

04/03/02 “See News Release 028 for any concurrences and/or dissents.”

SUPREME COURT OF LOUISIANA

No. 2001-C-2466

JOHNNY M. EVANS, SR.

VERSUS

DERIDDER MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD

CALOGERO, Chief Justice, dissents.

The majority’s opinion is based on the fallacy that an employer may simply terminate a civil service employee who refuses to submit to a polygraph examination. However, the lower court cases cited by the majority hold that refusal to submit to a polygraph examination may be deemed insubordination justifying dismissal only under certain circumstances. In Creadeur v. Dep’t of Public Safety, Div. of State Police, 364 So. 2d 155, 157-58 (La. App. 1 Cir. 1978), the primary appellate court case relied upon by the majority, the court held that “as a general rule a police officer may be required to take a polygraph or similar test where the request is reasonable and bears sound relationship to police work, lawful departmental policy or interdepartmental matters, but that the rule is not absolute and is subject to the exception of reasonableness under the circumstances of each case.” Notably, in Creadeur, which relied on Roux v. New Orleans Police Dep’t, 223 So. 2d 905 (La. App. 4th Cir. 1969), the appellate court, in determining the reasonableness of the request, was especially impressed with the appointing authority’s testimony that the officer was informed when he was asked to submit to the examination that the results thereof would not be used to discharge the officer “or anything like that but to channel the investigation, to show us in what direction we should follow.” 364 So. 2d at 156. Not only are the results of the polygraph examination being offered by the appointing authority to

justify Officer Evans's dismissal in the instant case, the majority also appears to hold today that mere refusal to submit to an examination can justify dismissal in and of itself. Even if that holding were correct, it is one thing to allow an employer to terminate for insubordination a civil service employee who refuses to submit to a polygraph examination, and it is quite another to say that polygraph examination results may be admitted as competent evidence in a judicial or even quasi-judicial proceeding against the employee to justify his dismissal. Because I disagree that the one necessarily follows the other, I respectfully dissent from the majority's holding today.

As the majority notes, the issue in this case is whether the polygraph examination results may be reasonably found to be competent evidence admissible in an administrative proceeding. The fact that an employee may be fired for insubordination under special circumstances for refusing to submit to a polygraph examination does not make polygraph results legally competent evidence. I do not disagree that it might appear incongruous to the casual observer to allow the appointing authority to require an employee to submit to a polygraph examination or else be terminated, but then not allow the results of the examination in evidence at an administrative hearing to justify the decision to dismiss the employee. Yet, the majority concedes that the results of the examination would not be admissible in a criminal trial against the police officer. To my mind, the same reasons for not allowing such evidence in a criminal or civil proceeding militate against allowing such evidence in an administrative proceeding, where, as the majority concedes, lay persons are frequently involved. Ante, p. 8.

I find the reasons for disallowing polygraph examination or stress test results in criminal cases to be relevant to the instant case. As the majority notes, in State v. Catanese, 368 So.2d 975 (La. 1979), we set forth several policy reasons for not

allowing such evidence in criminal trials: (1) the fact-finder would give conclusive weight to the polygraphist's opinion; (2) the reliability of the examination results depends solely on the polygraphist's skill; and (3) no extensive procedural safeguards exist governing the admission of polygraph results. The majority addresses none of these policy considerations specifically; instead, the majority states generally that administrative proceedings should be treated differently than ordinary trials for various reasons and that police officers hold a position of public trust. However, there is no indication here that the proceeding before the Board meets any of the majority's stated conditions for treating evidentiary issues regarding polygraph examinations differently than we treat such issues in ordinary criminal or civil trials. The Board here was merely adjudicating a dispute between the appointing authority and the civil servant, and there is no suggestion that it was composed of non-lawyer members who had any expertise in polygraph results. Elsewhere, the majority, presumably in addressing the Catanese policy reasons, simply concludes that the Board gave proper weight to the polygraph examination results and observes that the licensed polygraphist was extensively cross-examined by counsel, ostensibly establishing the reliability of the witness's interpretation of the polygraph measurements. The fact remains that the Board in this case functioned as any other jury might in determining the credibility of a party and the weight to give the testimonial evidence.

