STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RONALD M. MOLNAR, Appellant,

vs.

STATE OF WISCONSIN – DEPARTMENT OF CORRECTIONS, Respondent.

Case 76
No. 67495
PA(adv)-133

Decision No. 32336-A

ORDER DENYING APPELLANT'S PRE-HEARING REQUEST TO OFFER RESULTS OF POLYGRAPH EXAMINATIONS INTO EVIDENCE AND TO COMPEL INDIVIDUALS TO UNDERGO A POLYGRAPH EXAMINATION

On August 11, 2008, the Examiner held a pre-hearing status telephone conference during which the Appellant advised the Examiner that he wished to introduce the results of a polygraph examination as evidence at hearing for the purpose of corroborating Appellant's testimony at hearing and that he also wished to have three other individuals who are likely to testify at hearing undergo a polygraph examination for the purpose of impeaching the testimony of the three individuals. Respondent objected on the basis that the results of polygraph examinations are not admissible evidence and that the Appellant has no authority to compel any of the other individuals to submit to a polygraph examination. Having considered the positions of the parties, as well as the record to date, the undersigned issues the following

ORDER

1. Appellant's request to offer the results of polygraph examinations into evidence at hearing is denied.

2. The Examiner will not compel any individual to submit to a polygraph examination.

Dated at Madison, Wisconsin, this 27th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

STATE OF WISCONSIN – DEPARTMENT OF CORRECTIONS (Molnar)

MEMORANDUM ACCOMPANYING ORDER DENYING APPELLANT'S PRE-HEARING REQUEST TO OFFER RESULTS OF POLYGRAPH EXAMINATIONS INTO EVIDENCE AND TO COMPEL INDIVIDUALS TO UNDERGO A POLYGRAPH EXAMINATION

The parties have not stipulated to the admissibility of the results of any polygraph examination. Appellant seeks to introduce into evidence at hearing the results of his polygraph examination, as well as the results of the polygraph examinations of other individuals who may testify at hearing, for the purpose of corroboration or impeachment. At the time of this request, neither the Appellant, nor any of the other witnesses, had undergone a polygraph examination.

Appellant also seeks an order compelling these other witnesses to submit to a polygraph examination. Respondent objects to the introduction into evidence of any polygraph examination results and denies that the Examiner has authority to compel any individual to submit to a polygraph examination.

In CHRISTENSEN v DHSS, CASE NO. 77-62-PC (Pers. Comm. 1/5/78) the Examiner issued an Interim Decision, in which he responded to an appellant request to have the Commission require certain of respondent's employees submit to polygraph tests and to admit these tests into evidence. The respondent had refused to stipulate to the polygraph tests and had indicated that it would object to the introduction of any polygraph examinations offered.

The Examiner in CHRISTENSEN concluded that the Wisconsin rule, as set forth by the Supreme Court at least in criminal cases, completely excluded polygraph tests prior to STATE V. STANISLAWSKI, 62 WIS.2D 730 (1974). The Examiner in CHRISTENSEN further concluded that, in STANISLAWSKI, the Court held that, in criminal cases, the results of polygraph tests would be admissible on the issue of credibility, for corroboration or impeachment purposes, if four preconditions were met:

1. A written stipulation

2. Notwithstanding the stipulation that the admissibility of the test results is subject to the discretion of the trial court

3. Right to cross-examine the polygraph operator as to qualifications, conditions under which the test was administered, and the limitations of and possibilities for error in the technique of polygraphic interrogation, and

4. Appropriate jury instructions

Recognizing that, under Sec. 227.08(1), Stats., an administrative agency, such as the Commission, is not bound by rules of evidence that govern court proceedings, the Examiner in CHRISTENSEN stated that the strict rules set out in STANISLAWSKI are not automatically transferable to administrative proceedings.

The Examiner in CHRISTENSEN states that the Court, in STANISLAWSKi, did note:

> "Experts in the field give a high degree of accuracy or dependability to polygraph examinations, conducted by a competent examiner. Polygraph test accuracy is viewed as comparing favorably with other types of expert psychiatrists, document examiners, and physicians . . . While experts agree that the training and experience of the examiner are crucial in attaining accurate results, those most familiar with the field believe that polygraph examinations constitute a reasonably reliable diagnosis of truth and deception responses to questions asked." 62 Wis. 2d at 738-9.

The Examiner in CHRISTENSEN went on to state:

> Despite this relative degree of reliability of competently administered polygraph tests noted by the court, there are policy factors peculiar to criminal trials that underlie the requirement of a written stipulation between the parties. In an administrative proceeding, there is no basis for a blanket exclusion of what might well be highly probative evidence, depending on the skill of the examiner and the nature of the facts, because both parties have not agreed on the use of such evidence.

The Examiner in CHRISTENSEN then issued his preliminary ruling that the appellant would not be barred from introducing the results of any polygraph test solely because of the absence of a stipulation; but that the offer of such evidence must be accompanied by the appropriate foundation by a competent examiner, who would be subject to cross-examination and that only then would a ruling on admissibility be made.

