

Anne Arundel County Ethics Commission

Advisory Opinion

96-112

Issue

Whether a person employed by the police department as a polygraph examiner may conduct private polygraph examinations in Anne Arundel County through his outside business?

Background

This Opinion is based upon facts developed through an investigation conducted by employees of the police department. The Commission assumes for the purpose of this Opinion, that the investigation was thorough and that the facts stated in the investigation are true. A summary of the relevant facts is provided as follows. The Anne Arundel County Police Department employs polygraph examiners, whose duties include conducting polygraph examinations on people involved in police investigations of criminal activity. The people subject to the polygraph examinations may or may not be suspects, and they may or may not have been formally charged with a criminal offense.

The polygraph examiner who is the subject of this Opinion, (the "employee") is also the owner, or one of the owners, of a private "family" business that conducts polygraph examinations for a fee. The examiner's son also conducts polygraph examinations for the business, which is described by the owner as doing "private investigations, service of summons and security consultation including polygraph testing to include specific and applicant testing."¹ Both the polygraph examiner and his son are "certified" by the school that each attended but there is no licensing or certifications required of polygraph examiners by the state of Maryland or by Anne Arundel County. The examiner said that he does not "normally" conduct examinations of people who have been formally charged with a crime in Anne Arundel County. He said that in cases where he perceived a conflict of interest, his son would handle the polygraph examination. However, evidence gathered through the investigation indicates that the employee may have conducted a polygraph examination, through his private business, of a suspect in an ongoing criminal investigation. Additional information suggests that the employee may have "hinted" to certain police officers that some of the subjects of his private polygraph examinations were "dirty."

Discussion

¹ The employee's agency is not licensed in the state of Maryland as a private detective agency, so this Opinion is based solely on the employees's outside work as a polygraph examiner. Conducting private investigative work would raise similar issues, but they are not included in the scope of this Opinion.

As a county employee, a polygraph examiner is subject to the county ethics law. The relevant provisions to this inquiry include §3-101, conflicts of interest; §3-104, use of prestige of office or position; §3-105, restrictions on outside employment; and §3-107, disclosure of confidential information.

The ethics law does not absolutely prohibit outside or secondary employment. It restricts outside employment that would create divided loyalties between the county employer and the private employer. There are essentially three restrictions on outside employment.

The first restriction, §3-105(b)(1), prohibits employees from engaging in outside employment with any entity that is subject to the regulatory authority of the employee's agency or has some contractual dealing with the agency. Ownership of, and employment with, a family business would constitute an employment relationship and an interest in an entity. In the current circumstances, however, it does not appear that the polygraph business operated by the employee has any contractual relationship with the police department. And since there are no licensing or other regulatory requirements for polygraph examiners, the private business would not be subject to the authority of the police department.

The second restriction, §3-105(b)(2), prohibits any outside employment relationship that would impair the impartiality or independent judgment of the employee. In trying to stimulate business for his private enterprise, the employee might solicit or otherwise receive business from attorneys who represent clients under police investigation. If a police employee can charge a private fee for conducting a private test, the employee could eventually be pursuing private business to the detriment of his duties to the police department. His loyalty to the county would at the very least, be suspect. And, if the police refuse to accept the results of a polygraph examination conducted by their employee, albeit through his outside employment, are they undermining their own credibility? If the employee accepts work on behalf of potential defendants, the line between his police work and his private work would raise significant questions about the employee's objectivity and the police department's independence and credibility.

Another problem with this type of outside work is the dilemma faced by the employee if he learns of possible criminal conduct in the course of his private work. Does he have a duty to inform his public employers, the police department? If he does not have such a duty, can he then withhold evidence or incriminating statements from his employers? These questions present a few of the reasons why private polygraph work in the criminal area could and most probably would impair the employee's independence and impartiality in the conduct of his work for the police department. Therefore, §3-105(b)(2) would prohibit the employee from undertaking a private polygraph examination of anybody who may be involved in a criminal investigation, whether as a witness, or as a participant in a criminal act, at least in Anne Arundel County.. This prohibition would extend not only to current investigations, but also where there is a reasonable likelihood of a future investigation.

