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STATE OF NORTH CAROLINA

COUNTY OF NORTHAMPTON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
17 OSP 08256

Reginald Rudolph Benthall Petitioner, v. North Carolina Department of Public Safety Respondent.	**AMENDED FINAL DECISION**

This amended final decision is filed to correct artifacts of dictation and other clerical errors. N.C. Gen. Stat. § 1A-1, Rule 60(a).

THIS MATTER came on for hearing before Hon. J. Randolph Ward, Administrative Law Judge, on March 22, 2018 in Halifax, North Carolina. Following an opportunity for the parties to submit proposed decisions or other written arguments, this Final Decision was prepared.

APPEARANCES

Petitioner: David G. Schiller, Atty.
Schiller & Schiller, PLLC
Raleigh, N.C.

Respondent: Tamika L. Henderson, Asst. Atty. General
N.C. Department of Justice
Raleigh, N.C.

EXHIBITS

Petitioner's Exhibits 1, 2, 3 & 4 were admitted.

Respondent's Exhibits 1, 2, 3, 4, 5, 5A, 5B, 5C, 5D, 5E-N, 5F, 6, 7 & 8 were admitted, subject to exclusion of evidence relating to polygraph testing.

WITNESSES

Petitioner: Reginald Rudolph Benthall

Respondent: Anthony Smith
Joseph Lewis
Gilbert Don Hurst
Luther Donald Glover, III
Lashonda Taylor Scott
Kevin Dale Haislip
Claudette Ford Edwards

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. §§ 14-258.1(b); 126-1.1(a); 126-34.02(b)(3); 126-35; 150B-25.1(c); 25 NCAC 01J .0604(a)(1) through (4); 25 NCAC 1J 0614(8) (a) (b), and (e).

ISSUE

Whether the Petitioner was terminated from his State employment without just cause.

EXCLUSION OF POLYGRAPH EVIDENCE

Evidence of the Respondent's polygraph test of the Petitioner is excluded from the admitted evidence, and appears in the record as Respondent's "offer of proof."

In North Carolina, polygraph evidence is not "admissible in any trial" in the General Court of Justice, civil or criminal, even by stipulation. *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983).

Respondent sought to show that Petitioner took the polygraph test voluntarily, although he signed a Department form stating that he could be fired for failing to do so. (Tr 18:11-13; R Ex 5D, p 049.) "Prior to 1975, the law in North Carolina was clear that evidence relating to polygraph examinations was inadmissible at trial." *State v. Grier*, 307 N.C. 628, 637, 300 S.E.2d 351, 356 (1983). Thereafter, our courts allowed polygraph evidence to be admitted, with cautionary instructions, if both parties stipulated and agreed to its admission. But in 1983, our Supreme Court, "disturbed by the possibility that the jury may be unduly persuaded by the polygraph evidence," ruled that polygraph evidence was inadmissible, even if "the parties stipulate to its admissibility." Id., 307 N.C. at 643-45, 300 S.E.2d at 360-61. See also, *State v. Allen*, 222 N.C. App. 707, 731 S.E.2d 510 (2012) (Ftnt. 7); *State v. Biggs*, 244 N.C. App. 344, 780 S.E.2d 891, 2015 WL 7729217 (2015) [Reported per Rule 30(e)] ("a polygraph test … is inherently unreliable").

Science continues to support the wisdom of these decisions, with reasons both obvious and subtler. The commonsense observation that, "The physiological responses measured by the polygraph are not uniquely related to deception," is borne out by scientific scrutiny. See, *The Polygraph and Lie Detection*, Committee to Review the Scientific Evidence on the Polygraph of

the National Academy of Sciences, *https://www.nap.edu /download/10420* (viewed 8 Aug. 2018). In this case, the examiner also had a "movement sensor in the chair that the person sits in, and it measures any type of movement," apparently now a standard practice. Anecdotally, the most honest man to a polygraph is a psychopath.

The National Academy's committee also observed that, "Despite efforts to create standardized polygraph testing procedures, each test with each individual has significant unique features." *Id*. This underscores the *Grier* Court's observation that, "If a trial court were to adequately police the reliability of [polygraph] results, the time required to explore the innumerable factors which could affect the accuracy of a particular test would be incalculable." *State v. Grier*, 307 N.C. at 643, 300 S.E.2d at 359.

The National Academy of Science's committee responded to an inquiry by the Department of Energy ("DOE"), which has charge of fissionable materials, that polygraph security screening of employees would result in "too many loyal employees falsely judged deceptive and too many major security threats left undetected." The polygraph may be a useful prop for police interrogations, but it cannot be relied upon for actionable information.

An administrative law judge may go outside the rules of evidence to consider the "most reliable and substantial evidence available." N.C. Gen. Stat. §150B-29(a). The evidence relating to Respondent's polygraph test is excluded here because polygraph testing is "inherently unreliable" under all circumstances.

