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Polygraph Examinations of Current Public Safety Employees

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❖ Introduction

The truthfulness of public safety employees, police, firefighters, and correctional personnel, is understandably a special concern of their employers, given the functions they serve and the trust that is given to them. Confidence that police officers tell the truth is particularly important in terms of the frequent necessity that they testify in court about evidence gathered during criminal investigations, searches and seizures, and arrests.

One useful tool that many agencies use to help ensure that truthfulness is the polygraph. Most private employers are prohibited from compelling employees to undergo polygraph investigations under the 1988 federal [Employee Polygraph Protection Act, 29 U.S.C. Secs, 2001-2009](#) for purposes of discipline or discharge, as well as for pre-employment screening. There are limited exceptions for tests administered as part of an ongoing investigation involving economic loss or injury to an employer's business, such as theft, embezzlement or industrial espionage. When such testing is allowed, a variety of procedural protections for employees is provided.

But the statute completely excludes federal, state, and local government employers from its application, and contains more limited exemptions for national defense and security contractors, FBI contractors, private security firms, and pharmaceutical firms,

That is not the end of all legal issues concerning the use of the polygraph by public safety agencies, however, as various jurisdictions have adopted different restrictions on polygraph use either by court decision or statute. This article briefly examines some of the court decisions in this area upholding or overturning orders to public safety personnel to submit to polygraph examinations, as well as the use of the polygraph in the context of special assignments, such as drug enforcement duties, vice, or other special assignments. It also briefly touches on the issue of collective bargaining.

At the conclusion of the article, there are some suggestions, and a listing of relevant resources and references.

Two previous articles in this journal examined issues surrounding pre-employment use of the polygraph to screen applicants for public safety jobs. See [Pre-employment Polygraph Examinations of Public Safety Applicants - Part 1](#), 2011 (7) AELE Mo. L. J. 201 and [Pre-employment Polygraph Examinations of Public Safety Applicants - Part 2](#), 2011 (8) AELE Mo. L. J. 201.

Those articles address the issue of the validity of polygraph examinations, as well as discussing polygraph questions with a possibly discriminatory impact and the impact of disability discrimination law on polygraph examination. They also set forth some detailed suggestions concerning how to conduct polygraph examinations. That material is not repeated here, and the past articles should be read in conjunction with this one. At the end of the first article, there are many general resources and references also not repeated here.

❖ **Courts Upholding Orders to Take Polygraphs**

Given the fact that federal law does not prohibit the use of polygraph examinations on any public employees, there are many courts that have upheld compelled polygraph examinations for current public safety personnel.

In [Luty v. City of Saginaw](#), #07-2035, 2009 U.S. App. Lexis 2674 (Unpub. 6th Cir.), a federal appeals panel sustained the demotion of a police lieutenant who refused to submit to a polygraph examination as part of an internal investigation. The panel rejected her

First Amendment objections to the test. “It is clear in this case that the plaintiff’s ‘speech’ was of no public concern whatever and, therefore, is not protected by the First Amendment.”

While the results of polygraph examinations continue to be inadmissible in most court proceedings as not sufficiently reliable, many courts still consider them a valuable tool in investigations of misconduct and disciplinary infractions by public safety personnel. Some give the rationale that employees faced with the prospect of taking the polygraph test will make inculpatory admissions rather than face the possibility of being branded a liar.

In [*Furtado v. Town of Plymouth*](#), #06-P-892, 69 Mass. App. Ct. 319, 867 N.E.2d 801, 2007 Mass. App. Lexis 663, 26 IER Cases (BNA) 401, the court held that a town did not violate a state polygraph statute by requiring police officer, accused of sexually molesting two minors, to submit to test to determine whether he should be disciplined after he was granted immunity from prosecution. This was based on an exception to a state statute barring compelled employee polygraph tests which excluded such examinations administered by law enforcement agencies to their employees.

Requirements of polygraph examinations have been upheld by courts following accusations of criminal conduct, involvement in vehicle accidents, or for employees suspected of rule infractions. See [*Harris v. City of Colo. Springs*](#), #93CA0158, 867 P.2d 217, 9 IER Cases (BNA) 142 (Colo. App. 1993) (court upholds the termination of police officer who refused to take a polygraph exam after his involvement in an off-duty vehicle collision); [*Soto v. City of Laredo*](#), #89-96, 764 F. Supp. 448 & 454 (S.D.Tex. 1991), (court upholds disciplinary action against a police officer who refused to take a polygraph test after his arrest for possession of marijuana); and [*Kendrick v. Bd. of Police Cmsnrs. of K.C. Mo.*](#), #WD 52797, 945 S.W.2d 649, 1997 Mo.App. Lexis 948, (court refuses to overturn an officer's termination for excessive force and lying because the Police Board considered testimony that he had failed a polygraph examination. There was sufficient other evidence to believe the charges).

In [*City of Warrensville Heights v. Jennings*](#), #89-2096, 569 N.E.2d 489 (Ohio 1991), the Ohio Supreme Court upheld the right of a police chief to order subordinates to take a polygraph examination when they are under suspicion of misconduct. It is unnecessary for the department to have a rule requiring such exams.

