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Pre-employment Polygraph Examinations of Public Safety Applicants

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❖ Use in Screening Public Safety Applicants

A number of courts have examined the use of the polygraph in pre-employment screening of applicants. In [Mullen v. County of Suffolk](#), #2006-03220, 2007 N.Y. App. Div. Lexis 9671, 43 A.D.3d 934;841 N.Y.S.2d 648 (2nd Dept.), an intermediate New York appeals court dismissed the appeal of a police applicant who was rejected because his polygraph examination indicated deception concerning his involvement with illegal drugs and narcotics.

The judges ruled that management did not act irrationally or arbitrarily in relying on the results of their own polygraph test as well as a secondary review conducted by the Vermont state police.

Similarly, in [*Croddy v. FBI*](#), #00-651, 2006 U.S. Dist. Lexis 71823, 25 IER Cases (BNA) 272 (D.D.C. 2006), a federal court ruled against applicants who were rejected by the FBI and Secret Service because they failed a polygraph examination. Those agencies legitimately can inquire about an applicant's financial status, drug use, health, and criminal history based on the requirements of the job and concern about potential employees' integrity, honesty, and reliability.

In [*Anderson v. Philadelphia*](#), #87-1546, 845 F.2d 1216 (3rd Cir. 1988), a federal appeals court ruled that the use of the polygraph as a screening device for applicants for jobs with the police department or correctional facilities did not deprive them of employment without due process.

The plaintiffs never had a legitimate claim of entitlement to employment with the city, and therefore, they were never deprived of a property interest. Additionally, they were not deprived of a liberty interest because the allegedly stigmatizing information was never published.

The plaintiffs also failed to prove their equal protection rights were violated because they did not meet their burden of proving that a statute allowing the polygraph testing was not rationally related to a legitimate state interest. This use of the polygraph could reasonably be believed to produce a better qualified group of employees.

What about applicants for non-sworn positions? In [*O'Hartigan v. Dept. of Personnel*](#), 821 P.2d 44 (Wash. 1991), an applicant for a non-sworn position as a word processor with the state patrol claimed that a pre-employment polygraph examination violated her constitutional rights to privacy and equal protection.

The Washington State Supreme Court rejected all constitutional challenges to the polygraph exam requirement, finding that there was a legitimate interest in seeing to it that all law enforcement personnel have the highest possible moral and ethical character.

This justified some intrusion into what might otherwise be areas protected by privacy, subject to reasonable guidelines. Exempting law enforcement employers from otherwise applicable state statutory restrictions on the use of the polygraph by employers did not violate equal protection, given this interest.

In accord is the case of [*Truesdale v. Univ. of No. Car.*](#), #8721SC1218, 371 S.E.2d 503 (N.C. App. 1988), in which a court upheld pre-employment polygraph tests for a public university security officer that probed an applicant's sexual practices.

She was hired on a probationary basis, but was then informed that she would be required to take a polygraph exam before becoming a permanent employee. She refused to take the polygraph when she learned that some of the examination questions would address her sexual practices, preferences and partners. The court rejected claims that this violated her right to privacy or her privilege against self-incrimination.

Control questions which were to be asked prior to the administering of the actual polygraph examination included questions relating to theft, prior commission of crimes, homosexual activity, sexual arousal by contact with children, unusual sex acts and anti-governmental activity.

The actual polygraph questions, which were only thirteen in number, were designed to determine if the applicant was untruthful on the application for employment or in answering the control questions.

The court found that making the plaintiff answer the questions regarding sexual practices did not violate her right to privacy. Note, however, that at the time of the decision, the U.S. Supreme Court, in [*Bowers v. Hardwick*](#), #85-140, 478 U.S. 186, *reh'g denied*, 478 U.S. 1039, (1986) had ruled that there was no fundamental right to engage in adult consensual homosexual activity, a holding later overruled in [*Lawrence v Texas*](#), #02-102, 539 U.S. 558 (2003). Accordingly, while the court's ruling as to questions concerning sexual arousal through contact with children, or other unlawful sexual activities remains viable, a court would likely rule differently as to the questions about homosexuality today.

In [*Porto v. Town of Harrison*](#), 474 N.Y.S.2d (A.D. 1984), the court held that a police department can require applicants to take a polygraph as part of the screening process. The applicant argued that he was denied due process by being required to submit to the additional burden of a polygraph exam after he had completed all the necessary steps for appointment to the job, but before he was appointed.

There was no equal protection claim, as he did not allege that other similarly situated applicants were treated differently. He did not challenge the polygraph requirement itself

or the validity of the municipal resolution instituting the requirement. Rather, his argument was simply that it denied him due process to impose a new requirement on him which had not been in existence at the time his application was originally submitted.

