

**U.S EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS
P.O. Box 77960
WASHINGTON, D.C. 20013**

██████████

Complainant

v.

**JEH JOHNSON, Secretary
U.S. Department of Homeland Security
(U.S. Secret Service)**

Agency

EEOC Case No.

██████████

Agency Case No.

████████████████████

September 19, 2018

**APPEAL OF A DECISION FOR SUMMARY JUDGMENT TO THE
UNITED STATES SECRET SERVICE WITHOUT A HEARING**

INTRODUCTION

This is an appeal from the entry of judgment in favor of the United States Secret Service (hereafter “Agency” or “USSS”), emailed to Complainant ██████████ (hereafter “██████████” on August 20, 2018. The essential flaw in the administrative judge’s decision is her conclusion that there is no genuine dispute about the validity of the lie detector test administered to Complainant. If the test was, as the evidence shows, improperly administered, the ostensible results are of no value; and it cannot be concluded that Mr. ██████████ failed the test and, therefore, was not qualified.

Mr. [REDACTED] complaint made three allegations, none of which were reduced to material fact in the USSS favor. First Mr. [REDACTED] alleged that he was not afforded the same due process nor were the standard best practices followed with regard to his security clearance adjudication and background check required for employment with the Secret Service. Second, Mr. [REDACTED] alleged the investigative agents made inquiries about his disability that were expressly prohibited under Executive Order (E.O.) 12968 and in violation of the Security Clearance Adjudication Process. Third, Mr. [REDACTED] alleged that during the polygraph examination process given by Special Agent Ellen Ripperger on September 18, 2014, that inappropriate inquiries into his disability were made, that his exam was conducted in a hostile manner in terms of how the questions were asked of him (inflection, tone of voice, etc.), and that he was called a liar and accused of numerous crimes he did not commit including arson and illicit drug use. It is Mr. [REDACTED] contention that few individuals could have passed the polygraph exam that he was given, let alone an individual with an anxiety disorder. Mr. [REDACTED] alleges that the disability he disclosed to the USSS as part of the investigative process was utilized against him to steer his exam such that he could not pass it.

All of Mr. [REDACTED] allegations regarding what transpired during his

polygraph examination could have been determined conclusively true or false beyond a reasonable doubt by means of the audio recording made of his polygraph exam, which the USSS was ordered to produce by Administrative Judge Antoinette Eates. The audio recording the USSS produced of this critical piece of evidence was inaudible, with the exception of a 22 second introduction. The remainder of the recording contains principally static and noise. The proffered explanation by the USSS that the audio recording is not audible due to a “faulty microphone” is simply not credible and the USSS has not produced a scintilla of evidence to support this claim. For reasons discussed at length under the FACTS section of this appeal, it is beyond a shadow of a doubt that the audio recording of Mr. [REDACTED] polygraph examination was either destroyed by the USSS or never recorded by Special Agent Ellen Ripperger. The Department of Homeland Security Office of the Inspector General (DHS-OIG) currently has an active investigation with regard to why the recording of Mr. [REDACTED] exam no longer exists and how the USSS could possibly fail to produce it. The investigation began in the early first quarter of 2018 and is ongoing; and Senior Special Agent Michael Benedict of DHS-OIG stated to all parties of the EEOC Complaint when asked for a timeline for completion by Judge Antoinette Eates that “The

investigation is ongoing and we are unable to provide an estimated completion date at this time.” On knowledge and belief, DHS-OIG does not continue to investigate cases which lack any merit or significant chance of discerning malfeasance has occurred.

Mr. [REDACTED] is not challenging the validity of the polygraph examination process for job applicants or the request that he submit to one for employment in this complaint. Mr. [REDACTED] is challenging the validity of the polygraph examination given to him by Special Agent Ellen Ripperger and the possibility that he was deliberately “steered to fail” the exam by Special Agent Ellen Ripperger because of his disability.

The administrative judge, ruling on the Agency’s motion for a decision without a hearing, made numerous inferences which will be articulated in detail in favor of the USSS, which is wholly inappropriate given the USSS is the party moving for summary judgment.

