BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 39	Case 64 No. 49206 A-5067
and	
MADISON GAS AND ELECTRIC COMPANY	

Appearances:

Mr. Richard Thal, Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of Office and Professional Employees International Union, Local 39, referred to below as the Union.

Ms. Kristine A. Euclide, Stafford, Rosenbaum, Rieser & Hansen, Attorneys at Law, 3 South Pinckney Street, Suite 1000, P.O. Box 1784, Madison, Wisconsin 53701-1784, appearing on behalf of Madison Gas and Electric Company, referred to below as the Employer.

AWARD DENYING MOTION IN LIMINE

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Russell Smith, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. On July 2, 1993, the Employer filed a Motion in Limine to exclude "all evidence and testimony concerning polygraph test and results", together with a supporting brief and Affidavit. A conference call on the motion was conducted on July 6, 1993, during which I informed the parties that I would not rule on the motion until the Union had an opportunity to submit argument on the motion. Hearing on the matter was set for and held on July 8, 1993, in Madison, Wisconsin. At the adjournment of that hearing the Union submitted its written response to the Employer's motion.

BACKGROUND

The Motion in Limine states, as its grounds, the following:

> 1. Polygraph tests and the results thereof are inherently unreliable and may be prejudicial. Therefore they should not be admitted in an arbitration proceeding.
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> 2. The results of polygraph tests are routinely excluded by arbitrators or, if admitted, are given no weight. Admission of worthless evidence will confuse the issues and waste time. The time available for the taking of testimony in this case is already limited.
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> 3. The Union and the grievant . . . unilaterally proceeded with the test. (The Employer) did not participate in the selection of the polygraphist or formulation of the questions used. Nor was (the Employer) allowed to monitor the

administration of the test to ensure its reliability. This renders the test highly suspect and inadmissible.

4. (The Employer) has been unable to obtain any information about the test and how it was administered, such as what questions were asked, who framed them, the score of each question, etc. The Union and (the Grievant) have refused to consent to the release of any such information.

5. The results of the polygraph test are irrelevant and immaterial to the issues of this case.

. . .

The affidavit, filed by Kristine A. Euclide in support of the Employer's motion, reads thus:

. . .

2. The polygraph test administered to (the Grievant) on June 10, 1993, was administered unilaterally without any input from (the Employer).

3. (The Employer) did not participate in the polygraph test in any manner. It had no input into the selection of the polygraphist, formulation of the questions, the monitoring or administration of the test or the analysis of the test results.

4. The Union and (the Grievant) have refused to disclose any information about the test to (the Employer) other than to provide a copy of a two page summary report. For example, the Union has refused to answer (the Employer's) questions about how the questions were formulated, what questions were asked, what the results of each question were, what (the Grievant's) involvement was in the formulation of the questions, etc.

> 5. On June 17, 1993, I asked Linda Hagar, the Union representative in this matter, if she would be willing to provide us with additional information listed in paragraph 4 above. Ms. Hagar refused. I then told Ms. Hagar that we would attempt to contact the polygraphist to see what information we could obtain from him. However, I told Ms. Hagar that I was certain that the polygraphist would not provide us any information about the test without a written release from (the Grievant). I asked Ms. Hagar to provide such a release, but she said she would not provide such a release at this time.
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> 6. Thereafter, I attempted to reach the polygraphist. On four different days I called him and he was unable to speak with me. He did return my phone calls, but I was unavailable. On June 28, 1993, I spoke with the polygraphist. He confirmed that he had given a polygraph examination to (the Grievant), but stated that without a written release from (the Grievant), he could not and would not provide any additional information about the examination.

. . .

THE EMPLOYER'S POSITION

Citing arbitration awards and secondary sources, the Employer contends that "(m)any arbitrators, as a matter of course, deem polygraph tests and results to be unreliable." Beyond this general reluctance to admit evidence based on polygraph tests, the Employer contends that the failure of the Union to bring the Employer into the testing process or to "demonstrate the expertise of the polygraphist and reliability of the test procedures" specifically militate against the admission of any such evidence in this case.

More specifically, the Employer argues that "(i)t violates notions of fair play to allow into evidence polygraph test results when the employer was excluded from any participation in the choice of examiner, the procedures followed, questions asked or cross-examination of the employee." Such notions of fair play and due process have been noted and applied in arbitration cases directly on point to that at issue here, according to the Employer.

