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Legal Admissibility of Employee Polygraph Examinations in Poland

Polygraph testing in Poland is associated mostly with criminal cases and discussion about the power of evidence from such examinations in criminal investigations. The use of the polygraph in Poland in criminal cases has been described extensively.¹ Nevertheless, recently the discussion has increasingly frequently pertained to the use of such examinations in other fields, and especially in labour and employment. Court cases related to labour law increasingly frequently feature the question of admissibility of such examinations and the consequences that they entail for the employee, including also the option to dissolve an employment contract on the power of such an examination. Moreover, the enrolment procedure of the future employee using such an examination is questionable. The above concerns questions related to rights of employees in the private sector, while the

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admissibility of such examinations towards officers of specified police forces is regulated by separate acts of law.

In Polish legal terminology, *badania poligraficzne*² (polygraph examinations) are also called *badania psychofizjologiczne*³ (psychophysiological examinations) and *badania wariograficzne*⁴ (variographic examinations). They have no legal definition in the Polish Code of Criminal Procedure,⁵ and are only described as “using technical means aimed at controlling the involuntary reactions of the organism”.⁶

The scope of use of polygraph examination in criminal procedures has been regulated since 2003 by the code of criminal procedure (Art. 171 §5 p. 2,⁷ Art. 192a,⁸ and Art. 199a⁹), and also by the judgements of the Supreme Court and Appellate Courts.¹⁰ Thus, the question of admissibility in investigations and in criminal cases as such is decided.

As far as labour law is concerned, a fundamental question arises, namely whether and on what grounds such an examination can be conducted on employees. And – should there be no clearly defined grounds and/or norms – can one infer that such examinations are permissible from the fact that the act does not forbid them expressly? It must be remembered that polygraph examination of employees occurs in two basic varieties: examinations of candidates for work (service), i.e. pre-employment, and control testing of employees or officers (screening).

While the former aims at barring undesirable people from work (service), primarily those who use false information in the application procedure, the latter – sometimes referred to, though not very precisely, as “loyalty examination”¹¹ – serves the detection of people who have infringed the rules binding at work (in the service), for example disclosed confidential information to other parties, leaked personal data, and/or acted to the detriment of the company and/or its clients.

First, to be able to consider the admissibility of such examinations in the private sector, worth analysing are the legal regulations that concern the examination of officers in certain state services and candidates for such services.

Such examinations are common in many countries, especially in the United States and recently also in Russia and other countries of the former USSR.¹² In the US, such examinations are generally used on police and special services

officers, and also on various civil employees of the federal administration should these have access to confidential information, drugs, etc.¹³

On the grounds of acts of law, undergoing such examinations in Poland are candidates for various police and special services, and also officers. In the case of candidates for service in the Foreign Intelligence Agency (AW), Internal Security Agency (ABW), Central Anticorruption Bureau (CBA), Police, Border Guard, and Military Gendarmerie, the admissibility of such examinations results directly from the act. In reference to the candidates for the Military Intelligence Service (SWW), Military Counterintelligence Service, and Customs Services, it results only from the provisions of bylaws published as fairly general delegations from the act. On the other hand, polygraph examination of officers serving in the Police, CBA, Customs Services, AW, ABW, and Border Guard are admissible on the grounds of the acts.

The legal admissibility of such examinations of officers, as defined in the acts, remains consistent¹⁴ with Article 60 of the Constitution,¹⁵ which requires that principles of access to public service are the same for all citizens enjoying full public rights.

Moreover, there is no contradiction between articles 30 and 47 of the Constitution and conducting polygraph examinations if their results primarily serve the protection of constitutionally guaranteed rights and freedoms.¹⁶

To explain how the question of polygraph examination is regulated in the case of officers in individual services, the pertinent regulations are described below.

