

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF STATE,)
DIVISION OF LICENSING,)
)
Petitioner,)
)
vs.) CASE NO. 86-1480
)
WILLIAM L. MCCALLISTER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice the Division of Administrative Hearings, by its duly designated Hearing Officer, K. N. Ayers, held a public hearing in the above-styled cause on August 28, 1986 at Bartow, Florida.

APPEARANCES

For Petitioner: James V. Antista, Esquire
Office of General Counsel
and Cabinet Affairs
Room LL-10, The Capitol
Tallahassee, Florida 32301

For Respondent: John C. D. Newton, II, Esquire
Mayhan Station
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Tallahassee, Florida 32308

By Notice of Emergency Suspension dated April 10, 1986, the Department of State, Division of Licensing, Petitioner, suspended the license of William L. McCallister, Respondent, as a Class P Polygraph Examiner and his right to practice there under.

This emergency suspension was predicate upon Administrative Complaint dated March 20, 1986. As grounds for emergency suspension it is alleged that in administering a pre-employment polygraph examination to Ms. Rose Giannotti, Respondent asked sexual questions of Ms. Giannotti which were unrelated to employment; that while administering a pre-employment polygraph examination to Ms. JoAnne Meyer the Respondent touched and fondled Ms. Meyer without her consent; that while administering a pre-employment polygraph examination to Ms. Phyllis Langsdale Respondent pressured and coerced her to withhold information regarding her drug usage; and that by virtue of these allegations Respondent constitutes a threat to public safety and welfare. The charges are alleged to violate Section 493.319(1)(f) and (p), Florida Statutes.

Respondent's Petition for Formal Administrative Hearing filed April 9, 1986, was forwarded to the Division of Administrative Hearings by letter form

Department of State dated April 30, 1986, and received in this office on May 2, 1986. By Notice of Hearing dated May 7, 1986, this case was scheduled to be heard June 5, 1986. At the request of Respondent the June 5 hearing was continued until August 28, 1986, to provide time to adequately prepare for the hearing.

At the hearing the Petitioner called 5 witnesses; Respondent called 3 witnesses, including himself; the parties stipulated that 3 additional witnesses would testify, if called, that Respondent was not the type individual who would commit the offenses alleged in the Administrative Complaint, that he had a good reputation in the community, and that such acts as alleged were contrary to Respondent's character and reputation; and 14 exhibits were admitted into evidence.

Proposed recommended orders have been submitted by the parties. Proposed findings which have been rejected by the Hearing Officer with reasons therefor in these proposed findings are contained in the appendix attached hereto and made a part hereof.

FINDINGS OF FACT

1. At all times relevant hereto William L. McCallister was licensed in Florida as a Class P Detection of Deception (Polygraph) Examiner and he was so employed by the Polk County Sheriff's Office. He has conducted some 800 polygraph examinations since becoming licensed.

2. Standard procedure in conducting polygraph examination, which was followed by Respondent, involves taking the examinee to an examining room where interruptions are unlikely, going through the test questions with the examinee before the test begins to avoid any surprises to the examinee, modifying the questions as necessary to allow the examinee to truthfully answer the questions, and then connecting the polygraph machine to the examinee and conduct the test. Upon completion of this test the examinee is asked if he or she had any problems with the questions, any discrepancies so found are resolved and the test is readministered. Respondent always administers the test twice to insure accuracy.

3. The three complaining witnesses who were given polygraph examinations by Respondent are Rose Marie Giannotti, Phyllis Langsdale, and JoAnne Meyer. Langsdale's examination occurred January 8, 1985, Giannotti's exam was given February 7, 1985, and Meyer's exam was given March 11, 1985.

4. Ms. Langsdale was employed by Polk County Commissioners in the Crime Watch Division. Her former supervisor in that job resigned to run for sheriff and was elected. Langsdale then applied to transfer to the Sheriff's Office where a job similar to the Crime Watch position was established.

5. It was standard procedure for all applicants for jobs in the Polk County Sheriff's Office to be given a polygraph examination. Prior to conducting the test Respondent asked Langsdale questions on the test form and filled in the "green sheet" from the answers given. During the pretest questions Langsdale admitted having used cocaine, marijuana and amphetamines. On the green sheet Respondent reported Langsdale as having used cocaine only once and that was in 1984 and marijuana and speed last used in 1982. Langsdale testified she told Respondent she had used cocaine only once in her life and that was while she was a teenager and that she was pressured into smoking marijuana in 1984 by a boy friend.