LEGAL STANDARD

Commission regulations governing Federal Sector EEO complaints provide for issuance of a decision without a hearing when the Administrative Judge finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment

procedure set forth in Rule 56 of the Federal Rules of Civil Procedure.

The Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exist no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

In ruling on a motion for summary judgment, a court's function is not to weigh the evidence, but rather to determine whether there are genuine issues for trial. *Id.* at 249. The evidence of the non-moving party must be believed at the summary judgment stage, and all justifiable inferences must be drawn in the non-moving party's favor. *Id.* at 255.

An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986).; *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988).

A fact is "material" if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, issuing a decision without a hearing is not appropriate.

In the context of an administrative proceeding, an Administrative Judge may properly consider issuing a decision without holding a hearing

only upon determination that the record has been adequately developed for summary disposition. See *Petty v. Department of Defense*, EEOC Appeal No. 01 A24206 (July 11, 2003).

In order to avoid summary judgment, the non-moving party must produce admissible factual evidence sufficient to demonstrate the existence of a genuine issue of material fact requiring resolution by the fact finder. *Celotex*, 477 U.S. at 322-24. The party opposing a properly made motion for summary judgment may not simply rest upon the allegations contained in his or her pleading, but must set forth specific facts showing that there is a genuine issue still in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).¹

FACTS

Mr. [REDACTED] is currently and at all times relevant to his complaint was a GS-14 information technology specialist with the Social Security Administration. He applied for a GS-15 IT Program Manager (PLCYPLN) position Job Announcement Number: TEC-AS166-13-MP with the USSS, on or about September 16, 2013, and was extended a conditional offer of employment by the USSS on July 17, 2014 from the Human Resources Department at the Secret Service. The Conditional Offer of employment stated

¹ This is the verbatim text of a statement of legal standards issued by an EEOC administrative judge in another case.

that Mr. [REDACTED] “appointment to the above position is contingent upon [his] successful completion of a background investigation.”

Mr. [REDACTED] brought this claim alleging that he was not hired based on the disclosure of his disability (diagnosed obsessive compulsive disorder comorbid with major depressive disorder in remission with medication). More specifically, Mr. [REDACTED] alleged that because his background was impeccable in all respects, the polygraph was the only mechanism that USSS could leverage to “legitimately” rescind his offer of employment upon learning of his disability.

ARGUMENT

The abridged version of this Argument can be summarized in four sentences.

The USSS assertion that “Spoliation has not occurred” with regard to evidence in this complaint is not accurate. The testimony of Special Agent Ellen Ripperger in this matter is neither credible nor believable, and contradicts with the material physical evidence presented in the original complaint on numerous occasions. A genuine issue of material fact remains if the polygraph exam given to Mr. [REDACTED] was conducted properly, interpreted correctly, and if Mr. [REDACTED] was “steered to fail” the exam by Special Agent Ellen Ripperger by using the applicant’s disclosed disability of having an anxiety disorder (OCD). Mr. [REDACTED] a

disabled applicant who took an exam with admitted technical difficulties was denied a retest, while another non-disabled candidate (Stephen Tignor) was afforded a retest when his polygraph exam was reviewed and was found to have in the USSS own words “absolutely no issues.”² The remainder of this argument provides evidence of material facts in support of these four sentences.

The USSS statement that “Spoliation has not occurred”³ with regard to the Audio Recording of Mr. ██████████ Polygraph is Materially False.

The USSS statement that “Spoliation has not occurred” with regard to the Audio Recording of Mr. ██████████ polygraph exam is materially false. The Complainant introduced numerous pieces of written evidence detailed in this appeal that prove the audio recording of Mr. ██████████ polygraph exam was made properly and was completely audible despite USSS claims to the contrary. The USSS offers no evidence to contradict the evidence submitted by the Complainant, including the USSS Quality Control Worksheet which stated the polygraph exam recording was audible and was randomly checked to be audible at discrete periods throughout the entire polygraph exam by two quality control examiners. The USSS merely states that Special Agent Ellen Ripperger properly recorded the exam, saved it to her laptop and a shared network drive, and that an accurate reproduction

² Deposition of Special Agent Ellen Ripperger, Page 142, Lines 18-19.