❖ Courts Overturning Orders to Take Polygraphs

In a number of states, courts have overturned orders to public safety personnel to undergo polygraph examinations. In [*Kaske v. City of Rockford*](#), #55501, 450 N.E.2d 314 (1983), for instance, the Illinois Supreme Court banned polygraph use in public safety agencies. The decision came in two consolidated appeals.

In one, two police officers sought to prohibit their employer from compelling them to undergo a polygraph examination concerning allegations that one of them had smoked marijuana. In the second, an officer challenged his termination, which was based on the admission into evidence of the results of his polygraph examination in a disciplinary hearing into charges of on-duty sexual contact with a detainee and the filing of an untruthful report.

The court ruled that polygraph examination results were not admissible in administrative hearings, such as police disciplinary proceedings, just as they are not admissible in court. It ruled this way based on a finding that polygraph evidence is not sufficiently reliable enough to be a basis for deciding issues that may deprive a public employee of their livelihood.

The court further ruled that an officer could not be compelled to submit to a polygraph examination, and that his refusal to do so could not be the basis for discipline.

That remains the law in Illinois today. In [*Kelley v. Sheriff's Merit Cmsn. of Kane Co.*](#), #2-06-0624, 2007 Ill. App. Lexis 386, 372 Ill. App. 3d 931; 866 N.E.2d 702 (2nd Dist. 2007), the court ruled that an Illinois county could not suspend a corrections officer for refusing to undergo polygraph examination during an investigation, in light of the [*Kaske*](#) court decision and its concern that public employees be given a “just, fair, and impartial hearing” when their livelihoods are at stake.

The court ruled that [*Kaske*](#)'s holding had not been limited to police officers, but also applied to a corrections officer. She was not; however, a “peace officer” under the terms of a statute passed a year after [*Kaske*](#) prohibiting polygraphs on peace officers, so she could not rely on the statute in refusing to undergo the polygraph, but only the court decision. The appeals court further extended [*Kaske*](#) to apply to the use of the polygraph as an investigative tool, as well as tests intended for admission into administrative hearings.

The Florida Supreme Court adopted a similar approach in [*Farmer v. City of Ft. Lauderdale*](#), #61001, 427 So.2d 187 (Fla. 1983), invalidating an order from a police chief that a subordinate submit to a polygraph exam in connection with a robbery investigation. The officer was dismissed for disobeying the order.

The court found that the chief did not have the authority to require the officer to involuntarily submit to a polygraph in an investigation of his alleged wrongdoing, and he could not be fired for refusing to submit.

The court hinged its ruling on the relative unreliability of the polygraph. “Suffice it to say that polygraph testing has not taken its place alongside fingerprint analysis as an established forensic science. It may someday meet that burden, but has as yet not done so.”

The court noted that there was no issue of compelled self-incrimination, as the officer had been assured of immunity from any use of his statements in the polygraph exam for criminal prosecution. The officer had answered questions about the investigated incident outside of any polygraph examination.

“To further subject petitioner to the same questions when he is attached to a machine of undemonstrated scientific reliability and validity to obtain test results which could not be used in court, is, we believe not a lawful and reasonable order and can thus not provide a basis for dismissal. To hold otherwise would open the door for the use of other investigative techniques, such as hypnosis, sodium pentothal or whatever other technique any given municipality believes would be of any assistance in an investigation.”

In [*Oberg v. City of Billings*](#), #82-284, 674 P.2d 494 (Mont. 1983), the Montana Supreme Court struck down a state law allowing law enforcement agencies to compel officers to submit to polygraph exams. The officer had been found insubordinate for refusing to take the polygraph in connection with the investigation of a citizen complaint about him. The court found that the statute allowing polygraph exams of law enforcement agencies violated the officer’s right to equal protection of the law in light of another state statute granting all other employees in the state protection against such compelled polygraph examinations.

In Nebraska, a state statute authorized the compelling of “law enforcement” officers to take a polygraph. A Nebraska state corrections employee was not a “law enforcement” officer, however, and did not have to take a polygraph test. State law prohibited nonconsensual polygraph exams except for specific exceptions. [White v. State](#), #95-2932, 48 Neb. 977, 540 N.W.2d 354, 1995 Neb. Lexis 234.

Some older decisions ruling that officers could not be dismissed for refusal to take a polygraph include [Stape v. Civil Service Commission of Philadelphia](#), 404 Pa. 354, 172 A.2d 161 (1961); [Engel v. Township of Woodbridge](#), 124 N.J.Super. 307, 306 A.2d 485 (1973); and [Molino v. Board of Public Safety](#), 154 Conn. 368, 225 A.2d 805 (1966).

❖ Polygraph Use for Officers on Special Assignments

When otherwise permitted under state law, polygraph examinations can play an especially useful role in helping ensure the integrity of personnel assigned to extra sensitive assignments with more opportunity for corruption, such as drug enforcement, vice, etc.

