State of New Hampshire

PERSONNEL APPEALS BOARD
State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

89-T-100

Appeal of Keith Allen
Order on Pending Motions

September 21, 1989

This Order follows and amplifies the Board's Order dated June 21, 1989. A number of prehearing issues remained which necessitated the continuance of the hearing on the merits. The Board (McNicholas, Johnson and Scott) met on Wednesday, August 23, 1989, for the purpose of convening a conference to address the outstanding issues related to prehearing discovery, the presence of certain witnesses, and scheduling of the hearing on the merits. Attorney Randolph Reis appeared on behalf of the appellant. Corrections Staff Attorney Michael K. Brown appeared on behalf of the Department of Corrections.

1. Polygraph Test Results.

On August 8, 1989, Appellant filed a Motion for Default or Exclusion of Polygraph Evidence, claiming his counsel had not received all the material ordered by this Board. By the time of this hearing, however, Appellant apparently had received the test results. Accordingly, the Motion for Default was withdrawn at the hearing, and the Board understands that there are no outstanding issues relative to the polygraph exam that need resolution at this time.

2. Presence of Inmate-Informant.

Appellant has requested that the Department produce the inmate-informant, who appears to be the primary source of at least the original allegations. The Department believes that the informant may still be in custody, possibly in North Carolina. The Department claims it has no authority to order his return to New Hampshire, rather it only has the power to refuse his transfer if so requested by another jurisdiction.

The Board orders the Department to locate the inmate. Once he is located, the Department shall make a good faith effort to have him transferred to New Hampshire for a sufficient period of time to attend the hearing. If the Department cannot arrange for his transfer to New Hampshire, it shall inform the Appellant of the informant's whereabouts so that Appellant may take the inmate's deposition, if desired.

3. Investigative File.

The Department has apparently only made a portion of the investigative file available to Appellant. The Department claims that the remainder of the file relates to other matters, and that the disclosure of the remainder would unnecessarily compromise institutional security.

The Board would like to review, in camera, the portions of the file that have not been made available, including the transcript of the tape of the interview with the inmate. After review, the Board will weigh the probative value of the material against the security claims of the Department and make further orders as necessary.

4. Third-party Documents.

Appellant wants to have access to various documents concerning the informant that have been supplied to the Prison by third-parties, presumably other correction or law enforcement agencies. The Prison says these documents were provided under an assumption that they would be kept confidential, though the Prison offered no direct evidence of any such agreement.

The Prison offered to let counsel for Appellant review the material at the Prison. In fact, a paralegal did go over the material, or some of it; but the paralegal was not allowed to copy anything. The file is apparently two to three inches thick.

The Board is not persuaded that the process offered by the Prison is unreasonable under the circumstances. Accordingly, the Board orders the Prison to continue to make the documents available to Appellant's counsel. Appellant's counsel may review the documents at the Prison, and may tag the ones he wants. The Prison shall then make its best efforts to secure the voluntary release of the information so tagged. If the volume of documents requested is so burdensome for the Prison as to create an unreasonable demand upon its time and resources, then Attorney Reis will be required to assist in securing their voluntary release. Any documents that cannot be easily released shall be submitted to the Board for review in camera.

The Board trusts that Appellant's counsel will endeavor to narrow the request to the maximum extent possible, consistent with the full protection of Appellant's rights.

5. Inmate-Informant's Mental Health Records.

The Board concludes that the mental health records of the informant are covered by the physician-patient privilege. Accordingly, they may be released only if the informant waives the privilege.

6. Hearing.

At the request of the parties, the Board will hold the hearing at the Prison. A hearing on the merits will be scheduled in November or December.

THE PERSONNEL APPEALS BOARD

Patrick J. McNicholas, Chairman
George R. Cushman, Jr.
Peter C. Scott

cc: Michael K. Brown, Esq.
Department of Corrections Staff Attorney

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State of New Hampshire

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89-T-100

APPEAL OF KEITH ALLEN

Order on Pending Motions

June 21, 1989

By letter dated November 2, 1988, Appellant, an employee of the Department of Corrections, appealed his termination from employment as a guard at the New Hampshire State Prison. Appellant filed an amended notice of appeal on November 11, 1988, pursuant to the request of the Board.

By letter dated February 13, 1989, Appellant contacted the Board to seek assistance in certain discovery matters. On April 20, 1989, Appellant filed a Memorandum in Support of his Motion to Produce, in which he detailed his discovery request.

The Board, Commissioners McNicholas and Scott, met on Wednesday, April 26, 1989, to convene a pre-hearing conference in the matter. Attorney Randolph Reis appeared on Appellant's behalf. Attorney Michael Brown appeared on behalf of the Department of Corrections.

Following the hearing, on May 12, 1989, Appellant filed a Motion in Limine to Exclude Polygraph Test Results. On June 12, 1989, the Department of Corrections filed its Response. We will deal with this motion first, as it bears on some aspects of the discovery motion.