³ AGENCY'S OPPOSITION TO COMPLAINANT'S MOTION TO SHOW CAUSE, Page 3, First Sentence under Argument.

of that recording was provided to the Complainant. However, the audio file produced by the USSS does not match the description of the audio file described in quality control documents, the sound pressure levels described by Special Agent Ellen Ripperger during her deposition, and is significantly shorter (~ 30%) than the duration of Mr. [REDACTED] polygraph examination. While the USSS asserts that it did not alter the audio file, they have provided no evidence to support such an assertion in the face of ample physical evidence that such destruction did take place; and just because the USSS said it, does not make it so.

The USSS did not accurately describe the Quality of the Audio File Produced.

The USSS accuses the Complainant of not accurately describing the clarity of the audio files produced, describing portions of them as “largely comprehensible” which is another materially false statement. Both the Complainant and his attorney listened to the entire recording in the manner described by the USSS with “high volume” or “using headphones”. The only section of the audio that could be considered “largely comprehensible” is the first twenty two seconds of the examination consisting of the file number, Mr. [REDACTED] and the polygraph examiner’s name, and the date and time the session began. Static is all that can be heard for the remainder of the recording, except that near the end of the recording speaking can be heard in the background for approximately one minute. The words are barely discernable.

The fact of the matter is the audio files provided by the USSS were virtually blank and contained nothing of any use or significance. The original audio files provided to the Complainant were hand delivered to Judge Antoinette Eates, but she made no mention of ever listening to them during the telephone conference regarding the Spoliation Sanctions Motion, and instead cherry picked information provided to her by the USSS during the teleconference for her decision favoring the USSS.

Evidence supports that the Audio of Mr. ██████████ Polygraph Examination Existed Beyond a Shadow of a Doubt, but was not Produced by the USSS.

The following indisputable facts exist with regard to the audio recording made of Mr. ██████████ polygraph examination.

1. Agent Ripperger claimed that “On my computer screen, when we hit "record," it shows that we're recording. Throughout the exam, it showed me that I was recording the exam, and there's a dialogue box that shows the volume being recorded.” *Deposition of Agent Ripperger, op. cit., page 28, line 15 to page 28 line 21.*
2. Agent Ripperger also claimed that when she reviewed the audio file in August of 2016, “I heard me talking to Mr. ██████████ about the polygraph exam

and the questions that we were going to be going over.” *Id.* page 31, lines 12-14.⁴

3. Among the documents produced in response to Mr. [REDACTED] discovery requests was the “U.S. Secret Service “Polygraph Program Quality Control Worksheet/Applicant Exam” (hereafter “QCW”) that was filled out after Special Agent Ellen Ripperger conducted the polygraph examination of Mr. [REDACTED]
4. The QCW contains a checklist of ten items, the sixth being “Exam Audio Recorded (random checks throughout exam)”. A check mark appears under the “Yes” column; and it was signed by both Special Agent Ed Alston, a “Quality Control Reviewer”, and Special Agent Thomas Christopher, a “Quality Control Supervisor”.
5. These random checks establish that an audio recording had been successfully made, and undermine the assertion that the reason virtually nothing is audible is because microphones did not work.
6. Mr. [REDACTED] “failed” a single question in his polygraph on “serious crimes”. However, he was judged as failing by Special Agent Ellen Ripperger, but her evaluation was not concurred with by Special Agent Edward Alston who judged the result as “inconclusive”. A third agent, Sgt. William Magnuson

⁴ See Agent Ripperger’s Deposition, *op cit.*, page 121, lines 12-21.

was brought in to review the exam and break the tie. Sgt. William Magnuson agreed with Special Agent Ellen Ripperger that a significant response occurred with regard to the question on serious crimes. However, a proper quality control review requires the audio of the polygraph exam to be reviewed as well. *Affidavit of Danny Seiler, dated October 4, 2016, Paragraph 8.b.*

7. By inference, Sgt. William Magnuson must have heard the audio of Mr. [REDACTED] polygraph examination to review the exam. Special Agent Ellen Ripperger, Special Agent Ed Alston, and Special Agent Thomas Christopher all signed documents or stated under oath that they had reviewed the audio recording of Mr. [REDACTED] polygraph exam and found it to be audible.