In [Los Ang. Police Prot. League v. City of Los. Ang.](#), #B077854, 35 Cal.App.4th 1535, 42 Cal.Rptr.2d 23, 10 IER Cases (BNA) 1192, 1995 Cal.App. Lexis 563, an intermediate California appeals court upheld a requirement that officers who volunteer for sensitive assignments must submit to a polygraph test. Such jobs require “the highest level of integrity,” the court noted. Such assignments included working on anti-terrorist activity, vice, narcotics, and organized crime. Failing the test did not automatically disqualify the officer for assignment to these divisions, but did invite greater scrutiny, and officers were given an opportunity to discuss “why the results were unfair and should be disregarded.” The polygraph test results merely raised red flags enabling those conducting background investigations to focus their inquiries.

The [California Public Safety Officers Procedural Bill of Rights Act Sec. 3307](#) provides that “No public safety officer shall be compelled to submit to a lie detector test against his or her will. No disciplinary action or other recrimination shall be taken against a public safety officer refusing to submit to a lie detector test.” But the court reasoned that officers who voluntarily seek transfers to such sensitive positions are not “compelled” to take the polygraph, as those seeking such transfers know it is a requirement.

A similar result was reached in *Fraternal Order of Police Lodge No. 5. v. City of Philadelphia*, 118 Pa. Commw. 132, 546 A.2d 137 (1988) in which the court upheld the validity of a polygraph examination requirement for police officers wishing to transfer into the police department's special investigations unit. This unit was created to fight corruption in the police department and pursue major investigations involving organized crime, drugs, prostitution, gambling and vice.

Similarly, in *Calhoun v. Cmsnr. Balt. City Police*, 103 Md.App. 660, 654 A.2d 905 (1995), a Maryland appellate court upheld the involuntary transfer of all drug enforcement officers who cannot pass a periodic polygraph exam.

❖ **Collective Bargaining Issues**

In jurisdictions where compulsory polygraph examinations of public safety personnel are allowed, it is possible that such tests may be prohibited or limited because of the terms of a collective bargaining agreement.

Similarly, in a state such as Illinois, where such compulsory polygraphs tests are prohibited, it is at least conceivable that a union representing officers could negotiate a contract which allowed such test in some instances. In *Kelley v. Sheriff's Merit Cmsn. of Kane Co.*, #2-06-0624, 2007 Ill. App. Lexis 386, 2007 Ill. App. Lexis 386 (2nd Dist. 2007), without reaching the issue, as it was not raised by the facts, the court speculated that this might be permissible.

In *Twp. of So. Brunswick and P.B.A. L-166*, NJ-PERC #86-115 (1986), 12 NJPER (LRP) ¶17,138, however, it was found that the duty to bargain on a police union's proposal, prohibiting management from administering polygraph or other deception testing, or blood, tissue and breathalyzer tests of police officers, was not mandatorily negotiable. And in *Troy Uniformed Firefighters Assn. and City of Troy*, PERB Case U-2451, 77-78 PBC (CCH) ¶ 40,384 (1977), a board regulating state labor relations stated that it no longer required governmental departments to bargain over breathalyzer and polygraph tests.

The question of whether mandatory polygraph tests are mandatory, permissible, or prohibited subjects of collective bargaining is an issue of state law, and will vary from jurisdiction to jurisdiction.

❖ Resources

1. [Lie detection](#). Wikipedia article.
2. [Oakland \(California\) Police Department Lie Detection Screening Devices Policy](#). (Feb. 16, 2001).
3. [Polygraph](#). Wikipedia article.
4. [Polygraph Exams](#). Summaries of cases reported in AELE publications.
5. [Untruthfulness & Resume Fraud](#). Summaries of cases reported in AELE publications.

❖ Relevant Prior Monthly Law Journal Articles

1. [Disciplinary Consequences of Peace Officer Untruthfulness Part I - Job Applications](#), 2008 (9) AELE Mo. L. J. 201.
2. [Disciplinary Consequences of Peace Officer Untruthfulness Part II - Employee Dishonesty](#), 2008 (10) AELE Mo. L. J. 201.
3. [Pre-employment Polygraph Examinations of Public Safety Applicants - Part 1](#), 2011 (7) AELE Mo. L. J. 201.
4. [Pre-employment Polygraph Examinations of Public Safety Applicants - Part 2](#), 2011 (8) AELE Mo. L. J. 201.

❖ References

1. [Polygraph Use by the Department of Energy: Issues for Congress](#), by Alfred Cumming, Congressional Research Service (Feb. 2009).
2. [Use of the Polygraph in Security Clearance Investigations](#). Chapter 8 of *Security Clearances and National Security Information: Law and Procedures* written by Sheldon I. Cohen for the Defense Personnel Security Research Center. (December 2000).
3. [Police officer may not be dismissed for refusal to submit to a polygraph examination -- Farmer v. City of Ft. Lauderdale](#), 11 Fla. St. U.L. Rev. 697 (1983).
4. ALR Annotation: Refusal to submit to polygraph examination as ground for discharge or suspension of public employees or officers, 15 A.L.R.4th 1207, Sec. 2.

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