputed that SCDPS has the authority to terminate an employee for such an offense. (ROA, p. 188). The two-issue rule requires an appellate court to affirm the lower decision where a decision is based on more than one ground, and the appellant did not appeal all grounds on which the decision was based. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

In fact, a recent decision involving SCDPS and the Appellant's counsel aptly illustrates the point. In *Sorrell v. S. Carolina Dep't of Public Safety*, 2014 WL 2575750, at \*1 (S.C. App. Jan. 15, 2014), SCDPS fired Sorrell for two independent reasons: (1) for improperly arresting individuals without probable cause and (2) for his improper conduct during that arrest. The Administrative Law Court (ALC) properly affirmed both reasons, and because Sorrells only appealed one of the grounds – the first issue related to probable cause – the two-issue rule “required affirmance.” *Id.*; see also *Jones*, 387 S.C. at 346, 692 S.E.2d at 903.

For the same reason, the SEGC's holding that SCDPS properly found that Appellant failed to provide complete and truthful information must also be affirmed. While Appellant argues that the inclusion of information related to the polygraph “tainted the evidence,” the record shows the opposite. The SEGC explicitly based its decision on not one, but two other grounds – (1) the inconsistencies of Appellant's testimony

regarding the phone conversation with First Sergeant Causey, and (2) the inconsistencies of Appellant's statements regarding his adherence to SCDPS policy for towing abandoned vehicles. If that were not enough, the SEGC also explicitly ruled that it did not – repeat not – consider the results of the polygraph in making this determination.

For these reasons alone, the decisions of the SEGC and ALC must be affirmed in full.

**II. THE SEGC'S COMMITTEE ATTORNEY PROPERLY RULED ON APPELLANT'S OBJECTIONS TO DOCUMENTS INCLUDED IN "COMMITTEE EXHIBIT I."**

Similarly, Appellant does not address in any way the fact that he failed to object to the inclusion of the Polygraph Report summary, found at page 56 of "Committee Exhibit I." The regulations governing appeals to the State Employee Grievance Committee provide that the state agency must submit relevant documents to the State Human Resource Director for inclusion in Committee Exhibit I. S.C. Reg. § 19-718.07(D)(1). A party may object to the inclusion of specific documents in Committee Exhibit I prior to the hearing. S.C. Reg. § 19-718.07(D)(3)(b). Specifically, the regulation states as follows:

The documents transmitted by the State Human Resources Director to the designated Committee panel and Committee Attorney must be marked into evidence as "Committee Exhibit I" during the Committee Chairman's opening statement at the beginning of the hearing unless excluded by the Committee Attorney based on a prior objection raised by either party.

(emphasis added).

Prior to the hearing, Plaintiff raised objections to the following documents in Committee Exhibit I, all on grounds of "hearsay":

- Pages 8-10: SCDPS's response to the SEGC's request for information to the agency regarding its termination of the Appellant.

- Pages 11-12: SCDPS's termination letter to Appellant.
- Pages 13-15: SCDPS's Personnel Change in Status Report to the South Carolina Criminal Justice Academy regarding its termination of Appellant.
- Pages 36-47: Sections of OPR's investigative report into Appellant's misconduct. This report includes references, on pages 41 and 42, to Appellant's polygraph examination, and that the results indicated "deception indicated."

(ROA, p. 12). Notably, Appellant did not object to the inclusion of the actual polygraph report summary, found at page 56 of Committee Exhibit I. (ROA, p. 170).

In its response to Plaintiff's pre-hearing objections, SCDPS noted that S.C. Reg. § 19-718.05(D) **requires** the agency to furnish a copy of "all records, reports, and documentation of the earlier proceedings of the grievance within 15 calendar days" of the request of the State Human Resource Director with following the request." In this case, as in all grievance appeals, the State Human Resources Director actually directed SCDPS to submit, *inter alia*, a brief summary of SCDPS's position, Appellant's employment records, and copies of findings and determinations at each step of the grievance procedure. Furthermore, SCDPS noted that relevant legal authority permitted – and even **required** – submission of these materials, **even if** the tribunal considered them to be hearsay. (ROA, pp. 13-14).

Upon review of the arguments and documents in question, the Committee Attorney ruled that (1) the documents were not hearsay, and (2) were properly before the Committee. (ROA, pp. 9-11). The Appellant fails to suggest in any way why this ruling is incorrect. For this reason alone, his argument fails, and the SEGC's decision must be affirmed.