6. Langsdale further testified that respondent told her the Sheriff wouldn't hire anyone who had used drugs within the last year and suggested he put 1982 on the green sheet for date of last use of marijuana so she could pass. Langsdale denies advising Respondent the date of last use of cocaine other than while a teenager. Respondent testified that Langsdale told him she had used cocaine only once in her life in 1984 while with a boy friend at the beach. This is the entry made on the green sheet.

7. Following the examination Langsdale and Respondent had a meeting with the Sheriff and Langsdale was hired for the job. This job involved speaking to groups and was a high profile one in which Langsdale was often in the public eye.

8. In mid to late 1985 the Lakeland Ledger did an investigative report on some of the employees hired by the new sheriff and in the course of that investigation obtained access to the polygraph files on those employees. Among those files was the polygraph green sheet on Langsdale which noted the last use of cocaine in 1984. When this information was published in the newspaper Langsdale was quite upset at the adverse publicity and demanded to see her personnel file. Upon seeing the 1984 date opposite the last use of cocaine on the green sheet, she complained that the report was incorrect and was asked to make a statement.

9. From that statement came the charge that Respondent had counseled her to give a false answer to drug use so she would be employed. The false answer involved the date of the last use of marijuana. The green sheet noted 1982 and Langsdale testified she told Respondent the last use was 1984 and he counseled her to say 1982. It is not logical that Respondent would counsel Langsdale to say last use of marijuana occurred in 1982 when he entered on the green sheet that the last use of cocaine occurred in 1984, if the purpose of the deception was to insure her employment by showing no drug use in the last year.

10. Similarly Langsdale's contention that the green sheet was altered by the Respondent, which was not given as a basis of the disciplinary action taken by the Petitioner, is not supported by logic or reason. Absolutely no motive was shown for Respondent to have made such an alternation. The publication of this information in the Lakeland Ledger occurred more than six months after the polygraph examination was conducted, Langsdale had made no charges against the Respondent prior to the newspaper publication, and no possible motive was offered to induce such an alteration.

11. On February 7, 1985, Respondent gave a polygraph examination to Rose Marie Giannotti who submitted an application for a job as auxiliary deputy sheriff.

12. Giannotti testified that she was not qualified to be hired as a uniformed officer and was seeking only a civilian job as bookkeeper in the sheriff's office. However, her application was for a uniformed position and Giannotti was asked questions prescribed for such a position.

13. Standard examination questions for a uniformed officer position are different from those given to an applicant for a civilian position. Specifically, the applicant for a uniformed officer position is asked questions regarding homosexuality while the applicant for a civilian position is not.

14. Questions regarding homosexuality are proper questions to ask an applicant for a uniformed officer position while conducting a polygraph examination.

15. Giannotti testified that when Respondent asked her about homosexuality, she thought that term was applied only to men. To clear the issue, Respondent asked her if she had ever committed cunnilingus on a woman. Giannotti testified she wasn't familiar with that word, but if it meant had she ever gone down on a woman, the answer was no.

16. Giannotti also testified that Respondent asked her if she had ever performed fellatio on her husband or had anal sex. She replied that what she did with her husband was private and of no concern to anyone else. Respondent, categorically denies asking Giannotti any questions regarding her marital relations.

17. Most of Giannotti's testimony related to Respondent's questions to her regarding the use of drugs. Her testimony generally was that she told Respondent that she had used marijuana a few times as a teenager and he suggested he put on the form that she had used marijuana ten times so her answer would be accurate when she was asked if she had used marijuana more than ten times. On the green form Respondent noted Giannotti as having used marijuana ten times with her last use in 1985.

18. During the polygraph examination, Giannotti's reaction to the questions regarding use of drugs indicated deception and Giannotti failed the examination. At the conclusion of the examination Giannotti testified she was upset and crying and she and her husband came back to talk to the sheriff two days later about the polygraph examination.