The third restriction, §3-105(c)(1), prohibits a county employee from participating in outside employment that assists or represents any person concerning a matter in which the

County has an interest. This restriction would prohibit an employee from conducting private polygraph examinations in any case where the police department may have an "interest," without regard for issues of the employee's own impairment of judgment. An interest is defined in §1-101(n) to include any legal interest. The prevention and prosecution of crime falls clearly within the legal interest of the police department and would prohibit a police department employee from conducting a private polygraph examination where there may be criminal involvement. Where a test subject may become a suspect or a witness in a criminal investigation, the county police department can be considered to have "an interest", at least within the county. Some examples of this interest would be cases of: possible internal theft, fraud or embezzlement in a private business; allegations of spousal or child abuse in domestic cases; the possibility of current drug or alcohol abuse by applicants for a job.

There is even the possibility that due process issues could be raised in a prosecution where a police employee conducted a private polygraph examination of a subsequently charged individual. For example, would the police evidence be considered "tainted" if a police employee privately polygraphed a suspect, even if the police were not aware of that fact? Would the courts reasonably assume that the police department has access to all the information obtained by their employee, even in his "private" capacity? Are there issues of privilege or self-incrimination involved? Would the private polygraph be subject to the same restrictions as other police evidence or investigations?

Admittedly, issues of due process are not for the Ethics Commission to consider. However, conduct by an employee that adversely affects the credibility and integrity of specific police investigations can have a significant impact on the public's trust in the conduct and judgment of county officials and employees. The prohibitions of §§3-105 and 3-101 were enacted to prevent just those problems.

To the extent that the employee conducts polygraph examinations outside Anne Arundel County, or in cases where criminal conduct may have occurred outside the county, the prohibitions would not apply. It is the employee's affirmative obligation to ensure that no test that he undertakes may lead to a criminal investigation, prosecution, or other involvement by the Anne Arundel County police department.

The fact that the employee's son is available to conduct examinations where there may be a conflict with the father, is not a cure to the prohibition. The employees' ownership interest creates an inherent conflict between the public employer and the employee's interest in the private entity, no matter who conducts the test. A benefit to the business is a benefit to the employee/owner.

The prestige issue raised by §3-104 would have a significant impact on the private business as well. The employee may not use his connection with the police department in advertising, in describing his qualifications and experience, or in soliciting or accepting referrals. He may not use his knowledge of the operations of the police department, his access to confidential information, or even his easy access to public information to benefit himself or his private business. To the extent that he makes use of the prestige, title, or authority of his position for his private gain, or the gain of his son or his business, he would violate §3-104. To

the extent that he uses confidential information for his own benefit or the benefit of another, he would violate §3-107 of the ethics law.

Finally, §3-101, the non-participation provision, prohibits an employee from participating in a matter, except in an administrative or ministerial capacity, if he or a relative has an interest in that matter.. Conducting a polygraph examination requires a certain amount of discretion and subjective judgment that would render it non-ministerial and non-administrative. The conduct of a private polygraph test for a private fee, would constitute "an interest in the matter". Therefore, the recusal requirements of §3-101 would apply to this employee. However, since the conflict of interest provision of §3-105 already prohibits the employee from undertaking private polygraphs involving potential criminal investigations, the recusal provision would only come into play only in very rare and unusual circumstances. For example, if the employee was conducting a private test of a suspected thief in Prince George's County and it subsequently developed that this same suspect had committed similar crimes in Anne Arundel County, §3-101 would require the employee to recuse himself from participating in the matter through his county employment. The involvement of the county employee might still taint the prosecution of this individual, but that problem is not a matter for the Ethics Commission's review.

Conclusion

The Anne Arundel County Ethics Commission advises that the employee polygraph examiner may not conduct any private polygraph examinations, or allow such examinations to be conducted through his private business, in any case where there is an ongoing criminal investigation, or where there is a reasonable likelihood of a future criminal investigation, in Anne Arundel County. The employee must take affirmative action to ensure that his private business will not involve criminal activity, investigations or prosecutions involving the Anne Arundel County police department. The Commission further advises that the employee may not use any connection to the police department in any advertising, soliciting, or listing of credentials, or in any other way to promote his outside business, nor may he allow his son, or his business entity to use that connection, either inside or outside of the County. The employee may not use his access to confidential information, or his unusually easy access to public information in any way to benefit himself, his relative or his business. Finally, the Ethics Commission points out that to the extent that the police department may have stricter provisions on outside employment, the stricter provisions would apply.

January 14, 1997

By: Anne Arundel County Ethics
Commission