In responding to the question of whether or not the Commission can or should order a polygraph examination of respondent's witnesses, the Examiner in CHRISTENSEN concluded that, given the lack of precedent and the cautious approach taken by the Supreme Court in STANISLAWSKI, "an order compelling an examination appears to be a step beyond that which the distinction between a criminal and an administrative proceeding will support." The Examiner in CHRISTENSEN then stated that he would not enter an order requiring the examination of respondent's witnesses.

In CHRISTENSEN v DHSS, CASE NO. 77-62-PC (Pers. Comm. 9/13/78) the Commission adopted the Interim Decision of the Hearing Examiner. In this decision, the Commission also considered respondent's subsequent objection to the admission of the opinion of the polygraph examiner regarding the honesty of appellant's responses on the basis that it lacked sufficient foundation. In overruling this objection, the Commission concluded

that both the qualifications of the expert examiner and the procedures used in the examination were presented in sufficient detail to provide an adequate foundation for the testimony in question. In a concurring opinion, Commission Chair Joseph W. Wiley, stated as follows:

> While I concur in the final order in this case, I disagree with the determination of the hearing examiner to admit into evidence the results of a polygraphic examination. In my opinion, the polygraph is too unreliable to be used as evidence, particularly when there are other forms of competent evidence available relating to the issue in question.

In GLASER V. DHSS, CASE NO.79-66-PC, 79-PC-ER-63 (PERS. COMM. 7/31/79) the Commission, in a Prehearing Decision and Order, ruled on the following evidentiary question:

> "Absent a stipulation by the parties, are the results of petitioner's polygraph examination admissible as evidence for the purpose of corroborating the truthfulness of the petitioner's responses as to facts testified to during examination and contradicted by respondent's witness(es)."

Respondent relied upon STATE EX REL HARRIS V. SCHMIDT, 69 WIS.2D 668 (1975) when it objected to the admissibility of such polygraph evidence.

Citing CHRISTENSEN, the Commission concluded that, when confronted with an appellant who sought to use the results of a polygraph examination to corroborate facts to be testified to by the appellant in her attempt to sustain her burden of proof, it should not be necessary that there be a stipulation before a polygraph test of the party offering it can be considered. Finding that the probation revocation proceeding in HARRIS was distinguishable from the hearing before the Commission, the Commission stated:

> The Commission does believe that the other qualifying factors quoted in HARRIS apply as a matter of sound evidentiary law and that questions of admissibility and probative value and weight of the proffered evidence is committed to the sound discretion of the examiner.

These "other qualifying factors" in HARRIS are as follows:

> . . . Admissibility of the test results is subject to the discretion of the hearing examiner and if he is not convinced that the examiner is qualified or that the test was conducted under proper conditions, he may refuse to accept such evidence. If the graphs and examiner's opinion are offered in evidence, then the opposing party shall have the right to cross-examine the polygrapher examiner respecting the examiner's qualifications and training, the conditions under which the test was administered, the limitations of and possibilities for error and the techniques of polygraphic interrogation and, at the discretion of the hearing examiner, any other matters deemed pertinent to the inquiry. (At 683).

Although not stated in GLASER, in determining these "qualifying factors," HARRIS relied upon STANISLAWSKI.

The Commission then issued an Order which included the following:

> 1. The appellant will not be barred from introducing the results of her polygraph test solely because there has been no stipulation as to its admissibility by the respondent.
>
> 2. If the polygraph results and polygraph examiner's opinion are offered in evidence, the opposing party shall have the right to cross examine the polygrapher as delineated in HARRIS, quoted above.
>
> 3. If the hearing examiner is not convinced that polygrapher was qualified or that the test was conducted under proper conditions, he may refuse to accept such evidence.

In the subsequent Decision and Order, GLASER V. DHSS, CASE NO. 79-66-PC, 79-PC-ER-63 (Pers. Comm. 7/27/81), the Commission noted that respondent had urged the Commission to find that the polygraph examination of the appellant and the testimony of experts concerning that examination were irrelevant to the issues before the Commission for decision. The Commission stated, assuming *arguendo*, that all of the polygraph evidence was interpreted in appellant's favor, both with respect to the propriety and reliability of the examination as it was administered and with respect to the conclusion drawn by the expert who administered it and interpreted the examination, this evidence had a very minimal evidentiary weight when compared to the other evidence introduced at hearing and that matters of credibility were better determined by reference to demeanor of the witnesses, and the consistency or lack of it, of their testimony.