19. At this meeting with the sheriff, Respondent was present with the sheriff, Giannotti and her husband. Giannotti didn't get the job because she hadn't passed the polygraph examination. Giannotti testified that Respondent apologized to her husband. Respondent testified that her husband apologized to him for his wife's conduct. The sheriff did not testify.

20. Giannotti was subsequently employed by the sheriff's office and in November 1985, after the Ledger had published reports on employees hired by the sheriff, Giannotti was asked to give a statement to Mary Campbell who was conducting an investigation at the request of the sheriff.

21. Giannotti was later fired from the sheriff's department after being charged with impersonating an officer and car theft.

22. By undated memo (Exhibit 7), Mary Campbell was told by the sheriff to look into alleged improprieties by Respondent while conducting polygraph examinations on Langsdale and Giannotti. That memo also referred to an anonymous report that Respondent is the person who "advised the media on the KKK item in the Redman Polygraph," with a request to have the Respondent "take a poly on this issue if he will."

23. Giannotti's and Langsdale's statements were obtained by Campbell in November 1985. As a result of these complaints or the disclosure of the Klu Klux Klan (KKK) information, Respondent was dismissed from the Sheriff's Department as polygraph examiner in December 1985. In February or March 1986 Ms. Campbell received an additional complaint from JoAnne Meyer.

24. JoAnne Meyer applied for a position with the Polk County Sheriff's office in January or February 1985 and was given a polygraph examination by Respondent on March 11, 1985.

25. Meyer testified that Respondent asked her no questions regarding sex, but did ask her about drugs. Following the first polygraph test Respondent asked her if there were any areas in which she was upset and wanted to discuss. Meyer, who was in the process of getting a divorce, told Respondent of an incident some years ago where her ex-husband had given her some valium which spaced her out during which time she was sexually used by several friends of her husband. She also told him she was concerned because her ex-husband had taught her son to shoplift.

26. Respondent then took another polygraph examination of Meyer. When that was completed the polygraph attachments were removed from one hand and Meyer testified Respondent took her hand, put it on his crotch and asked what she was going to do about it. She replied you must be kidding. She further testified that after Respondent said he had marital problems, she made it plain to him that all she wanted to do was settle down into a monogamous relationship with somebody and just live quietly.

27. Meyer also testified she was asked by Respondent to say hi into a video camera for a friend of his. She agreed and while she was sitting in front of the video camera Respondent pulled her dress up to show her knees and walked behind her chair. He then started his hands down the inside of the front of her dress when she stopped him.

28. Respondent adamantly denies any improper touching of Meyer but corroborates Meyer's apparent compulsion to talk about her marital and sexual problems. Meyer produced the dress she wore at the polygraph examination pursuant to a subpoena issued by the Respondent. This was a high neck dress which provided little, if any, room for hands down inside the front.

29. Both Respondent and Mary Campbell testified that at the time Meyer's polygraph examination was given, the video camera had been removed from Respondent's office (where Meyer's polygraph was given) and was kept in the training section.

30. Although this polygraph examination was conducted in March 1985, she did not make accusations regarding respondent until after she read in the Ledger that other women had filed complaints against the Respondent. She attributes the delay to the trauma associated with her divorce and her not wanting any more problems at that time.

31. Although Meyer passed the polygraph examination she was not hired by the Sheriff.

32. Petitioner presented the Associate Director, Division of Licensing, Department of State, who testified that the agency has been using the American Polygraph Association standards of conduct in disciplining licensed polygraph examiners, and that the Florida Polygraph Association has adopted those standards. Exhibit 8 contains the constitution and code of operating procedures for the Florida Polygraph Association.

33. Respondent's expert witness acknowledged that, if a polygraph examiner asked an examinee questions relating to his or her marital sex life, such would constitute misconduct as would an improper touching of an examinee by the

examiner. This witness also testified that asking witnesses questions relating to homosexuality was proper for certain potential employees. Here the sheriff's department specifically approved use of those type questions on pre-employment polygraph examinations for uniformed officers.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of these proceedings.

35. Section 493.319(1), Florida Statutes, provides in pertinent part:

The following constitute grounds for which disciplinary action specified in subsection (2) may be taken:

- (f) Proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct in the practice of his business for which the license is held.
- (p) Violated any provision of this chapter.