**III. THE APPELLANT FAILED TO FILE A TIMELY OBJECTION TO THE INCLUSION OF THE POLYGRAPH REPORT IN COMMITTEE EXHIBIT I. FURTHERMORE, THE SEGC SPECIFICALLY EXCLUDED CONSIDERATION OF THE POLYGRAPH REPORT FROM ITS ORDER.**

As noted above, the Polygraph Report regarding Appellant's examination appears at page 56 in Committee Exhibit I. Prior to the hearing before the SEGC, Appellant failed to object to its inclusion in Committee Exhibit I. (ROA, p. 170).<sup>2</sup>

At the hearing, Appellant's counsel objected to the "admissibility of anything with reference to the polygraph, either through the written, written documentation provided already to the board or through any possible testimony. I believe it's inadmissible in our state, a polygraph, and really should not be admitted." (ROA, p. 26, lines 12-17). Later, Appellant's counsel clarified that he was "renewing" his earlier objection, which was stated on grounds of hearsay. (ROA, p. 27, lines 1-18). The Committee Attorney again overruled the objection.

In any event, the Committee Attorney's ruling on the objection, even if mistaken, was harmless. The SEGC did not reference the polygraph report when it found that the Appellant was, in fact, negligent in the performance of his duties, because he **admitted** that he did not check the residence of the registered owner of the vehicle. Moreover, as set forth above, the SEGC specifically noted that, in rejecting Appellant's contention that he was never untruthful in his responses to First Sergeant Causey, it specifically "did not consider the results [of the a polygraph examination] in making [its] determination regarding the offense of Failure to Provide Truthful and Complete Information." (ROA, p. 8).

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<sup>2</sup> When asked whether he told First Sergeant Causey that he went by the subject's house following the collision, the polygraph indicated that Appellant's response was untruthful.

The admission of evidence is in the discretion of the tribunal, whose ruling will not be disturbed absent (1) an abuse of discretion amounting to an error of law, and (2) prejudice. Though testimony may constitute inadmissible hearsay evidence, no prejudice is shown when it merely corroborates other evidence admitted in the case. *Starkey v. Bell*, 281 S.C. 308, 315-16, 315 S.E.2d 153, 157 (S.C. App. 1984).

Because Appellant can show neither abuse of discretion nor prejudice, the SEGC's decision must be affirmed.

**IV. APPELLANT'S ASSERTIONS THAT HE WAS *PRO SE* AT THE HEARING ARE CLEARLY FALSE.**

For reasons that are not clear, Appellant alleges in his brief that 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 has little or no understanding as to the Rules of Evidence nor admissibility." (Brief of Appellant, p. 9). He later references a "representative of LCSD, Officer Jones," who is unknown in this case, and states that 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," (Brief of Appellant, p. 9).

These assertions are incomprehensible. If nothing else, the Record on Appeal sets forth – at length – that Appellant was represented throughout the hearing by John O'Leary, Esq. (ROA, p. 28) ("[M]y name is John O'Leary. I represent Mr. Batchelor...").

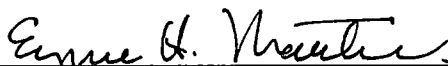
**CONCLUSION**

For the reasons stated above, the South Carolina Department of Public Safety respectfully requests that this Court DISMISS the appeal of Appellant Robert Wayne Batchelor, affirm the decisions of the SEGC and the ALC in full, and award any other such relief to the South Carolina Department of Public Safety as it deems just and proper.

Dated this the 27<sup>th</sup> day of May, 2016.

Respectfully submitted,

RICHARDSON PLOWDEN & ROBINSON, P.A.



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THE STATE OF SOUTH CAROLINA  
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**PROOF OF SERVICE**

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I, the undersigned employee for Richardson Plowden & Robinson, P.A., counsel for the Respondent South Carolina Department of Public Safety, do hereby certify that I have served a copy of the *INITIAL BRIEF OF RESPONDENT* by causing a copy of the same to be deposited in the United States mail, first class postage prepaid, addressed to counsel of record as follows on this 27<sup>th</sup> day of May, 2016:

John A. O'Leary, Esquire  
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Paralegal

May 26, 2016  
Columbia, South Carolina.

May 26, 2016

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**SC Court of Appeals**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211

RE: *Robert Wayne Batchelor v. South Carolina Department of Public Safety*  
Appellate Case No.: 2016-000785 / ALC Case No.: 2015-ALJ-30-0515-AP  
Our File No.: 7671-001

Dear Ms. Kitchings:

Enclosed for filing is the original and (1) one copy of the *Initial Brief of Respondent* (original unbound) relating to the above matter, along with the Proof of Service. Please file the extra copy and return to our office in the self-addressed stamped envelope enclosed.

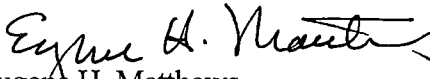
By copy of this letter, we are this day serving one copy of the Initial Brief on the counsel for the Appellant.

Should you have any questions or concerns regarding the enclosed, please do not hesitate to contact our office.

With best regards, I am

Sincerely,

RICHARDSON PLOWDEN & ROBINSON, P.A.

  
Eugene H. Matthews

/jlm  
Enclosures as Stated

cc: John A. O'Leary, Esquire (w/encl.)

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