In Chapter 5, Service of Central Anticorruption Bureau officers (Art. 50), the Act on the Central Anticorruption Bureau¹⁷ stipulates that a candidate is admitted to serve at the CBA after undergoing a qualification procedure, which consists among other things of determining the physical and psychological fitness to work at the CBA. Yet, in the case of candidates applying for CBA posts that require special skills or predispositions, the qualification procedure may be expanded with actions aimed at testing the usefulness of a candidate to work in such a post, including conducting a polygraph examination. An officer, in turn, can be referred by right of office or on his own request to a medical committee, to have the following ascertained: his health condition, physical and psychological fitness to perform the service, and also the connection between individual illnesses and the service. The officer may also

be subjected to polygraph examination. The decision about preparing an officer for such an examination is made by the Head of the CBA, and such a decision of the Head of the CBA does not require justification (Art. 63 of the Act on CBA). In further detail, conducting the examination is regulated by the published bylaw, which mentions polygraph examination by name, and also refers to psycho-technical examinations, a term that encompasses polygraph examinations as well.¹⁸

Subjected to such examinations may also be candidates for work for the Internal Security Agency and Foreign Intelligence Agency, and also officers who already work for them.¹⁹ The procedure of examinations is determined in detail by the bylaw.²⁰

The admissible goals and scope of polygraph examinations were described in detail in a regulation of the Minister of Internal Affairs of 20th March 2007, concerning the way and conditions of defining the physical and psychological fitness of police officers to serve in specific posts or in specific organisational units of the Police Forces.²¹ In §9 of the document, the scope of polygraph examination is described in the form of a catalogue. This contains the options for testing loyalty in service, drawing undue profits (in any form) related to serving in the Police, potential pathologies and addictions that are undesirable in service. The scope of polygraph examinations is also described in the bylaws to the Act on the Customs Service.²² The regulation speaks of conducting physical fitness tests and psychological and psycho-physiological examinations. The document not only defines the scope and the goal of polygraph examinations, as is the case in the bylaw to the act on the Police, but also describes the entire procedure of the examination. In §23, it states that polygraph examinations may not use questions referring to denominations, political views, and sexual preferences. Moreover, the paragraph contains information that one examination must consist of at least three tests.

The thus defined goals of the examination and the *a contrario* defined scope limit the possibility of free definition of the goal and object of examinations, and specifically, asking the officers and candidates questions that are not related to the thus defined goal and scope of the examination. Asking questions that concern personal matters, for example, and those not related to the service is not allowed.

Another question that needs considering is the admissibility of employee examinations among people who are not officers of the services and

formations listed above. What is meant here is primarily the admissibility of polygraph examinations for governmental and regional and local authority staff, and the possibility of conducting such examinations among the staff of private firms.

It seems that an investigation of the question must begin with a reiteration of the principle of the rule of law, which stipulates that public bodies may do only what the law orders or allows them to, while legal persons and natural persons can do whatever is not forbidden by law.

Based on this principle, it seems obvious that polygraph examinations may be extended only to those employees (officers) who are envisaged in the acts as potential and necessary subjects of such examinations. Therefore, candidates for work in state institutions other than the ones mentioned above (i.e. the Police, Internal Security Agency, Central Anticorruption Bureau, Foreign Intelligence Agency, Military Intelligence Service, Military Counterintelligence Service, Border Guard, Gendarmerie, and Customs Services) must not be subjected to polygraph examinations, nor may be the employees or officers working in these institutions.

However, what remains an open question is the admissibility of polygraph testing of candidates and staff of private businesses. Such examination is significant in the case of posts that entail employee access to important information (related to the protection of personal rights, bank and corporate secrets, etc.), access to valuable goods (e.g. escort officers), access to security systems (e.g. airport staff, court IT personnel), and weapons.