1. Polygraph Test Results.

Appellant apparently wants the Board to exclude all reference to the polygraph examination administered by the Department of Corrections. The Department of Corrections apparently relied upon the results of polygraph examination, as part of its larger investigation, in making its decision to terminate Appellants.

Appellant approaches the issue as primarily an evidentiary one. Appellant cites several New Hampshire cases which require the exclusion of polygraph test results in criminal cases. State v. French, 119 N.H. 500 (1979); State v. Ober, 126 N.H. 471 (1985). The Board finds that the risks inherent in allowing such evidence placed before a jury in the criminal context do not compel the exclusion of the opinion evidence in an administrative proceeding such as this one.

The Department, based on the authorities it cites, apparently views the issue as turning on the power of the employer to require the employee to submit to a polygraph examination. In State Department of Highway Safety and Motor Vehicle Laws v. Zimmer, 398 So.2d 463 (Fla.App. 1981), the Court ruled that the employee could be discharged for refusing to take a polygraph test The Court noted, in dicta, however, that the results of the polygraph would not be admissable, citing a criminal case. Id. at 465.

The Board assumes for the present that the Department has the authority to require the taking of the polygraph test. Neither party has provided any authority that would challenge the relatively long-standing practice of the Department of Corrections. Indeed, as the Department of Corrections points out, no state law has been passed which prohibits the practice, and the Employee Polygraph Protection Act of 1988 has carved out an exception for state governmental units. See 29 U.S.C. sec. 2006(a).[1]

The Board views the issue in this case as whether the Department may base its decision to terminate Appellant, either in whole or in part, on the results of the examination. Presumably the Department did in fact rely on the results, or it would not have opposed the Motion to Exclude.

The Board finds no statute, rule or decision prohibiting the Board from relying on the opinion of the polygraph examiner. Accordingly, the Board will allow evidence on whether, in this particular case, the Department properly relied on the results of the polygraph examination of Appellant. Accordingly, we deny Appellant's Motion in Limine to exclude the results. See also Appeal of Parrish and Reiger (May 14, 1987).

The Board, however, has an inherent suspicion of the polygraph examination. The Senate Report for the Labor and Human Resources Committee found that "polygraph examinations [administered] as part of an investigation of a specific incident relating to the employer" show "some evidence of validity". Senate Report No. 100-284, 4 U.S. Code Cong. & Ad. News 726, 733-734 (1988). This is hardly a ringing endorsement. The Committee Report

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1/ The Board is mindful that some courts have denied states the power to require polygraph examinations. For example, California found that such requirements violated an employee's right of privacy under the state constitution. Long Beach City Employees Assoc. v. City of Long Beach, 719 P.2d 660 (Cal. 1986). The Board believes, however, that a broad proscription should be undertaken by the Legislature, or the Court, not the Board.

also observed. that "with a control' question technique exam, [the more accurate of the techniques discussed in the Report,] the inevitable errors are almost always false positive findings." Id. at 730 (emphasis added).[2]

The Board views with approval the polygraph examination requirements set out in 29 U.S.C. sec. 2007. The Department is strongly urged to review that portion of the federal statute.

The Board will condition any reference to the polygraph examination on the Department producing for Appellant all material, including questions and tapes, that relate to the polygraph examination. The Department need not produce the evidence, however, if it does not intend to rely on the results.

2. Discovery related to the informant.

A large portion of the disputed part of the discovery request relates to matters involving the informant. Appellant claims he cannot adequately prepare for a hearing without knowing who and where the informant is. The Department claims that it would endanger the informant if his identity were disclosed. Appellant has offered to close the hearing to protect the informant.

Serious allegations have been raised against Appellant. He has a right to know who the accuser is, if not to face his accuser. Accordingly, the Department must produce any documents where the only reason for withholding involves the disclosure of the identity of the informant. The Board will, however, order the hearing itself closed, and Appellant is hereby ordered not to disclose the identity of the informant.

As stated before, the Department need not produce the documents, if it does not intend to rely on the statements of the informant. Based on what little has been discussed about the merits, however, it may be difficult to support the termination without such statements. The polygraph examination results, standing alone, would ordinarily be insufficient.

2/ Recent articles have attacked the validity of the polygraph test results, and have generally condemned their use. Tiner & O'Grady, Lie Detectors in Employment, 23 Harv. C.R.-C.l.L. Rev. 85 (1988); Note, Lie Detectors in the Workplace: The Need for Civil Actions Against Employers, 101 Harv. L. Rev. 806 (1988).

3/ See 29 U.S.C. sec. 207(a). "[T]he error rate is sufficiently high to warrant the further prohibition that employers not take adverse employment action based on the analysis of test results without additional supporting evidence." Senate Report No. 100-384 at 734.

3. Other matters.

The Board understands that most of the other matters have been resolved by agreement of counsel. If any further problems exist, however, the parties should notify the Board.

THE PERSONNEL APPEALS BOARD

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George R. Cushman, Member

Peter C. Scott, Alternate

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