

Polygraph Testing in Arbitration: What are the Rights and Responsibilities of the Advocates

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The rights of Employers and Employees to use polygraph testing in arbitration is a topic that, even though there have been many grievance arbitrations concerning it, has many questions still unanswered in some advocates minds. The purpose of this paper is to look into the process and arbitral history of polygraph testing in order to better understand the rights and responsibilities of the parties in regard to the use of a polygraph. Polygraph testing (lie detector) is extremely rare in grievance arbitration due to the fact that the vast majority of arbitrators feel that polygraph evidence should either be excluded or given little, if any, weight. (1) The Employee Polygraph Protection Act of 1988 (EPPA) became federal law on December 27th, 1988 and it prohibits many employers from requiring employees to submit to lie detector testing or retaliating against employees for refusal to test (2) as does certain collective bargaining agreements, local agreements or past practices. It is important to note that many employees such as certain government employees, national defense employees, FBI contractors, nuclear or electric power plant workers, armored car services, controlled substance dispensers and some other similar employees are exempt from the protections of the EPPA. In the private sector there sometimes are limited exemptions where the issue involves theft of the employer's property but the EPPA lays out very strict guidelines for an employer to follow in cases where they are allowed to polygraph including, strict authorization requirements, understanding that access alone is not sufficient grounds for a polygraph test, understanding to not discipline an employee in cases where the polygraph would serve as the only proof of guilt, use of proper witnesses, 48 hour advance notice of testing, full disclosure to the employee and providing the employee with a written statement that includes: identification of the company and location of the employee, description of the loss and activity under investigation, why the employee is a suspect, cost of the loss and how the employer knows that the employee had access to the loss. The statement must be signed by someone other than the examiner, who is authorized to legally bind the employee and must be kept in the employers' records for three years. Many employers who can test under the requirements are reluctant to because for *each* violation of the act there is a \$10,000 fine. In addition to EPPA, employers are required under the National Labor Relations Act, as amended (3) to provide union representatives the right to be present during investigatory interviews. These "Weingarten" rights also apply to polygraph tests including not only the pre-examination interview but also the test itself. (4)

The Polygraph Process

The term “lie detector” is synonymous with voice stress testing, polygraph, deceptograph or any other diagnostic process that is engaged in order to produce an opinion as to the honesty or dishonesty of an individual. (1) According to the American Polygraph Association there have been over 250 studies surrounding the accuracy and validity of polygraph testing. These studies have also shown that the testing is highly accurate although not 100% accurate. A polygraph test does not indicate if a person is lying rather it shows changes that occur in a human body during stress that are basically the same body changes that occur whenever someone is being untruthful. Most people fail to realize that nervousness does not normally interfere with a polygraph test but it is important to note that some honest individuals can encounter stress when telling the truth during a polygraph test and a dishonest person can sometimes manipulate the test thus rendering a result that is not fact. This probably helps to explain the fact that polygraph tests can't be used to establish guilt in a court of law but are sometimes used to confirm innocence and can help remove the unpleasant stigma of suspicion from many suspects and also why many arbitrators give them little, or no, weight. Even in those rare cases where the use of a polygraph is proper a witness's testimony can often offset the result of a conflicting polygraph test. (5) (6)

It is extremely important that the polygraph examiner be professionally trained at a school accredited by the American Polygraph Association and to refrain from the common errors that can occur during a test such as improper equipment, poorly worded questions, improper testing techniques and human error. The average polygraph test takes about one and one half hours to complete and must be preceded by a pre-test interview that can last thirty minutes or more. During this pre-test interview the polygraph examiner must explain the legal rights surrounding the use of a polygraph to the parties. Trick questions may not be used during the pre-test or the polygraph examination. The polygraph examination is not akin to a cross-examination session. Most polygraph tests center on three elements: the pneumograph that records respiration, the cardiosphygmograph that records pulse rate and blood pressure, and the galvanograph that records skin responses and resistance.

Conclusion

Even though the American Polygraph Association has found many studies that show polygraph testing is extremely accurate it is not 100% accurate. Also, in many cases people who are lying will show up as telling the truth and people who are telling the truth will often show up as lying. (6) The EPPA restricts many employers from requiring employees to submit to a polygraph test, including pre-employment testing and employers can be fined substantial amounts of money for violations of the EPPA requirements. Even in those rare cases where polygraph testing can be performed the advocate must place the examiner on the witness stand at the arbitration hearing for not only direct examination but also for cross-examination, the examiner must provide the arbitrator evidence of required testing experience, prove the accuracy of the report and

provide the arbitrator with testimony and evidence that will clearly show that the examiner is qualified under the law to be an examiner, thus an expert witness in polygraph testing. (7) Also, the examiner must provide the arbitrator with the sequence and clarity of the examiner's questions and the raw data the examiner evaluated including the fact that no trick questions were used. (8)

In addition to the EPPA, employers must be cognizant of the fact that many states including the District of Columbia have laws that disallow the use of polygraph as a condition of employment including state, county, and municipal employees, law enforcement agencies, firefighters and correctional department employees who are not covered by the protection of the EPPA. (1) It should also be pointed out that labor arbitrators have not given much credence to lie detector results for myriad reasons including the fact that polygraph testing will continue to be criticized because they are sometimes inaccurate and the person's emotional state can alter the test results, even if the hearing is being held in a state that has not enacted polygraph laws that disallow the use of polygraph testing. (7) (10) In fact, in a much cited writing Arbitrator Edgar A. Jones explains that polygraph evidence is so inherently prejudicial and unreliable that any arbitrator could refuse to enforce an agreement provision authorizing its use. (9)

Prior to even considering the use of a polygraph test it is recommended that an employer should seek legal counsel to make sure that EPPA and other laws or standards have been met and a test could even be given. If a test is allowed it is recommended that both parties be involved in the selection of the polygraphist and the formulation of the questions that will be asked and insure that a minimum of at least two separate tests will be run to help prove the validity of the test. (6) Heavy fines could be imposed on an employer that violates EPPA standards and in those cases where a polygraph could be required it is recommended that an employer should balance the cost factor against the lack of weight, if any, that an arbitrator may apply to the test. An employer should always keep in mind that in the United States there is a long standing belief that the polygraph is not yet technically reliable enough to counter the inherent prejudicial impression that a polygraph is just not a good indicator of who is telling the truth and most, if not all, arbitrators share this belief along with the belief that polygraph refusals are not to be considered an inference of guilt. (11) (13) Employers should also check to see what type of medication a person is taking prior to taking a polygraph because an argument could be made that the test was not accurate due to the medication altering the result. (12)

If an employee is required to be tested, it is recommended that the employee seek advice from his or her union representative concerning the appropriateness of the test and if the employee is a non-union worker they may want to seek proper legal counsel if asked to take a polygraph. Union employees should be aware that in some instances a test could be required therefore it is recommended that their right to union representation under the Weingarten rule should be evoked by the employee and it is recommended by this writer that one should never forget the "work now grieve later" rule before test refusal.

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