

Legal aspects of non-procedural polygraph testing of police officers

Abstract: The article discusses polygraph tests of loyalty which the Polish police officers can be subjected to. The author comments doubts about legitimacy and legality of polygraph testing and assumes that such tests will be more useful in terms of prevention rather than actual detection of dishonest police officers.

Keywords: police, polygraph testing, loyalty

Unquestionably, one of the most important values for each police force are its human resources. The quality of the personnel directly and considerably influences the effectiveness of tasks to be performed and goals to be achieved. The quality of the staff depends on their selection procedures. It needs to be emphasised that a rational staff selection should aim not only at employing a necessary number of police officers (a quantity aspect) but also at developing their qualifications, those which are relevant to the police needs (a quality aspect)¹. What arises serious doubts in this respect is whether the need do determine such qualifications justifies admissibility of polygraph testing.

In practice, there can be distinguished two main areas of carrying out polygraph tests. Firstly, they constitute a tool owing to which people suspected of committing a crime can be selected and the value of the evidence of the detected clues can be identified². The analysis of a person's response allows it to identify if the testee has memory traces about a particular event, even though the person denies their involvement in the incident. For such purposes, polygraph screening was used in the 1920s.

Secondly, polygraph tests were often used as a personnel selection tool. The American labour market policy of the 1950s resulted in the emergence of a new trend in polygraph testing, and applicants' and employees' truthfulness became subject to polygraph screening. Responsible for security and public order, American government agencies have been conducting polygraph tests for more than 80 years. In her article, M. Zubańska indicates that over 60% of big American police departments carry out polygraph tests in order to select candidates for the service³. The author emphasises that in the United States it is believed that such factors as the possibility to reveal information, unobtainable in any other way, employees' selection speed and high polygraph testing effectiveness reflect well on polygraph screening. The knowledge of the fact that candidates seeking employment in the police have been involved in criminal activities, or have been addicted to drugs or alcohol prevents them from being employed. If such people were admitted to join the police and the above mentioned information was revealed, the police would be put at the risk of losing public confidence. Moreover, it would have a negative impact on the cost of the training of a police officer who, in the near future, would be subject to dismissal from the service⁴.

Following a dominant in the Polish law doctrine view, polygraph testing requires statutory authorization. Statutory practices show that agencies which are responsible for the state security often follow such procedures. In 2002-2006, the Polish legislator admitted pre-employment screening for officers of the Internal Security Agency, Intelligence Agency, Military Intelligence and Counter-Intelligence Services, Central Anticorruption Bureau,

¹ ARMSTRONG, M. *Zarządzanie zasobami ludzkimi*, Kraków 2004, p. 311.

² In his respect, the tests are of interest to forensic polygraph testing (KĘDZIERSKI, W., A. SZAJOWSKA - ZGOŁA. In *Technika kryminalistyczna*. Volume 1, (Ed.) Kędziński, W., Szczepno, p. 225).

³ ZUBAŃSKA, M. *Praktyka wykorzystania badań poligraficznych (wariograficznych) w Stanach Zjednoczonych*, Przegląd policyjny 4/2007, pp. 157 - 158.

⁴ Ibid.

Border Guard, Military Guard and Tax Inspection Office. In 2007, the catalogue was extended by including the police⁵.

Subjected to polygraph testing can be only police officers who apply for or already occupy particular posts at police organizational units⁶. The screening is optional then. Having received an appropriate motion, the subject entitled to order the test can either order or refuse it. Of great significance here is to assess how the motion has been justified. The polygraph test has to confirm whether a police officer subjected to polygraph screening remains honest in the service, benefits from their police work, or exhibits pathological behaviour or undesirable addictions. When leaving at this point the issue of calculation completeness, the "police officer's loyalty in service"⁷ should be discussed in particular. Establishing a subject range of this term seems to be the most difficult.

"Loyalty in service" has neither been legally defined in any police resolution nor in the Police Act. The legislator usually uses a not fully defined term in order to liberalize the law. In this case, specification of a legal norm is made during its application. It does not however mean that a body applying the law is allowed to do it freely. It is unacceptable to cite a not completely determined term without establishing its substance in the context of a concrete case.