Polish labour law does not expressly forbid polygraph examination of such people. Especially, polygraph examination is not forbidden by the Labour Code. In turn, the Labour Code (specifically, Art. 11¹) provides that the employer is obliged to respect the dignity and other personal rights of the employee. Among the personal rights, the Labour Code expounds only the dignity of the employee, which is to be construed as the respect due to the employee in regard to his or her personality, individuality, gender, civic and social attitude, and the system of values professed.²³ The assessment of an employee's qualifications may not infringe his or her personal rights (Art. 11¹ Labour Code, and Art. 23 and Art. 24 of the Civil Code), even though, in its essence, such an assessment may enter these areas.²⁴ Thus, the borders of admissibility of examinations may additionally be defined by regulations concerning the protection of personal rights, should the examination enter

the legally protected realm of privacy of the examinee. Thus, an examination as such is not forbidden, but one can imagine a situation in which a certain way of conducting the examination can be ruled out due to the manner of conducting it, and especially the scope of questions used in it. When these conditions are met, the qualms expressed among others by J. Wóciławicz (*Badania poligraficzne (wariograficzne) pracownika i funkcjonariusza, doctrina Multiplex Veritas, Toruń 2004, p. 38*), namely, that polygraph examination infringes the guarantees resulting from Art. 11¹ of the Labour Code, are unjustified. Such prohibitions may also result from the professional ethical principles of expert polygraphers. One may doubt whether the principles of ethics allow, for example, examinations to be held in so-called marital cases. Moreover, examinations in which the religion of the examinee, his or her political views, and sexual preferences are tested would be illegal. Moreover, it is certain that the subject must not be forced into polygraph examination, but must express voluntary and informed consent to the examination being conducted. Any examination without the consent of an employee, irrespective of the lawful scope and objective, will be illegal in its essence, as any person forced to take an examination faces a restriction on his or her liberties.

Due to the character of many jobs, it is necessary to support the admissibility of conducting such examinations among employees in the private sector, yet governed by specific rules and regulations. A polygraph examination should be constructed in such a way that it does not infringe the Act on the protection of personal data,²⁵ and used in a way that does not infringe the Code of Criminal Procedure or the Labour Code, while the test questions should not in their scope go beyond the subjects accepted for a personal questionnaire of an employee and the employee's CV. The questions asked during the test may not encroach on the private realm of the life of the individual, nor infringe the individual's rights, including dignity, the right to protection of private life, honour, good name, etc. Moreover, the form and manner of conducting the examinations may not infringe the dignity of the examined employee. The questions formulated by the polygrapher must not be obtrusive, nor can they concern the realm of private life. Probably the most important question is the consequences of such employee examinations.

In employee-related cases, the result of a polygraph examination conducted as part of the investigation or procedure before the court never forms the only grounds for undertaking certain decisions in the trial, and especially it cannot constitute the only grounds for sentencing or acquittal. The result of

a polygraph examination is always subject to the judgement of the court and is confronted with the mass of evidence. The Polish judiciary has examined cases when a polygraph examination of the employee was the reason for the employer to apply disciplinary discharge. Such a practice must be considered non-permissible. The more so, as, for example, in the case of a negative result of a polygraph examination, even the legal regulations referring to the officers of e.g. Customs Services do not envisage discharge.²⁶ Such an outcome results only in transferring an officer to another post, where conducting such tests is not required – consequences towards the employees in the private sector should not go further.²⁷

Independently of the selective function of polygraph examination in labour and employment relations, their results, much like in criminal procedures, must be treated only as ancillary evidence, and a suggestion for the employer that the given employee should have no access to corporate secrets and/or access to information of special significance, or that the employee requires special supervision.

In summary:

1. The Polish legal system allows pre-employment and screening polygraph examination of officers of specific police and special services.
2. Testing of officers and administrative staff, other than those mentioned in 1. above, is not allowed.
3. Examination of candidates and employees of private businesses is not forbidden.
4. All polygraph examinations, of the people mentioned in 1. as well as 3. above, must be performed with the consent of the subjects, while the scope of examination may cover only the information to which the supervisors or employers have the right to access. In this way, they cannot concern other questions (e.g. private/personal questions).
5. The results of the examination cannot, on their own, constitute grounds for dismissal.