36. Petitioner has adopted no rule to implement this statutory provision or to spell out a further definition of misconduct. In lieu thereof Petitioner "follows" the code of ethics of the American Polygraph Association. No evidence was presented or argument made as to how Respondent violated subparagraph (p) above quoted.

37. Since this code of conduct is given general applicability by Petitioner it can be defined as a rule which is unpublished. It is thus a non-rule agency policy which the agency must defend each time it attempts to apply this non-rule policy to a licensee. *Barker v. Department of Professional Regulation, Board of Medical Examiners*, 428 So.2d 720 (Fla. 1st DCA 1983); *State, Department of Administration v. Harvey*, 356 So.2d 323, (Fla. 1st DCA 1977). In such a case the agency carries a heavy burden.

38. As stated in *Florida Medical Center v. Department of Health and Rehabilitative Services*, 463 So.2d 380 (Fla. 1st DCA 1985), p. 382:

To the extent the agency may intend its final order to rely upon or refer to policy not recorded in rules or discoverable precedents, that policy must be established by expert testimony, documentary opinion, or other evidence appropriate to the issues involved and the agency must expose and elucidate its reasons for its discretionary action. (Citations omitted).

39. Petitioner here presented no evidence that this code of ethics is appropriate for the profession of polygraph examiners, only that such a code is used by the agency. This evidence is insufficient to sustain the burden and validate such a non-rule policy.

40. The only expert witness who testified in these proceedings was called by Respondent. This witness testified that it would be misconduct for a polygraph examiner to fondle an examinee or falsify an application.

41. Although factual findings have been made regarding activities of Respondent which are not included in the charges as contained in the Administrative Complaint and which were not used to justify the emergency suspension of the Respondent's license, no consideration has been given to that evidence. To do so would deny Respondent due process. *Wray v. Department of Professional Regulation, Board of Medical Examiners*, 435 So.2d 312 (Fla. 1st DCA 1983). Due process requires that a Respondent be informed with reasonable certainty of the nature and cause of the accusation against him, has reasonable opportunity to defend against attempted proof of such charges, and the proceedings are conducted in a fair and impartial manner, free from any just suspicion of prejudice, unfairness, fraud or oppression. *Hadley v. Department of Administration*, 411 So.2d 184 (Fla. 1982); *State ex rel Munch v. Davis*, 196 So. 491 (Fla. 1948). It is elementary also, in our system of law, that adjudicatory action cannot validly be taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know the claims of his opponent, to hear the evidence introduced against him, to introduce evidence in his own behalf, and to make argument. *Philadelphia Company v. S.E.C.*, 175 F.2d 808, 817 (D.C. Cir. 1948).

42. The burden is on the Petitioner to prove the charges alleged. *Balino v. Department of Health and Rehabilitative Services*, 348 So.2d 349 (Fla. 1st DCA 1977). The quality of evidence required to sustain this burden has been variously described before and after the present Administrative Procedures Act was passed. In *Reid v. Florida Real Estate Commission*, 188 So.2d 846 (Fla. 2d DCA 1966) the Court concluded that an action to revoke a license was penal in nature and penal sanctions should be directed only toward those who by their conduct have forfeited their right to the privilege [of licensure] and then only upon clear and convincing proof of substantial causes justifying the forfeiture of license. *Accord, Lewis v. Planned Financial Services*, 340 So.2d 491 (Fla. 4th DCA 1976).

43. However, where only the right to continued employment is concerned, the quantum of proof has been held to be the preponderance of the evidence standard. *South Florida Water Management District v. Caluwe*, 459 So.2d 390 (Fla. 4th DCA 1984); *Florida Department of Health and Rehabilitative Services v. Career Service System*, 489 So.2d 412 (Fla. 4th DCA 1974).

44. United States Supreme Court has approached the burden of proof standards as constitutional due process issue. In *Addington v. Texas*, 441 U.S. 426, 99 S. Ct. 1804, 60 L.Ed. 2d 323 (1979), which involved the standard of proof required to commit an individual involuntarily for an indefinite period in a state mental hospital, the court, after discussing the three standards of proof, viz. beyond a reasonable doubt, preponderance of the evidence, and clear convincing, and the consequences of error to the individual, concluded the intermediate standard of clear and convincing should be used. This standard is applied in deportation cases, *Woodby v. I.N.S.*, 385 U.S. 276, 285 87 S. Ct. 483, 488, 17 L.Ed 2d 362 (1966); in denaturalization cases, *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 63 S. Ct. 1333, 1336, 1357, 87 L.Ed. 1796 (1943); and in severing parental rights to their children, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 188, 71 L.Ed. 2d 599 (1982).