Either the audio of Mr. [REDACTED] polygraph examination existed, or four individuals from the USSS lied about the existence of an audible recording of Mr. [REDACTED] exam.

If the Audio of Mr. [REDACTED] polygraph examination never existed, then Special Agent Ellen Ripperger must have committed perjury during her Deposition stating the details of how it was recorded.

1. According to Agent Ripperger, the audio recording of Mr. [REDACTED] examination is unintelligible because of a microphone failure. *Deposition of Agent Ripperger op. cit., page 25, line 4 to page 26 line.*

2. The Lafayette polygraph software contains two mechanisms to allow the examiner to monitor the audio recordings and prevent failures. *Affidavit of Brent Smitley, Lafayette Instrument Company, January 6, 2017, Item 7.*
3. The software contains a built-in feature that will warn the examiner when the audio recording level is too low. That feature can only be disabled by the examiner who must click on audio/video preferences, choose the general tab, and uncheck the “warn on low audio” option. *Id.*
4. If the software cannot recognize the audio being recorded, it will display a pop up message saying the audio is too low, and give the examiner an opportunity to adjust the audio accordingly. *Id., Item 9.*
5. The Lafayette Polygraph Software contains a second mechanism to monitor the recorded audio, which is a meter that is clearly visible to the examiner and shows the decibel (or intensity) levels of the recorded sounds in real time. *Id., Item 10.*
6. Agent Ripperger stated in her deposition that “On my computer screen, when we hit "record," it shows that we're recording. Throughout the exam, it showed me that I was recording the exam, and there's a dialogue box that shows the volume being recorded.” *Deposition of Agent Ripperger, op. cit., page 28, line 15 to page 28 line 21.*

If Special Agent Ellen Ripperger was telling the truth under deposition and she did record the audio of Mr. ██████ exam, that means someone within the USSS destroyed the audio recording of Mr. ██████ exam, or the USSS still has a legible audio file of Mr. ██████ exam, but chose not to produce it. The only other remaining possibility is that Special Agent Ellen Ripperger manually overrode the built in failsafe mechanisms for recording the polygraph audio, and then deliberately ignored the meter readings for the recorded audio levels while conducting an exam, deliberately producing an inaudible recording.

The Audio Recording Produced By the Secret Service Does Not Match the Audio Recording Described by Special Agent Ripperger Under Oath.

Special Agent Ellen Ripperger is a polygraph examiner who had no doubt in her results⁵ and four years of experience⁶. As such she was certainly aware of what a normal recording would look like on the sound level meter of the Lafayette polygraph software. Special Agent Ellen Ripperger describes in detail that she knew she was recording the exam and was cognizant of the volume level she was recording during the exam.⁷ Yet the audio indicator remains flat or nearly flat and green for 47 minutes during the polygraph exam. This would indicate nothing but background noise is being recorded.⁸ With the exception of an 18 minute period

⁵ Deposition of Ellen Ripperger Page 86 line 9.

⁶ Deposition of Ellen Ripperger Page 111 lines 22.

⁷ Deposition of Ellen Ripperger Page 28 lines 21.

⁸ Affidavit of ██████ Item No. 23 and Exhibit No. 3

between 40:00 min to 58:00 min into the second recording, the remainder of the exam shows the meter at either full scale deflection or very High noise levels, indicative of distortion. Even during the 18 minute period, a trained examiner would know there was excessive background noise, as the meter would peak sharply during the recording.⁹ The fact of the matter is simply that the sound pressure levels of the recording produced by the USSS is in no way shape or form indicative of a normal voice recording. If Special Agent Ripperger recorded the audio presented to the Complainant, she would have to know something was amiss during the exam by virtue of the audio meter. If the microphone were defective as claimed, the meter would not show normal recording levels as indicated by Special Agent Ripperger during her Deposition, unless both the microphone and the meters were both faulty, yet the meters mimicked normal microphone behavior when faulty, which is astronomically unlikely. Further, Mr. [REDACTED] was at the exam for approximately five hours and had only one fifteen to twenty minute break, but only 3 hours and twenty five minutes of audio was produced by the USSS.

Administrative Judge Antoinette Eates accepts the USSS “Explanation” that the lack of audio was due to a “Microphone Failure” without any evidence.