UPON DUE CONSIDERATION of the arguments and stipulations of the parties; the exhibits admitted; and, the sworn testimony of each of the witnesses, viewed in light of their opportunity to see, hear, and know of relevant facts and occurrences, any interests they might have, and whether their testimony is reasonable and consistent with other credible evidence; and, upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable rules and laws, the undersigned makes the following:

FINDINGS OF FACT

1. At the time of the events giving rise to this controversy, the Petitioner Reginald Rudolph Benthall was employed as a Maintenance Mechanic IV by the Respondent Department of Public Safety, in its Division of Adult Correction, at Odom Correctional Institution (hereinafter, "Odom"), at Jackson, N.C. He worked 28 years at Odom for the Respondent and its predecessor agencies, from August 14, 1989 until his discharge on August 18, 2017. He performed general building maintenance tasks, including repairing water leaks, replacing windows, repairing small machines (*e.g*., washer and fire alarm system), painting, and office finish work. *See*, Petitioner's Exhibit 1, Bates stamp number 000215 (hereinafter, "P Ex 1, p 215"). Prior to the subject incident, he had never been disciplined, and all his performance evaluations had been "good" or "very good." Transcript of the Hearing, page 184, line 16, through page 185, line 8 (hereinafter, "Tr p 184:16 – 185:8"). Mr. Benthall was a particularly valuable employee because of his breadth of knowledge about various types of maintenance. (See, *e.g*., P Ex 1, p 218-22 and 303.)

2. On Thursday, March 9, 2016, Correctional Officer Kevin Haislip, a 26-year veteran of the Department and Odom, was approached by an inmate who said that "he had some information he needed to tell someone." Officer Haislip asked the inmate if he wanted to speak to the officer in charge ("OIC"), who at that hour was Captain Donald Glover, and he said "no." (R Ex 5C, p 055-56.) He then asked the inmate if he wanted to speak to Mr. James A. Tuck, an Assistant Superintendent, and he said "yes." (Tr 165:6-18, 166:14-22) (This inmate is identified by name, but generally referred to in the record as the "confidential informant" or "CI.") He told Mr. Tuck "that he had been very helpful to other staff at other facilities, giving information concerning contraband coming in" illegally to inmates. (R Ex 5A, p 050.) There is no other account in the record of "CI" having previously given truthful information, or other evidence of his veracity. He did not testify, nor give a sworn statement, and was not questioned by the investigators. (R Ex 5.)

3. Officer Haislip notified Mr. Tuck of this request, and he came to "Field House 10" and spoke with the inmate. It appears that the CI did not give Mr. Tuck Mr. Benthall' s name during this first conversation. According to Officer Haislip's written statement, the CI approached him later in the day and:

> … advised me he needed to talk to Mr. Tuck again. Mr. Tuck talked to inmate [CI] again in Field House #10, Mr. Tuck questioned inmate [CI] on what he had to talk about. He proceeded to tell Mr. Tuck that a maintenance man was dirty, to which Mr. Tuck replied, "who." Inmate [CI] stated, "Benthall." He then told Mr. Tuck that it was going down tonight.

(R Ex 5C, p 2.). Mr. Tuck's written statement recounts that, on March 9, 2017, DC told him that he had overheard inmates Don Hurst and James Tunstall telling someone on a pay phone in their cell block "to meet Maintenance Staff Member Reginald Hall somewhere around Northampton County to receive tobacco and mini bottles of alcohol that could be brought into the facility…." (R Ex 5A, p 1.)

4. Based on his conversations with the CI, Mr. Tuck believed that Mr. Benthall would be bringing the tobacco and alcohol to Odom on the following morning of Friday, March 10, 2017. But "[d]ue to the time of day" he received this information, "it was too late to try and organize a formal Drug Interdiction Mission for the next day, so arrangements were made to have facility staff to be prepared to search Mr. Bentall's vehicle and his person…." (R Ex 5A, p 2.)

5. Early on the morning of Friday, March 10, 2017, Mr. Tuck discussed the information he received from the CI with Capt. Donald Glover, and they and Officer Haislip executed a search of Mr. Benthall, his truck and personal effects, and the Maintenance Shop building that served as the base of operations for Mr. Benthall and six or seven other maintenance technicians. No packaged tobacco or alcoholic drinks were found. (R Ex 5A, p 2; Tr 143:16-144:6, 145:1-9, and 191:5-193:10.)