Even if the applicant had already been on the eligibility list before the polygraph requirement was imposed, the court stated, “a fact which he does not allege,” he had no right to be appointed, and he also failed to claim that he had any other legally protectable right.

In an interesting decision, a court ruled that a city jail officer who requested a transfer to the county sheriff’s payroll had to take a polygraph exam required of new employees. [*Stone v. Chelan Co. Sheriff’s Dept.*](#), #54388-7, 110 Wash.2d 806, 756 P.2d 736 (Wash. 1988).

The court held that the officer, in requesting the transfer, was essentially “making initial application for employment” to the sheriff’s office, where he had not previously worked, for purposes of an exception to a state statute barring the requirement of a polygraph test as a “condition of employment.”

❖ Some Suggestions

The first thing that must be emphasized is that state and local statutes, ordinances, and court rulings on the use of the polygraph vary greatly, so that agencies should be sure to consult with competent local legal counsel concerning any proposed use of the polygraph in screening job applicants. In some jurisdictions, the use of the polygraph may also be subject to restrictions imposed as a result of collective bargaining.

The publication [*Recruiting & Retaining Women: A Self-Assessment Guide for Law Enforcement*](#), (National Center for Women & Policing 2001), contains a discussion of how to avoid problems with the use of polygraph examinations that may result in a discriminatory impact on female or minority applicants.

The document recommends, among other things, that:

1. Polygraph examiners “should be screened for gender bias and receive formal training in polygraph operation as well as training in cultural sensitivity, interview techniques, and legal requirements for personnel testing and selection.”
2. “Both the general areas of inquiry and the specific questions asked during a polygraph test should be directly related to the requirements of the position, and they should be reviewed by the agency’s legal department and approved by the agency head. The questions should be applicable to both male and female candidates alike.”
3. “Questions that refer to sexual acts should be directed toward undetected criminal activity, and not an exploration of legal sexual activity between consenting adults.”
4. “Tests should be monitored periodically (via one-way mirror or closed circuit TV) to ensure that polygraph examiners are consistent and professional. Test charts should be scored by a second examiner (or by computerized scoring software) to control for hidden biases or polygrapher/candidate personality issues. Only the chart results should be reflected in the final score and decision.”
5. “Large agencies with several polygraphists should make an effort to ensure diversity within the polygraph section. While it is not always possible, or even advisable, to provide candidates with a polygrapher of their same race or gender, the agency should provide a mechanism of appeal for candidates who raise issues of bias.”
6. “By requiring periodic statistical reports (monthly, quarterly, yearly) of polygraph testing and results, the agency head will be able to monitor the performance of their testing process.”

The article [Integration of Pre-Employment Polygraph Screening into the Police Selection Process](#) by Mark Handler, Charles R. Honts, Donald J. Krapohl, Raymond Nelson, and Stephen Griffin, *J Police Crim Psych* (2009), is an excellent overview of many of the issues and problems that may arise during the use of the polygraph in the screening of public safety job applicants.

It presents a balanced view, steering clear of accepting the positions of either uncritical proponents of the use of the polygraph or harsh critics of any attempt to utilize the polygraph who demonize its use as an unmitigated evil.

Among its recommendations:

1. Don't use polygraph test results as the "sole basis for the selection or rejection of a police candidate without other information."
2. Test information and results should be considered confidential, and "not used for any purpose other than to assist in candidate selection except as provided by law."
3. Issues addressed in polygraph tests should be limited to those which:
 - a. Are empirically shown "to correlate with officer suitability;"
 - b. Are related to the ability to perform law enforcement duties;
 - c. "Are restricted to overt past behaviors (not thoughts, inclinations, intentions or states of mind);"
 - d. "Are sufficiently recent to assure accurate recollection by the candidate;"
 - e. "Are sufficiently precise in definition as to avoid confusion in the mind of the candidate;"
 - f. "Are not adequately covered by other investigative method already employed as part of the screening process."
4. Polygraph test issues suitable for most police departments include:
 - a. "Tolerance related issues (adult acts of physical/domestic violence, use of racial or ethnic slurs directed at others, etc.);"
 - b. "Criminal conduct as an adult (involvement with or income from organized crime activities may represent the primary concern for some agencies)."
 - c. "Illegal drug use during recent years; Formal disciplinary actions received from previous employers."
5. "External review of a portion of the polygraph examiners' work product each year avoids or reduces 'drift' and can sustain the quality of the testing program."
6. "Unless precluded by law, policy or procedure, all examinations should be recorded in their entirety." Such recordings can make possible "meaningful quality assurance."

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Bernard J. Farber
Employment Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aol.com
Tel. 1-800-763-2802

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