Loyalty in service is a form of employee loyalty. In the field of organization and management it has been defined as workers' identifying themselves with a company in which they are employed. It is said that a worker's loyalty can be of an internal and external level⁸. The former consists of an employee's attitude (beliefs), the latter one – their behaviour. A loyal worker's characteristics are: strong internal motivation to work, emotional connection with a company, honesty, involvement, a belief that a manager deserves an employee loyalty, willingness to learn and to use one's own knowledge for a company's interest, and readiness for making an additional effort in a situation in which a company is in crisis. Taking an external dimension of an employee loyalty into account, these are: rejecting other job offers, recommending the organization, attention to its clients, not questioning a company's authority, taking care of its good name and creating its positive image, representing and achieving its aims, acting in accordance with established standards, ethical behaviour, aiming at the organization development and strengthening its position, protecting its material and non-material resources⁹.

Considering the above, it has to be assumed that polygraph testing of police officers should exclusively be related to the external level of loyalty in service. Criminal polygraph testing, as well as employee one, concentrates on examining the knowledge of behaviour, and

⁵ Article 35a of the Police Act of 6 April 1990 (i.e. O.J. 2002, no. 7, entry 58 with amendments).

⁶ The list of such posts and units was included in the order of 20 March 2007 of the Minister of Internal Affairs and Administration on procedures and conditions of identifying police officers' physical and mental abilities for the service at particular posts and organizational police units. (O.J. no. 62, entry 432). Those include organizational units of the Central Bureau of Investigation, Internal Affairs Bureau, as well as criminal analysis, recruitment, traffic, surveillance, organised crime and anti-corruption departments. Polygraph screening is allowed for posts where there are performed control and audit activities, as well as those related to carrying out psychophysiological tests. Besides, heads (and their deputies) of police units and departments can be subjected to polygraph testing, if any operational and independent posts are subordinated to them, and for which the test can be ordered.

⁷ The aim of the discussed research is more widely described in P. BOGDALSKI *Badania wariograficzne jako narzędzie polityki kadrowej w Policji*. In *Ius est ars boni et aequi*. The jubilee issue of a book given to prof Stefan Lental. P. Bogdalski, W. Pływaczewski and I. Nowicka (Eds.)

⁸ KRUPSKI, R. and K. PIÓRKOWSKA-WOJCIECHOWSKA, *Theoretical basics of employee loyalty*. Management no. 1, 2005, p. 45.

⁹ Ibidem, p. 46.

not on the reasons of it¹⁰. However, there is a problem to determine attributes which could be verified in this dimension of loyalty. The meaning of polygraph testing ought to be mentioned at this point.

In the literature, high efficiency of research into unconscious reactions of an organism, which is carried out in specific cases¹¹, is indicated. The legislator also considered this as in 2003 modifications to the Polish code of penal procedure were introduced. From the point of view of this legal regulation, polygraph expertise may – when a specific act is committed, constitute an instrument of selection of persons who do not have any knowledge or they know about definite circumstances of committing an act. It is obvious that it first calls for naming a group of subjects to be tested. All the materials that have been gathered by a unit conducting proceedings are the basis here. In consequence, an expert opinion is used in order to narrow down a circle of suspects and it is neither a proof of committing the act, nor of guilt of an examined person.

Polygraph testing, which is not carried out in the context of a specific case, is assessed in a different way. It particularly concerns loyalty examination. Lack of clearly defined points of reference causes that this kind of testing is of a low diagnostic value¹². E. Gruza points out that registered during such testing emotional symptoms may have various bases, and a person who evaluates them is exposed to the danger of being influenced by auto-suggestion or the public pressure. When taking this person's opinion into account, one cannot talk about evaluation of specific features according to objective criteria. The examination result largely depends on a kind of prepared tests, a method of carrying them out, qualifications of a person conducting the examination and psychophysical predisposition of a tested person.