45. License revocation proceedings are clearly penal in nature. *Vining v. Florida Real Estate Commission*, 281 So. 2d 487 (Fla. 1973). Where loss of a valuable license is involved the court in *Bowling v. Department of Insurance*, 394 So.2d 165 (Fla. 1st DCA 1981) held the critical matters in issue must be shown by evidence which is indubitably as substantial as the consequences. This

is a holding relating to allocation of the risk of error. As stated in *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed. 2d 18 (1976), both the risk of erroneous deprivation of private interest resulting from the use of a "fair preponderance" standard and the likelihood that a higher evidentiary standard would reduce the risk must be considered and, when so considered, the standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence, may misdirect the finder in the marginal case.

46. Because license revocation proceedings are penal in nature and the consequences of such action involve the loss of a valuable professional license, the standard of proof must be more than a preponderance of the evidence. The next higher standard is clear and convincing evidence.

47. Considering the evidence here represented it is significant that none of the complaints were by any means "fresh" when made as each was made some 9 to 12 months after the polygraph examination was taken; two of these witnesses were employed by the Polk County Sheriff at the time their complaints were forthcoming; the Sheriff was obviously upset by the disclosure of the Klu Klux Klan (KKK) involvement by some of the deputies he employed and he suspected the Respondent to be the source of this disclosure; and the third complaining witness's testimony is not credible. Respondent strongly denied the material allegations against him, presented expert testimony that the procedures he followed in conducting the polygraph examinations was the proper procedure; and presented character witnesses to testify to his good character and reputation for truth and veracity.

48. From the foregoing it is concluded that the Petitioner has failed to prove, by clear and convincing evidence, that Respondent was guilty of misconduct in administering polygraph examinations to Phyllis Ann Langsdale, Rose Marie Giannotti, or JoAnne Meyer while employed by the Polk County Sheriff's Department.

RECOMMENDATION

It is RECOMMENDED that a final order be entered finding Petitioner not guilty of all charges and the emergency suspension of his license be vacated.

DONE AND ENTERED this 3rd day of November 1986 at Tallahassee, Florida.

K. N. AYERS
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32301
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November 1986.

APPENDIX

Proposed findings submitted by Petitioner which are not adopted or accepted.

6. This finding comprises nearly two legal size pages and contains numerous factual conclusions. Those relating to the witness drug use are rejected as immaterial to the allegations made against Respondent. Those relating to sexually oriented questions which are in conflict with the Hearing Officer's numbers 11 through 21 are rejected as not supported by credible evidence.

7. This finding comprises nearly two legal size papers and contain numerous factual conclusions. No credible evidence was presented that the green sheet had been altered. See Hearing Officer's numbers 9 and 10.

8. This finding comprises one and one half legal size pages and contains numerous factual conclusions. Reference to a video camera in the examination room is rejected. See Hearing Officer's number 29. Statements in this finding inconsistent with Hearing Officer's numbers 24 through 31 are rejected as unsupported by the evidence.

10. Rejected insofar as this implies justification of non-rule policy is concerned.

Proposed findings submitted by Respondent which were not adopted or accepted.

26. Rejected. Additional questions are asked if the applicant evidences difficulty understanding the question and such questions are continued until the examiner is sure he has a question the applicant can intelligently answer.

29. Rejected as argument.

43, 44. Rejected as not supported by credible evidence. See 26 above.

49. Rejected as argument.

50. This testimony was disregarded.

57. This testimony was disregarded.

60. This testimony was disregarded.

74. Rejected as not supported by any evidence.

84. Rejected. Witness never testified to this.

103. Rejected as a conclusion.

111. Rejected as a conclusion.

135. Rejected as unsupported by the evidence.

151. Rejected as conclusion and argument.

164. Rejected as conclusion and argument.

165. Rejected as speculation.

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