The Administrative Judge Antoinette Eates erred when she accepted the USSS explanation that the lack of an audible recording was due to a microphone

⁹ Affidavit of [REDACTED] Item No. 9-68 and Exhibits 1,2,3

failure without the introduction of any evidence. No maintenance records were produced to show that the polygraph machine had undergone service by a technician after Mr. [REDACTED] polygraph exam. No orders for parts or maintenance for the polygraph machine were produced after Mr. [REDACTED] polygraph exam. No signed affidavits by the parties who discovered and rectified the Microphone Failure were produced by the USSS. There was less than a scintilla of evidence that any type of technical failure had occurred during Mr. [REDACTED] polygraph examination, while there was an abundance of written evidence that the recording was made, quality checked, and heard by at least four USSS personnel on separate occasions. If the Complainant can provide information under a maintenance contract when the last time the copy machine at his agency was serviced, by whom it was serviced, and what parts were replaced in it; certainly the Secret Service can provide the same information for a piece of complex national security equipment. Further, the number of people who had command and control of that recording was limited by USSS to a discrete few individuals in polygraph operations making external tampering virtually impossible.¹⁰

Accepting the USSS Claim the Audio of Mr. [REDACTED] Polygraph was Flawed, why does the USSS Insist all other Components of [REDACTED] Exam are valid?

¹⁰ Deposition of Ellen Ripperger pages 118 line 8 to 119 line 12.

If the USSS Claim that the polygraph machine captured flawed Audio during Mr. [REDACTED] Polygraph Exam, how can the Secret Service have such confidence in the rest of Mr. [REDACTED] Exam? While the USSS claims the fault was due to a “faulty microphone”, the USSS has no proof the fault was not due to a faulty power supply, pre-amplifier, software error, or any other component within the polygraph machine. Anyone who has dealt with an intermittent fault (which the USSS claims this to be) knows the inherent difficulty in diagnosing the root cause of an intermittent failure, and is aware that numerous parts may need to be replaced before the real culprit of the malfunction is truly rectified. Yet the USSS would not even consider such a possibility, showing hostile Animus toward Mr. [REDACTED] refusing to retest him when the CIO requested he be retested; unlike applicant Steven Tignor, who after failing his polygraph exam was retested when “absolutely no issues” were found to have occurred on his prior polygraph exam. *Deposition of Ellen Ripperger Page 142 lines 18-19.*

The USSS Failed Mr. [REDACTED] on his Polygraph as Quickly as Possible.

If an employment applicant responds significantly to a single relevant question on a USSS polygraph, he or she is deemed to have failed. Agent Ripperger interpreted Mr. [REDACTED] response to one question (regarding serious crimes) as significant. On the other hand, both Agent Edward Alston, who reviewed her interpretation on behalf of the Secret Service and polygraph expert

Danny Seiler, who was retained by Mr. [REDACTED] interpreted his response to that question as inconclusive. The USSS had to enlist a “tie breaker”, Sgt. William Magnuson, to make a final determination if Mr. [REDACTED] failed the serious crimes question, or if it was merely inconclusive. Given there was not a unified consensus within the USSS polygraph unit if Mr. [REDACTED] failed the question or if it was inconclusive, the USSS could have done a break out exam asking Mr. [REDACTED] directed questions about the crimes of interest. (Ex. Have you ever committed an armed robbery/rape/assault/murder/commercial burglary/etc?) and seen if he showed a significant response to any of the questions on specific crimes. The Secret Service did not do that. Instead they failed Mr. [REDACTED] as fast as they could and as expediently as they could, giving him no benefit of the doubt about a question which they themselves could not reach a consensus upon.

Mr. [REDACTED] case was Prematurely Dismissed by Administrative Judge Antoinette Eates before the Department of Homeland Security Office of the Inspector General could complete its investigation into criminal charges with regard to the missing Audio of Mr. [REDACTED] polygraph examination.