6. In searching in and around the maintenance shop building, the officers collected 10 objects associated with contraband, and photographed them together shortly before noon on March 10, 2017. (See, R Ex 7.) Two (2) empty "airplane size," liquor bottles had been discarded under

the gas or mower shed, near where inmates allowed to work maintenance took breaks. A little tobacco in a plastic bag and a cigarette lighter were found in the boiler room. (R Ex 5C, p 056; 107:23-108:4.) The larger empty plastic bottle smelled of alcohol. (Tr 132:25 – 133:1.) The photo also depicts matches, cigarette rolling papers, and a "shank" – a piece of metal fashioned into a stabbing instrument. Six or seven members of the maintenance staff use the "maintenance shop" building daily, and on a day when the weather was favorable for outdoor work, "between 18 to 22" inmates could be in the building at some point. (Tr 222:6 – 223:2)

7. The search provided no evidence that Petitioner was involved with bringing contraband into Odom.

8. Respondent's investigators later determined that the inmate James Tunstall, who the CI told Mr. Tuck was with inmate Don Hurst during the incriminating telephone call on he overheard on March 9, 2017, was "assigned to restrictive housing" at that time and could not have participated in the telephone call as the CI described. (R Ex 5, p 024.) Mr. Tuck requested "transcripts from the Telecommunications Section" of telephone calls on the morning of March 9, 2017[1] from the pay phone indicated by the CI. These transcripts do not appear in the record. There is no evidence in the record concerning what favors the CI sought or received, or other motives for giving his "information" to Mr. Tuck. Mr. Tuck did not testify at the hearing.

9. The "confidential informant" ("CI") provided unreliable information.

10. On the date of the hearing, Capt. Donald Glover had been employed in corrections for 26 years and served as a captain for 10 years at Odom. (R Ex 5C, p 055-56.) He credibly testified that any contraband, in any amount, was a serious concern due to its value inside the prison, and the propensity of some inmates to use violence to obtain it or retain it; but that he was willing to forego punishing an inmate involved with contraband to catch prison personnel that brought contraband into the prison.

11. On Monday, March 13, 2017, Capt. Glover interviewed inmate Don Hurst. (Tr 147:12-18.) Capt. Glover confronted him, saying they knew he was working with Mr. Benthall to bring in tobacco and alcohol. Hurst told him that he was fearful of retribution in the prison if he cooperated, and he was promised a transfer to another facility if he was forthcoming. (Tr 113:25 :12-18.) Inmate Hurst cooperated and was transferred out of Odom the following Friday. (Tr 119:19-120:3.)

12. Inmate Hurst told Capt. Glover and officers working with him that he was bringing in contraband because, after he got a maintenance job that allowed him to go outside the prison walls, a prison gang threatened to harm him if he did not help them get tobacco. He said his brother would obtain the contraband and give it to a prison employee to bring into Odom. He agreed that the prison employee was the Petitioner.

13. Inmate Don Hurst testified that, "They wanted a phone call so they would know about dropping it off with Benthall." At the behest of prison officials, he made two phone calls to

[1] The statement actually says "March 2, 2017," but by context, and a correction to the same date elsewhere in the statement, it appears that Mr. Tuck intended to say "March 9, 2017."

his brother, Nathan Hurst, on Thursday, March 16, 2017, recorded with his knowledge, "so that they could get it on the record." (Tr 88:15 - 89:8.) (See transcriptions in R Ex 5 p 035-037, and R Ex 5K.) In their "Investigative Findings," the investigators relied heavily on these "telephone transcripts" in concluding that Petitioner helped "introduc[e] contraband into Odom." (R Ex 5 p 030-031.) This was based on the belief that Nathen Hurst did not know they were being recorded, and thus any mention by this co-conspirator of Mr. Benthall by name, or the color of his truck, would prove that Petitioner was involved.

14. In his testimony, inmate Don Hurst repeatedly denied having talked to his brother by phone before these calls. (Tr 121:8-11.) On cross-examination, Hurst was asked whether, other than the March 16th conversations in Exhibit 5K, "did you ever use a prison phone to talk to your brother Nathan about working with Mr. Benthall?" Hurst responded, "I sent him a letter. I didn't use the prison phone. I sent him a letter." (Tr 111:7-13)

> Q. Okay. So 5K is the first time you ever talked to your brother about working with Mr. Benthall in this contraband scheme?
>
> A. Yes. I was advised to call and get it on tape. And that's the phone call I made to get it on tape. And before that there was nothing talking about it. I mean, he said, don't say nothing. So I'm not going to say nothing.

(Tr 111:19 – 112:1). The transcripts of the March 16th conversations suggest that inmate Hurst's answer was the literal truth. His brother seems to have a vague understanding of the story to be told, and particularly that he wants to identify a "burgundy truck," and that the target was Benthall, known as "Mr. B." Otherwise, Inmate Don Hurst supplies all the facts, and seems to be coaching his brother on the desired story.

15. In discussing the fear of gangs that caused him to cooperate with their contraband scheme, inmate Don Hurst testified:

> I figured the best route would be to do what they say because if I went and told it and I go to another prison, it's just going to follow me there through them gang members, and half of them have got cell phones. And they call from one prison to another.