References

[1] J. Widacki (2007), *European Polygraph*, 1.

[2] Such a notion is contained in the Act of 9th June 2006 on the Central Anticorruption Bureau (*Dz.U.*, 2006.104.708).

- [3] Such a notion is contained in numerous acts of law including the Act of 24th May 2002 on the Internal Security Agency and Foreign Intelligence Agency; the Regulation of the President of the Council of Ministers of 24th April 2003 concerning the standard for personal questionnaire and detailed principles and mode of conducting the qualification procedure towards candidates for service in the Foreign Intelligence Agency; Regulation of the President of the Council of Ministers of 29th November 2002 concerning the standard personal questionnaire and detailed principles and mode of conducting qualification procedures towards candidates for service in the Internal Security Agency; Regulation of the Minister of National Defence of 26th July 2006 concerning the qualification procedure towards soldiers applying for nominations for posts in the Military Counterintelligence Service; Regulation of the Minister of National Defence, of 26th July 2006 concerning the qualification procedure towards candidates for service in the Military Counterintelligence Service; the Act of 12th October 1990 on the Border Guard; the Act of 27th August 2009 on the Customs Service; the Act of 6th April 1990 on the Police; the Act of 24th August 2001 on the Military Gendarmerie and military policing forces.
- [4] Such a notion is contained in the Regulation of the Minister of Internal Affairs and Administration of 20th March 2007 concerning the mode and conditions of defining physical and psychological fitness of police officers to serve in specific posts and in specific organisational units of the Police, and the Regulation of the Minister of Finance of 20th December 2010 on conducting a physical fitness test, psychological examination, and psychophysiological examination of customs officers.
- [5] Act Code of Criminal Procedure of 6th June 1997 (*Dz.U.*, 1997.89.555 with later amendments).
- [6] Art. 171 §5 p. 2 Code of Criminal Procedure, Art. 192a §2 Code of Criminal Procedure, Art. 199a Code of Criminal Procedure.
- [7] According to Art. 171 §5 p. 2, it is forbidden to use hypnosis, and/or chemical or technical means that influence the psychological processes of the interrogated person, or aimed at controlling the involuntary reactions of such person's organism in relation to an interrogation.

- [8] Art. 192a provides the grounds for conducting psychophysiological tests to narrow down the group of suspects and define the evidence value of traces. In line with the article, to narrow down the group of suspects, or to define the evidence value of discovered traces, the following can be collected: fingerprints, a pap test from mucous membrane of the cheek, hair, saliva, samples of handwriting, and scent; furthermore, a photograph of a person can be taken or a voice can be recorded. Having finished using the above in an investigation, the material sampled or recorded should immediately be removed from the files and destroyed, if not necessary for further procedures. In the case mentioned above, with the consent of the examinee, an expert may also apply technical means aimed at controlling the involuntary reactions of that person's organism.
- [9] In turn Art. 199a of the Code of Criminal Procedure allows psychophysiological tests to be conducted on a suspect, the defendant, and – which needs emphasising – a witness.
- [10] The Supreme Court referred to the problem of polygraph examinations as early as in a sentence of 25th September 1976, II KR 171/76 stating that “such examinations are only of ancillary and indirect character and cannot be construed as independent evidence providing grounds for specific decisions”, with later case decisions of courts, supporting the option to conduct polygraph (variograph) examinations for the purpose of court procedures, pointing at the same time to their limited practicality (e.g. the verdict of the Supreme Court of 28th October 2004, III KK 51/04).
- [11] J. Pietruszka, O dopuszczalności i silnie prewencyjnym oddziaływaniu badań poligraficznych w stosunkach pracy, *Monitor Prawa Pracy* 2006, 4.
- [12] Y. Kholodny (2008), Interrogations using polygraph in Russia: 15 years of legal application, *European Polygraph*, 2.
- [13] J. Widacki (2008), *Kryminalistyka*, C.H. Beck, Warszawa, p. 384–386.
- [14] As the Constitutional Court stated in the sentence from 9th June 1998, the act must define objective criteria for the selection of candidates for service and regulate the principles and procedure of recruitment, so as to assure that the principle of equal opportunities is obeyed towards all candidates, without any discrimination and unjustified limitation. In this, the above does not in any way render it impossible for public authorities to