Beyond this, the Employer argues that evidence of the test administered to the Grievant should be excluded because "(n)either the qualifications of the administrator nor the reliability of the test procedures have been demonstrated." Here too, the Employer contends that arbitral precedent squarely supports its contention. Beyond this, the Employer asserts that hearing time should not be wasted on collateral points such as the reliability of the test when the Grievant's "veracity can be determined by the arbitrator first hand from the testimony itself at the hearing."

The Employer concludes that fundamental fairness dictates that its motion should be granted, and that the hearing should thus be limited to first hand testimony on the points at issue.

THE UNION'S POSITION

Noting that "(i)t is established that an arbitrator should not rely on a

polygrapher's testimony and results as proof that a grievant is guilty or innocent, but that such testimony could be used to corroborate or impeach the testimony of the grievant or other witnesses", the Union concludes that its evidence can assist in the resolution of credibility issues. This conclusion is, the Union contends, solidly supported in arbitration decisions and in recognized secondary sources on the arbitration process.

The Union argues that the fact that the Employer was not present when the test was administered is not determinative here, since the test constitutes "corroborating" not "conclusive" evidence. Current technology is, the Union contends, more reliable than the Employer admits.

Beyond this, the Union asserts that it is "prepared to provide documents to prove the qualifications of the polygraph examiner . . . and is ready to describe his professional qualifications, the manner in which he conducts tests and the manner in which he conducted the specific test on (the Grievant).

The Union concludes that the results of the polygraph test administered here has had, or can be given, adequate procedural safeguards to assure sufficient reliability for the test to be used as corroborative evidence. The Union concludes that the Employer's motion should be dismissed.

DISCUSSION

The motion questions whether the results of the Grievant's polygraph test should be received into evidence, urging that polygraph evidence generally and the Grievant's test specifically are unreliable and prejudicial.

The Union has not yet documented the qualifications of the polygraph examiner, nor offered evidence on the test procedures. The motion thus questions whether the polygraph evidence is so inherently unreliable or prejudicial that it should be excluded from the record. To address the motion, the allegations of the Employer's affidavit have been taken as fact.

The unreliability cited by the Employer can be grounded either technically or logically. The technical argument is one of long standing 1/ and urges that the polygraph is not yet technically reliable enough to offset the inherently prejudicial impression that a "lie detector" inevitably creates. This argument, although forceful, has procedural and substantive flaws. Procedurally, an

1/ See, for example, Frye v. United States, 293 Fed. 1013 (D.C. Cir., 1923).

analysis must start with the fact that I have no technical background in polygraph examinations. Even if I did, it would be improper to bring that expertise to bear outside the arguments and evidence offered in the case at hand. That I am not expert in the field means the technical validity of the polygraph can either be tested by my own unguided survey of the relevant literature, or by a survey undertaken after the parties have offered evidence and argument on the point. The latter approach is the more persuasive.

Substantively, the technical argument suffers from the fact that polygraph evidence is reliable enough to have been used by arbitrators 2/ and by courts. 3/ This point must not, however, be overstated. Both arbitrators 4/ and courts 5/ have rejected such evidence, limited its use, or granted it little, if any, weight. The point remains, however, that polygraph evidence is reliable enough to have gained some acceptability. It is not a test for the admissibility of evidence that it be entirely reliable. Such a test would preclude any expert testimony, and the bulk, if not all, of eyewitness testimony.

The remaining basis for the rejection of the polygraph evidence is logical. Under this argument, the evidence should be rejected because it is inherently prejudicial or unreliable. The most cited and forceful statement of this position is that of Arbitrator Edgar A. Jones, Jr., in "'Truth' When The Polygraph Operator Sits As Arbitrator (Or Judge): The Deception Of 'Detection' In The 'Diagnosis Of Truth And Deception'", Truth, Lie Detectors, and Other Problems In Labor Arbitration/Proceedings of the 31st Annual Meeting of the National Academy of Arbitrators (BNA, 1979). Jones' view is that the use of polygraph testing is so prejudicial that an arbitrator could, defensibly, refuse to enforce an agreement provision authorizing its use:

2/ See, for example, Wilkof Steel & Supply Co., 39 LA 883 (Maxwell, 1962); Nettle Creek Industries, Inc., 70 LA 100 (High, 1978); Kisco Company, Inc., 75 LA 574 (Stix, 1980); Ohio State Reformatory, 88 LA 1019 (Duda, 1986); and Koppers Company, Incorporated, 68-1 ARB Par. 8084 (Kates, 1967).