When the Administrative Judge Antoinette Eates issued a summary judgment for the USSS before DHS-OIG finished its investigation of potential criminal charges with regard to the destruction of the audio or deliberate failure to record Mr. [REDACTED] polygraph examination, it deprived Mr. [REDACTED] of due process of law. There remains a genuine issue still in dispute with regard to if Mr. [REDACTED]

as a disabled individual was given a polygraph examination by Special Agent Ellen Ripperger that was materially different from those of other job applicants who were not disabled. This issue can only be resolved with the production of the polygraph audio of Mr. [REDACTED] exam. If during the course of its investigation DHS-OIG should uncover an audible recording of Mr. [REDACTED] exam, this is of enormous significance, because the USSS records the audio of EVERY polygraph examination it administers. Mr. [REDACTED] exam can then be compared to all the other polygraph exams the USSS has given to discern if he was treated differently. Further, should the investigation determine that evidence was deliberately destroyed or USSS personnel were instructed to handle Mr. [REDACTED] background investigation or polygraph examination differently, it provides evidence beyond a reasonable doubt that Mr. [REDACTED] *was* treated differently than other USSS job candidates. The audio recording of Mr. [REDACTED] exam contains material indisputable facts which can be compared to a consistent baseline (the audio recordings of other polygraph examinations), and it was an enormous miscarriage of justice for Judge Antoinette Eates to arbitrarily dismiss the case without allowing DHS-OIG to complete and share its fact findings with the Court.

CONCLUSION

The entire proceedings of this matter under Administrative Judge Antoinette Eates and the explanations proffered by the USSS do not pass the smell test, and Judge Antoinette Eates' decision should be set aside if for no other reason than to preserve the appearance that no impropriety in this matter has occurred.

First, as required for summary judgment, Judge Antoinette Eates did not make all justifiable inferences in the non-moving party's (the Complainant's) favor. Principally, Judge Eates did not find that the mere possibility exists that the USSS either destroyed, withheld, altered, or willfully failed to produce the audio recording of Mr. [REDACTED] polygraph examination even when Mr. [REDACTED] produced ample physical evidence that the recording produced could not possibly have been the original polygraph recording; the very fact which the Department of Homeland Security Office of the Inspector General is currently investigating. Administrative Judge Antoinette Eates further failed to recognize the clear spoliation of evidence in the original complaint.

Second, Judge Eates did not even allow for the possibility that at the conclusion of the Department of Homeland Security Office of the Inspector General's investigation into Mr. [REDACTED] polygraph examination that evidence might be uncovered which was critical to helping prove Mr. [REDACTED] claims.

Third, Judge Eates failed to consider or recognize that the USSS could have used a polygraph examination as a guise to discriminate against a qualified

disabled applicant because the lack of transparency inherent in the polygraph examination process due to reasons of “national security”, which lends itself to abuse for nefarious purposes such as discrimination.

Fourth, Judge Eates employs faulty reasoning in finding that applicant Tignor was not similarly situated to the Complainant because in the past he had previously passed a polygraph examinations for other employment opportunities, and thus was more entitled to a retest than Mr. [REDACTED]. Applicant Tignor’s prior polygraph examinations by other examiners were for different positions and bore no relevance to the current position for which he underwent a test by Special Agent Ripperger. Indeed, if we accept Judge Eates’ reasoning, there would never be a need for an applicant to any law enforcement agency to undergo a polygraph exam when applying for a new law enforcement position had they passed a prior polygraph exam years ago for another agency, which in reality is never the case. The reality is job applicants are always given a new polygraph exam when changing national security positions because they may have committed espionage or crimes after their last polygraph exam. This very scenario in fact was the basis Special Agent Ripperger’s supervisor used to justify failing applicant Tignor and argue against retesting him. If anything, the fact that Tignor was given even more than two polygraph exams by the USSS shows even more disparate treatment against Mr. [REDACTED] who only received a single polygraph exam.

Fifth, Judge Eates' employs faulty reasoning in finding that because the individuals involved in permitting Stephen Tignor to take a second polygraph examination after his initial failure were not involved in Mr. [REDACTED] hiring for the IT position at issue, no discrimination could have possibly occurred. If we accept Judge Eates' reasoning here we must accept that no discrimination does not occur in analogous situations where for example all Hispanic applicants take an exam, fail, and are not offered a retest by one manager; but all white applicants take the same exam, fail, but are offered a retest by a different manager. This finding is absurd because agencies can discriminate at will simply by selecting management staff.