Considering a limited effectiveness of polygraph testing, it has to be assumed that it should be used in case of selected, the most important attributes of the external level of a police officer's loyalty only. Referring to the previously mentioned catalogue, it ought to concern "the way of acting which stays in accordance with the established standards" only. The content of a norm makes it possible to create more objective standards of behaviour which can be used in examination as points of reference. The other characteristics of the external loyalty level are not of such nature. Standards of behaviour, which could fill them up, will be made on the basis of subjective criteria.

Here, two other issues are worth mentioning. One is connected with consequences of behaviour that is against the accepted norm, the other one – with the way in which the norm is established. It seems that from the perspective of polygraph testing of significance are only these norms the violation of which may bring negative legal consequences for the employee. It does not matter what the nature of such responsibility is. It can be penal, disciplinary, industrial or civil in character. Consequently, the norm can be established in any way as long as it guarantees the above result. 'Established standards' are not only the ones laid down in universally applicable laws. In case of the police, they usually appear in internal acts such as orders, rules, decisions, guidelines or instructions.

In the discussed context a vital role is played by police ethical standards. It is assumed that professional ethics is a set of norms which define moral duties involved in performance

¹⁰ KULICKI, M. Instrumentalne ujawnianie i rejestrowanie emocji człowieka. In *Wariografia kryminalistyczna*. M. Kulicki (Ed.), Szczytno, 1998, p. 54; W. KĘDZIERSKI. Współczesne propozycje pozakryminalistycznych zastosowań testów szczeromówności. In *Wariografia kryminalistyczna*. M. Kulicki (Ed.), Szczytno, 1998, p. 89.

¹¹ WÓJCIKIEWICZ, J. Badania poligraficzne (wariograficzne) pracownika i funkcjonariusza. In *Doctrina multiplet veritas una*. The jubilee issue of a book given to prof Mariusz Kulicki, Toruń, 2004, p. 34.

¹² GRUZA, E. The opinion of 19 June 2006 concerning the project of changes into the Police Act and several other acts and considering constitutional nature of the suggested solutions. Preparation of the opinion was commissioned by the Bureau of Sejm Analyses of the Sejm Office (<http://orka.sejm.gov.pl/rexdomk5.nsf/Opwsdr?OpenForm&557>.), J. WÓJCIKIEWICZ, op. cit., p. 37 - 38.

of a job¹³. Violation of such norms by principle gives rise to moral sanctions which, unlike legal sanctions, are not formalised. Their impact is seen in the mentality of the person who caused the violation (the feeling of guilt) or in behaviour patterns within the social environment such a person is a part of (e.g. ignoring, excluding, or condemnation). In case of the Polish police, however, norms of professional ethics bear particular significance. Based on the statutory authorisation, the Polish national police chief issued an order where he laid down police ethical principles¹⁴. The aim of this act is to strengthen and complement police officers' rights and duties, which are a consequence of democratically established laws¹⁵. It should be stressed that ignoring standards of professional ethics is treated as disciplinary offence¹⁶. Thus, violation of norms consistent with those principles results not only in moral sanctions but also in legal ones.

Conclusions

The Polish legislation imposes restrictions on polygraph screening the police use to test their employees. The order clearly indicates that polygraph tests can be carried out in order to determine 'police loyalty', 'benefits police officers derive from the job they have been doing so far' or 'pathologies and undesirable addictions when in police force'. At the same time, general directives of legislative techniques require content areas of the above mentioned notions to be, on the one hand, clearly specified, and separated, on the other one¹⁷. The study represents a valuable contribution to the discussion which can be of help while identifying the designata of the notion of 'police loyalty'. What needs to be remembered is that public administration agencies must follow the rules according to which they can undertake only those activities which are legally required or permitted¹⁸. As a result, if the police use polygraph screening beyond the scope of the statutory authorisation, they violate the law, even if it is not clearly stated in the regulations. Therefore, analysed have been here only theoretical and legal aspects of polygraph tests of loyalty, and all practical issues (e.g. structure of tests) have been left beyond the analysis, as they are of secondary importance to the study.