In my view, the court of appeal had it right on a number of points. In this case, the dispute was between the internally-conflicting, self-serving hearsay statements of a convicted killer, one statement of which contained hearsay-within-hearsay of still another convicted murderer, and the testimony of a police officer with no prior disciplinary infractions who denied divulging confidential information to his son or Pickens, and who, in fact, had previously turned his son in to law enforcement

authorities on drug charges. As the court of appeal reasonably found, the Board clearly relied on the polygraphist's testimony and his interpretation of the results of his examination of the police officer employee to overcome the weak hearsay evidence against the officer and to justify the appointing authority's decision. The lay board members simply adopted the "lie detector" test results to find that the officer was not credible, thereby giving conclusive weight to "developing and inexact" scientific evidence, a result we explicitly warned against in Catanese.

The court of appeal next pointed out the questionable reliability of polygraph results. As the majority itself notes, the physiological measurements are fairly straightforward and "[i]t is up to the examiner to determine the suitability of the subject for testing, to formulate proper test questions, to establish the necessary rapport with the subject, to detect attempts to mask or create reactions on the chart, and to interpret the charts." Ante, p. 2, n. 1. Although polygraphists might now be licensed and subject to certain professional requirements since our decision in Catanese, the fact remains that the reliability of the test results is entirely dependent upon the skill and the subjective decisions of the examiner, who, as the Supreme Court has recognized, is effectively giving his opinion on the subject's truthfulness or deception on another occasion without any knowledge of the relevant facts. See United States v. Scheffer, 523 U.S. 303 (1998). Moreover, as the appellate court observed, the witness's opinion testimony is based on the subject's physiological responses, which have not been scientifically proved to be causally related to truthfulness or deception. See Evans v. DeRidder Municipal Fire and Police Bd., 01-118, pp. 5-6 (La. App. 3 Cir. 6/27/01), 789 So. 2d 752, 757-58. Justice Knoll in her concurrence recognizes the science as "developing and inexact." Tellingly, the majority makes no mention of whether the state of the science justifies accepting polygraph results today as reliable

evidence in a judicial or quasi-judicial proceeding. Instead, the majority simply notes that the witness was cross-examined as to possible inaccurate test results.

Finally, the majority, as Justice Weimer apparently recognizes in his concurrence, neglects to impose any restrictions or even basic evidentiary guidelines on the admissibility of polygraph test results in civil service proceedings, despite our cautionary language in Catanese. The rationale of Chaisson v. Cajun Bag & Supply Co., 97-1255 (La. 3/4/98), 708 So. 2d 375, discussed by the majority simply does not provide the “extensive procedural safeguards” we said in Catanese would be necessary for polygraph examination results to be admitted in evidence.

The majority opinion, when it comes down to its essence, simply turns on the facile logic that a civil service employee may be fired for insubordination for refusing to submit to a “lie detector” test, ergo the appointing authority should be able to introduce the results in a civil proceeding to justify a decision to dismiss the employee when the results of that test are negative. In Catanese, we recognized that polygraph examination results might be admissible in a post-trial setting to determine whether a new trial should be granted, that is, in circumstances where the defendant’s guilt or innocence is not at issue and the trial judge decides both the admission of the evidence and the weight to give it. I understand our reasoning there to suggest that polygraph examination results might have a role to play in the search for truth, as opposed to simply being the final arbiter on truth or deception. Clearly the Credeur court recognized as much. Thus, it is not illogical to allow an appointing authority to require under reasonable circumstances that the civil servant submit to a polygraph examination in the authority’s search for the truth, i.e., as an investigative tool, yet not permit the subsequent introduction of the negative results of such an examination in a quasi-judicial proceeding to prove that the civil servant was deceptive on a particular

occasion, and thus conclusively determine the civil servant's credibility, a role best left to the fact-finder unencumbered by questionably-reliable opinion testimony.

Based on the foregoing reasons, I would affirm the court of appeal's finding that the Board erred in allowing in evidence the testimony of the polygraphist regarding his interpretation of the results of the polygraph examination.