The fact of the matter is Tignor and [REDACTED] took the same polygraph test from the same examiner. Tignor failed his exam, but it is debatable if [REDACTED] failed his exam; and even if he did fail, it was by the slimmest margins. Tignor was offered a retest, and [REDACTED] was not. It was disparate treatment of a disabled employee.

The Supreme Court has held that summary judgment is only appropriate in situations where there exist no genuine issue of material fact. Mr. [REDACTED] raised three principal issues: (1) was the polygraph test conducted properly, and if not, did the USSS steer Mr. [REDACTED] to fail the exam due to his disability? (2) were the polygraph test results interpreted properly, and if not, did discriminatory animus

play a role in the interpretation of his results? And (3) did other applicant(s) for employment who was not disabled receive more favorable treatment in the analysis of their polygraph examinations than Mr. [REDACTED]

Because there is no intelligible audio recording of Mr. [REDACTED] polygraph examination, the first question cannot be answered. It can be determined with certainty however, that Agent Ellen Ripperger's explanation that the audio is unintelligible because of a microphone failure entirely lacks credibility. From this it can be inferred that the unintelligible recording is the result of spoliation, and that an intelligible audio recording would support the conclusion that the test was not conducted properly.¹¹ Additionally, Danny Seiler, a polygraph expert, states in his Affidavit that "the Quality Control Review conducted by the Secret Service may not have met the model policy standards of the American Polygraph Association without a complete review of at least the audio files"¹², which casts further doubt on the integrity of the exam given to Mr. [REDACTED]

¹¹ Since Complainant's spoliation was denied there is new evidence that has been adduced. An affidavit by a representative of the polygraph software company demonstrates that the sound monitor can only be turned off intentionally and the charts and graphs produced by the software (as explained in an affidavit by Complainant, who has a master's degree in electrical engineering) demonstrate that the audio monitor plainly indicated that an intelligible recording was **not** being made.

¹² Danny Seiler Affidavit Item No. 8(b).

This is the first reason why Judge Eates' decision should be vacated. Only a hearing can assess Agent Ripperger's credibility and determine by inference if Mr. [REDACTED] test was not properly administered, and if so, for what reasons.

There is evidence from which a fact finder can reasonably conclude that Mr. [REDACTED] responses during the polygraph examination were not properly interpreted. Even the polygraph examiners within the USSS could not concur on if Mr. [REDACTED] failed the question about committing "serious" crimes; and had to bring in a third reviewer, Sgt. William Magnuson, to act as a "tie breaker." Agent Ripperger interpreted Mr. [REDACTED] response to one question (regarding serious crimes) as significant. On the other hand, both Agent Edward Alston, who reviewed her interpretation on behalf of the Secret Service, and polygraph expert Danny Seiler, who was retained by Mr. [REDACTED] interpreted his response to that question as inconclusive.

When results are inconclusive, an applicant is entitled to a re-test -- and Mr. [REDACTED] was not afforded one.

This is the second reason why Judge Eates' decision should be vacated. Only a hearing can allow inquiry into the rationale behind the different interpretations of Mr. [REDACTED] responses.

Finally, it can be shown that another applicant, Stephen Tignor, who is not disabled, and who actually was determined to have failed the polygraph

examination conducted by Agent Ripperger was retested, passed, and was hired by the Secret Service.

This is the third reason why Judge Eates' decision should be vacated. Only a hearing can determine why a disabled applicant who took an exam with admitted technical difficulties was denied a retest, while another non-disabled candidate was afforded a retest when their polygraph exam was reviewed and was found to have in the USSS own words "absolutely no issues."¹³ A hearing is the only way to explain how such seemingly disparate treatment could legitimately occur.

For these and such other reasons as may become known, the judgment entered in this matter should be vacated and the matter remanded for further proceedings.

Respectfully submitted,

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¹³ Deposition of Special Agent Ellen Ripperger, Page 142, Lines 18-19.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by email to:

Steven Giballa
Agency Representative
United States Secret Service
Steven.Giballa@uss.s.dhs.gov

on this 19th day of September 2018.

Thomas J. Gagliardo