3/ See, for example, State v. Stanislawski, 62 Wis.2d 730, 216 N.W.2d 8 (1974). Polygraph evidence can, within narrow limits, be used in Wisconsin in the employment context, see Sec. 111.37, Stats.

4/ The "overwhelming" majority rule among arbitrators is to either exclude polygraph evidence or grant it little, if any, weight. See, generally, How Arbitration Works, Elkouri & Elkouri (Fourth Edition, BNA, 1985) at 315, and Evidence in Arbitration, Hill & Sinicropi (Second Edition, BNA, 1981) at 69.

5/ See, generally, Practice and Procedure in Labor Arbitration, Fairweather (Second Edition, BNA, 1983) at Chapter XIV, especially at 389-401. See also Fairweather's Practice and Procedure in Labor Arbitration, (Third Edition, 1991), at Chapter 14.

> I would adopt . . . the style of reasoning, that the uses of polygraphs are so contrary to accepted tenets of public policy that contract terms authorizing or requiring the subjecting of employees to them may not be effectuated by me as arbitrator. 6/

As I noted during the telephone conference on this issue, I am unwilling to go that far in the assertion of arbitral discretion. While facts may exist justifying a "public policy" override of the terms of a collective bargaining agreement, I am unwilling to assume such facts. Collectively bargained authorization of the use of a polygraph should afford sufficient procedural safeguards to justify its usage.

This conclusion serves as preface to the logical argument that polygraph evidence is inherently prejudicial. This argument can apply to a number of different aspects of the polygraph process. Evidence has yet to be offered on the point, but I assume the test involved here measures certain autonomic bodily functions to measure stress caused, presumably, by conflict in relating fabricated facts. Doubt can be placed at virtually any point in this chain. Whether such stress relates to truth-telling at all can be doubted. Presumably, honest individuals can register stress when relating the truth, and, presumably, a good liar can manipulate his responses. Doubt on what "truth" is must be noted. Presumably, a honest person can be mistaken, and a dishonest person can be so convinced of the lie that the lie no longer, for the dishonest, exists. How the polygraph examiner forms questions, and interprets responses, inevitably introduces a subjective element into a process made to appear objective.

Acknowledging the existence of these and other logical doubts surrounding polygraph evidence does not, however, require a conclusion that the evidence is fatally flawed. A willingness to permit such evidence on the stipulation of the parties implies a willingness to reject the use of such evidence as inherently prejudicial. This is the case here. If the doubts noted above can serve to justify the exclusion of polygraph evidence, it is not clear how any testimony, circumstantial or direct, can be admitted. Witness demeanor is an often cited tool used by triers of fact, from arbitrators to judges or juries. That tool is as open to the bulk of the considerations noted above as is polygraph evidence. In sum, if polygraph evidence is to be excluded, it must be excluded based on record evidence and argument, not on abstract arbitral logic.

The issue posed is whether the polygraph evidence subject to the motion should be treated as a matter of admissibility or of weight. Having rejected technical and logical objections, standing alone, to such evidence, it must be treated as a matter of weight.

Arbitrators are not strictly bound to the rules of evidence, but the statutory balance of relevance against prejudice states the logical process which should underlie the admission or exclusion of evidence. Sec. 904.01, Stats., defines "Relevant evidence" as "evidence having any tendency to make the

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6/ Truth, Lie Detectors, and Other Problems in Labor Arbitration at 109.

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Sec. 904.03, Stats., authorizes the exclusion of "relevant evidence" if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The two provisions underscore the desirability, which is more pronounced in arbitration than in judicial litigation, to include as much evidence as possible, and to err on the side of inclusion. The provisions broadly relate the probative value of evidence to "any" tendency to make the occurrence of a relevant fact more or less probable. The exclusion of relevant evidence is to be made only if the probative value of the evidence is "substantially" outweighed by other factors.

The conclusion stated above establishes that polygraph evidence can arguably assist in a credibility determination, by corroborating or impeaching first hand testimony. The issue posed now is whether whatever probative value such evidence possesses is "substantially outweighed" by other factors. That the Grievant sought, and submitted to, the polygraph addresses the risk of unfair prejudice to the Grievant. Unfair prejudice to the Employer is subsumed in the application of the remaining factors. I do not, however, believe such prejudice exists here.