define detailed conditions of access to a specific service due to its type and essence. Moreover, the act should define the criteria of release from the service and the procedure of making decisions relevant, so as to exclude all and any freedom in the operation of public authorities. Moreover, it is necessary to develop appropriate guarantees of legality of decisions concerning access to public service, therefore, primarily decisions about the admission or refusal of admission to the public service and release from this service (K. 28/97, OTK ZU, 1998, 4, 302).

- [15] Constitution of the Republic of Poland, Act of 2nd April 1997 (*Dz.U.*, 1997.78.483 with later amendments).
- [16] “Here the question arises as to whether providing a citizen with an additional argument to defend and prove his innocence is harmful to human dignity and rights (especially the right to defence), honour, good name, and the right to decide about one’s personal life.” – quoted in: J. Pietruszka, O dopuszczalności i silnie prewencyjnym oddziaływaniu badań poli-graficznych w stosunkach pracy, *Monitor Prawa Pracy* 4/2006.
- [17] *Dz.U.*, 2006.104.708.
- [18] Regulation of President of the Council of Ministers of 20th July 2006 concerning standard personal questionnaire for candidates for service in the Central Anticorruption Bureau provides in § 6 that, during the qualification procedure, a candidate is submitted to psychological and medical testing aimed at defining the candidate’s physical and psychological fitness to serve in the CBA. Further, in line with § 7, a candidate who applies for a CBA post requiring special skills or predispositions may be subjected among others to additional psychological and polygraph examinations; a psychotechnical examination.
- [19] On the power of the Act of 24th May 2002 on the Internal Security Agency and Foreign Intelligence Agency (uniform text: *Dz.U.* 2010, No. 29 item 154).
- [20] Regulation of the President of the Council of Ministers of 29th November 2002 concerning standard personal questionnaire, and detailed principles and mode of conducting a qualification procedure towards candidates for service in the Internal Security Agency. Moreover, Regulation of the President of the Council of Ministers of 24th April 2003 concerning

the standard personal questionnaire and detailed principles and mode of conducting the qualification procedure towards candidates for service in the Foreign Intelligence Agency states, in § 7, that a candidate applying to serve in the Foreign Intelligence Agency in a post requiring special skills or predispositions may be subjected to: a psychophysiological examination; a psychotechnical examination.

- [21] Regulation of the Minister of Internal Affairs and Administration of 20th March 2007 concerning the mode and conditions of defining physical and psychological fitness of police officers to serve in specified posts or in specified organisational units of the Police.
- [22] Regulation of the Minister of Finance of 20th December 2010 concerning conducting of physical fitness tests, psychological examination, and psychophysiological examination of customs officers.
- [23] J. Jończyk, *Spory ze stosunku pracy, Państwo i Prawo* 1966, 3, 134 and ff.
- [24] Sentence of the Supreme Court – Chamber of Labour, Social Insurance and Public Matters of 6th April 2011, II PK 274/2010.
- [25] Act on the protection of personal data of 29th August 1997 (*Dz.U.*, 2002.101.926).
- [26] Regulation of President of the Council of Ministers – Conducting physical fitness test, psychological and psychophysiological examination of customs officers (*Dz.U.*, 2010.230.1515) states in § 6 that a refusal to undergo a test of physical fitness, and/or psychological and/or psychophysiological examination results in transfer of the officer to another post, where conducting of such tests/examinations is not required.
- [27] P. Cizek, M. Chakowski, *Badać czy nie badać (wariografem) – oto jest pytanie, Personel*, 2005, 12, 57.