Considerations to date lead to the conclusion that pre-employment polygraph screening is blemished with a high risk of error. Consequently, this procedure cannot decide about the lack of honesty and loyalty on the part of present or would-be employees or about them having tendencies undesirable from the viewpoint of their employers. Therefore, pre-employment polygraph screening of police applicants should be used with extreme caution. The reason for this is limited effectiveness of the procedure, which results from the tests being used outside the reality of a specific case. Of some importance is also the potential for polygraph testing to be used to determine police officers' honesty - as the notion is vague, there may be interpretation discrepancies. Given the above, one can conclude that polygraph screening should be narrowly understood. It seems acceptable that among many attributes of employee's loyalty verification should apply only to conduct in line with norms to be followed by police officers. The same refers to ethical norms which were laid down by the national police chief in Police Ethical Principles.

¹³ See: LAZARI-PAWŁOWSKA, I. *Etyka. Pisma wybrane*. Wrocław, 1992, p. 84.

¹⁴ Order 805 by the National Police Chief of 31 December 2003 concerning 'Police Ethical Principles' (OJ of the National Police HQ, vol. 1, entry 3), issued on the basis of Art. 7(1)(7) of the Police Act.

¹⁵ See: Paragraph 1 of the order quoted in the above footnote.

¹⁶ Art. 132 of the Police Act.

¹⁷ See: Paragraph 8 and paragraph 10 of the annex to the Council of Ministers' order of 20 June, 2002 on Legislative Technique Procedures (OJ, No 1000, entry 908).

¹⁸ According to Article 7 of the Polish constitution, public authorities are obliged to act in compliance with the law (OJ, No 78 (1997), entry 483).

Finally, it should be emphasised that in this case the narrowing interpretation of law makes it possible to minimise the risk of error, which coincides with human rights protection standards¹⁹. One must remember that, as part of their service relationship, police officers also enjoy these rights²⁰. Here, worth referring to is the view voiced by the Polish Ombudsman, according to which it is not appropriate to use polygraph screening in employment relations²¹ because considerable psychological burden is put on an examinee and the test results are irrelevant to the intended purpose. Therefore, it seems that pre-employment screening of police applicants will be more useful in terms of prevention rather than actual detection of dishonest police officers.

Police practice of using polygraph screening proves that the police apply the new tool of internal selection with considerable caution. From December of 2008 until December of 2009, the Psychophysiological Research Team of the Personnel and Training Department at the National Police Headquarters carried out only 59 polygraph tests, among which 29 produced positive results and 20 - negative, respectively.

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¹⁹ According to provisions of the Polish constitution, human dignity is the source of rights and freedoms of an individual and a citizen, and it must be protected and respected by public authorities (Art. 30 of the constitution). Consequently, public authorities cannot take action that may result in legal or factual situations which can deprive an individual of their sense of dignity. However, some constraints on human rights and freedoms are allowed in connection with upholding such values as state security, public order, the environment, public health and morality, freedom and rights of other people (Art. 31(3) of the constitution). This type of constraints cannot be subject to broadening interpretation of the law, and their use requires extreme caution.

²⁰ K. Droiński emphasises that police officers must be treated as persons exercising their human rights and freedoms. The level of their protection should not be lower than the level of protection any other citizen is entitled to (K. Droiński In DROIŃSKI, K., MOCARSKA D., MOSIO T. *Prawo międzynarodowe publiczne i ochrona praw człowieka*. Szczytno, 2008, p. 102 and the next pp.).

²¹ An interview with J. KOCHANOWSKI *Pracowników nie można badać na wariografie*, Gazeta Prawna, issue 18 of 25 January 2008. Similar stance is also taken by trade unions. To give an example, in the United States *The Employee Polygraph Protection Act* has been in force since 1988. The act, the American trade unions had their say in the passing of which, puts constraints on pre-employment polygraph screening (see: Wójcikiewicz J., op.cit., p.34).

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Kľúčové slová: polícia, polygrafické testovanie, vernosť /oddanosť/

Resumé

Článok hovorí o polygrafickom testovaní vernosti /oddanosti/ policajtov, ktorému sa podrobujú. Autor článku vyslovuje svoj názor a pochybnosti na legitimitu a zákonnosť polygrafického testovania a predpokladá, že takéto testy by boli oveľa viac využité pri požiadavkách prevencie než pri skutočnom odhaľovaní nečestnosti policajtov.

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