The most apparent area of prejudice is if the admission of the polygraph evidence, standing alone, will override the first hand testimony of participants in the events leading to the Grievant's termination. It can be argued that polygraph evidence does not assist, but dominates, the finding of fact because it offers a technical out for a non-technical problem. To test the weight of polygraph evidence rather than categorically rejecting it does not, however, correspond to abandoning skepticism on it. Whether the slate of questions asked the Grievant conforms to facts relevant to this matter; whether the machine accurately measures autonomic functions corresponding to conflict; whether any such conflict can or does correspond to the strain of lying or the ease of truth-telling; and whether the readings have been accurately interpreted by the examiner are among the questions yet to be considered. I raise them not as an exhaustive list but to point out that polygraph evidence is not an easy out. At best, the evidence is only part of the task of assessing credibility. I am, then, not convinced the admission of polygraph evidence will, in itself, usurp the role of witness testimony.

The greater risk is that the admission of the evidence will raise unnecessary and misleading collateral issues. This risk is substantial enough to warrant the exclusion of such evidence. The grievance should not be permitted to devolve into a trial of the polygraph examiner or the polygraph itself. This risk is, however, speculative at this point. Neither the Union nor the Employer has contended that every witness should be given a polygraph, or that the exam given to the Grievant needs to be replicated. Such contentions may arise, but the risk of delay is speculative at this point.

In sum, the admission of polygraph evidence raises issues of weight, not admissibility. Granting the motion posed here requires a conclusion that polygraph evidence is so inherently unreliable that it cannot constitute

relevant evidence or so inherently prejudicial that its probative value should be overlooked. I am, in the absence of further argument and evidence, unwilling to conclude the evidence is technically unreliable. I am also unwilling to conclude the evidence is so incurably flawed as a logical proposition that it should not be weighed with other record evidence.

Before closing, certain considerations need to be stated to clarify how this general conclusion is to be applied in this case. Two prefatory points must be noted initially. First, the conclusions stated above rest on my own evaluation of the arguments. I have referred to external law, but do not view external law as controlling my view of the evidence as a matter of contract. Second, the arguments have not cited specific contract language, and I have presumed from this that the contract does not have provisions specifically applicable to this motion.

It is now necessary to tailor the general conclusions to the facts posed here. Because of the potential for the unnecessary litigation of collateral issues, I will note that the willingness or unwillingness of any witness to undergo a polygraph examination is irrelevant. No evidence will be taken on this point. Nothing in this record demonstrates that the use of the polygraph is sufficiently accepted or acceptable in this bargaining relationship to warrant the drawing of any inference based on the willingness or unwillingness of either party to request, or of a witness to submit to, the test. Beyond this, I will stress that the Union is offering the evidence only for credibility purposes "to corroborate or impeach the testimony of the grievant or other witnesses."

The conclusions stated above make the polygraph evidence admissible. Substantial questions still surround how the test was administered. It is conceivable that those questions, if not addressed, warrant granting the test results no weight.

The AWARD entered below notes the possibility that the evidence the Union seeks to offer may be entered by stipulation. I do not anticipate in raising this possibility that the Employer would have to stipulate that the polygraph examiner is qualified, or that the results obtained are valid. Rather, the possibility is mentioned so that the parties can at least attempt to stipulate the factual basis necessary to make their arguments on the weight to be accorded the polygraph results. Thus, stipulation on the polygraph examiner's qualifications would mean only that the examiner has the qualifications the parties stipulate to. Submission of the results and any documentation on how the results were achieved would mean only that the examiner achieved the results noted by the process thus documented. In the absence of such a stipulation, hearing will be set for a time when the polygraph examiner and any necessary documents are available for the Employer's inspection and examination.

AWARD

The Employer's Motion In Limine To Exclude All Evidence And Testimony Concerning Polygraph Test And Results is denied.

Further hearing consistent with the conclusions stated in this decision will be set. Evidence on the polygraph test, the qualifications of the person(s) administering that test, the procedures used to administer the test, and the conclusions drawn following the administration of those procedures will be accepted by the stipulation of the parties if such a stipulation is possible. If such a stipulation is not possible, hearing will be set for a time when the polygraph examiner and any necessary documents are available for the Employer's inspection and examination.

Dated at Madison, Wisconsin, this 23rd day of July, 1993.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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