In STATE V. DEAN, 103 WIS.2D 228 (1981), the Court reexamined STANISLAWSKI and stated:

> To conclude, we have not undertaken to evaluate the reliability of the polygraph. We recognize today, as we did in STANISLAWSKI, that the science and art of polygraphy have advanced and that the polygraph has a degree of validity and reliability. We are, nevertheless, not persuaded that the reliability of polygraph is such as to permit unconditional admission of the evidence. Our analysis of and our experience with the STANISLAWSKI rule lead us instead to conclude that the STANISLAWSKI conditions are not operating satisfactorily to enhance the reliability of the polygraph evidence and to protect the integrity of the trial process as they were intended to do.
>
> The STANISLAWSKI rule which appeared in 1974 to be a reasonable compromise between unconditional admission of and unconditional rejection of polygraph evidence does not appear at this time to be the satisfactory

> compromise, and we decline to continue to permit the admission of polygraph evidence pursuant to the rule set forth in STANISLAWSKI.
>
> We also reject the alternative of awaiting continued refinement of the *Stanislawski* rule on a case-by-case method. /21 Adequate standards have not developed in the seven years since STANISLAWSKI to guide the trial courts in exercising their discretion in the admission of polygraph evidence. The lack of such standards heightens our concern that the burden on the trial court to assess the reliability of stipulated polygraph evidence may outweigh any probative value the evidence may have.
>
> For the reasons we have set forth, we hold that hereafter it is error for a trial court to admit polygraph evidence in a criminal proceeding unless a STANISLAWSKI stipulation was executed on or before September 1, 1981. . . (At 278-9)

Prior to reaching this conclusion, the Court considered a seventh circuit decision which had addressed STANISLAWSKI and stated:

> The seventh circuit erred in failing to recognize that this court did not decide in STANISLAWSKI whether stipulated or unstipulated polygraph evidence was reliable under the FRYE standard or under any other standard. STANISLAWSKI is, contrary to the interpretation of the Seventh Circuit Court of Appeals, based substantially on the principles of consent and waiver rather than on the principles of scientific reliability. . . (At 257)

In ESTATE OF NEUMANN V. NEUMANN, 242 WIS.2D 205 (2001), the Wisconsin Court of Appeals discussed DEAN and its application to civil cases. In concluding that the results of polygraph examinations are inadmissible in civil cases in Wisconsin, the NEUMANN court stated that, in DEAN, the Court did not indicate that there could be different rules of polygraph admissibility for criminal and civil cases and that the Supreme Court's reasons for excluding polygraph test results in criminal cases would apply equally to civil cases. The court in NEUMANN found that the primary basis for the DEAN court's determination that results of polygraph examinations are not admissible in criminal proceedings was the Supreme Court's lack of confidence in the reliability of polygraph test results. The court went on to note that a criminal defendant has a constitutional right to present a defense and that, if polygraph results offered by a defendant as part of the exercise of a constitutional right are inadmissible, then polygraph results are surely inadmissible when no constitutional right is as stake.

Conclusion

In summary, the Commission has permitted an appellant to offer into evidence the results of an appellant polygraph examination for the purpose of determining issues of credibility in cases in which the parties had not stipulated to the use of the polygraph examination results. The CHRISTENSEN decision reflects a Commission understanding that the

results of a polygraph examination "might be highly probative evidence;" which understanding is seemingly based upon the Commission conclusion that the Court, in STANISLAWSKI, had accepted results of polygraph examinations as accurate and dependable; comparing favorably with other types of expert testimony routinely accepted into evidence.

When the Court in DEAN subsequently overturned the STANISLAWSKI rule regarding the admissibility of evidence of polygraph examinations in criminal proceedings in Wisconsin, the Court stated "We recognize today, as we did in Stanislawski, that the science and art of polygraphy have advanced and that the polygraph has a degree of validity and reliability." It follows, therefore, that the Court in STANISLAWSKI did not, as the Personnel Commission previously understood, accept that the results of polygraph examinations are accurate and dependable; comparing favorably with other types of expert testimony routinely accepted into evidence by courts in Wisconsin.

Given DEAN and its progeny, the Examiner is not persuaded that the Commission's previous conclusion that the results of a polygraph examination "might well be highly probative evidence" continues to be sound. Rather, consistent with the Personnel Commission's conclusion in the GLASER Decision and Order discussed above, the Examiner is persuaded that such evidence, if determined to be admissible under the conditions set forth in CHRISTENSEN and GLASER, is likely to carry minimal evidentiary weight. Sharing the view of the Court in DEAN, the Examiner is not persuaded that adequate standards have developed to guide this Examiner or the Commission in exercising their discretion to admit polygraph evidence and, therefore, the burden to assess the reliability of polygraph evidence outweighs any probative value that such evidence may have.

In summary, the parties have not stipulated to the admission of any polygraph examination results. Given the Examiner's conclusion that such evidence is likely to carry minimal evidentiary weight and that the burden to assess the reliability of the polygraph evidence sought to be introduced by Appellant outweighs any probative value that such evidence may have in determining credibility, the Examiner has denied Appellant's request to offer the results of polygraph examinations into evidence. For this reason, as well as the fact that the Personnel Commission has previously declined to order individuals to undergo a polygraph examination, the Examiner will not order any individual to undergo a polygraph examination. Having reached these conclusions, the Examiner need not address Respondent's claims regarding the appropriate procedure to be followed when conducting polygraph examinations.

Dated at Madison, Wisconsin, this 27th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

CAB/gjc

32336-A