(Tr 88:14-18.) This testimony raises questions about both inmate Hurst's ability to communicate undetected with his brother, and his motivation to cooperate if it was against the gang's actual supplier.

16. The Respondent's Office of Special Investigations ("OSI") was notified of the allegations against the Petitioner on March 29, 2017, and assigned investigators to the case on April 3, 2017. The investigators assembled the evidence against the Petitioner. Nathan Hurst would not return their calls. On April 27, 2017, the OSI investigators interviewed inmate Don Hurst at the Tyrell Prison Work Farm. The financial arrangements for the contraband scheme were discussed.

> Inmate Hurst admitted that he and his brother, Nathan, began setting up "Green Dot Card" operations at a local Wal-Mart. Inmate Hurst reported that the operations became so involved that Wal-Mart limited the amount of transactions to two (2) daily, hindering their operation. Hurst reported that they (inmate Don and Nathan) eventually had to conduct business with a local Western Union in order to keep up with the operation.

(R Ex 5, p 026.). However, inmate Hurst told Capt. Glover, and testified at the hearing, that he was effectively recruited by Petitioner, but worked with him only a very few times bringing in contraband. (Tr 107:12-15 - "I believe twice.")

17. The evidence tends to show that the witness upon which the Respondent's case relies, inmate Don Hurst, was at times deceptive.

18. The preponderance of the competent evidence of record fails to show that Petitioner committed the acts for which he was terminated.

19. On August 15, 2007, Respondent sent Petitioner a Notification of Pre-Disciplinary Conference the following day, specifying allegations that might result in disciplinary action. (R Ex 1.) Following that meeting, Respondent dismissed Petitioner in a letter dated August 18, 2017, setting out the acts and omissions determined to be sufficient reasons for this action. (R Ex 3.)

20. Respondent dismissed Petitioner and duly advised him of his right to appeal to the Office of Administrative Hearings in a Final Agency Decision letter dated November 21, 2017. (R Ex 4.)

21. Petitioner timely filed a Petition for a contested case hearing on December 5, 2017.

22. The Office of Administrative Hearings gave the parties due notice of the hearing in this matter on March 2, 2018.

BASED UPON the foregoing Findings of Fact, the undersigned makes the following,

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the parties and the cause. N.C. Gen. Stat. §§ 126-34.02(b)(3); 126-35.

2. At all times pertinent hereto, the Petitioner was a "career state employee," entitled to challenge his termination on the grounds that he was dismissed for disciplinary reasons without just cause. N.C. Gen. Stat. §§ 126-1.1(a); 126-34.02(b)(3). In such cases, the employer agency has the burden of showing, by a preponderance of the evidence, that the employee was discharged for just cause. N.C. Gen. Stat.§§ 126-34.02(d); 150B-25.1(c).

3. A career state employee may not be "discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126–35(a).

4. The record fails to show, by a preponderance of the evidence, that the Petitioner employee engaged in the misconduct alleged by the Respondent.

5. Respondent dismissed Petitioner without just cause.

6. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, disc. rev. den., 366 N.C. 408, 735 S.E.2d 175 (2012).

7. A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. *Green v. Green*, 284 S.E.2d 171,174, 54 N.C. App. 571, 575 (1981); *In re Custody of Stancil*, 179 S.E.2d 844,847, 10 N.C. App. 545, 549 (1971). Specific findings are not required on each piece of evidence presented. See *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993) (stating that the tribunal "need only find those facts which are material to the resolution of the dispute").

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned, makes the following

FINAL DECISION

1. That Respondent shall reinstate Petitioner to his former position or a similar position with the same benefits and conditions of employment;

2. That Respondent shall pay Petitioner back wages from the date of his dismissal, and restore all benefits that would have accrued from that time;

3. That Respondent compensate Petitioner for a reasonable attorney's fee, when such is approved by the Office of Administrative Hearings; and,

4. That counsel for Petitioner shall submit an affidavit concerning his time, services and expenses in this case, the normal and reasonable fees charged in cases of this nature by attorneys with his relevant skills and experience, and a copy or description of his contract with Petitioner.

NOTICE OF APPEAL RIGHTS

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of

Appeals as provided in N.C.G.S. § 7A-29 (a). The appeal shall be taken within **30 days** of receipt of the of the final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

IT IS SO ORDERED.

This the 14th day of August, 2018.

J Randolph Ward
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

David G Schiller
david@schillerfirm.com
Attorney For Petitioner

Tamika L Henderson
North Carolina Department of Justice
tlhenderson@ncdoj.gov
Attorney For Respondent

This the 14th day of August, 2018.

Jerrod Godwin
Administrative Law Judge Assistant
Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6700
Telephone: 919-431-3000