

In the Matter of

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER
PROTECTION
WASHINGTON, D.C.

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 16 FSIP 48

ARBITRATOR'S OPINION AND DECISION

This case arises from a request for assistance, filed by the National Treasury Employees Union (Union or NTEU), under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, which concerns a dispute between it and the Department of Homeland Security, Bureau of Customs and Border Protection, Washington, D.C. (Employer, CBP or Agency) over the impact and implementation of polygraph testing of current employees who apply for law enforcement positions.^{1/}

After an investigation of the request for assistance, the Federal Service Impasses Panel (Panel) directed the parties to mediation-arbitration with the undersigned.^{2/} Accordingly, on July 5 and 7, 2016, a mediation-arbitration proceeding was convened in the Panel's offices in Washington, D.C. During the

1/ Current bargaining-unit employees (BUEs) who apply for the position of Customs and Border Patrol (CBP) Officer, Agricultural Specialist, Import Specialist or Seized Property Specialist are required to submit to polygraph testing as part of the application process.

2/ Prior to the Panel's asserting jurisdiction in this case, the Employer raised duty-to-bargain questions with respect to several Union proposals. The parties, however, were able to work around those matters when the Union either modified or withdrew the language to which the Employer had objected.

mediation phase, the parties addressed their interests and positions, but they were unable to come to a voluntary resolution of all issues. The remaining issues, therefore, have been submitted for arbitration. In reaching my decision, I have considered the entire record in this case, including the parties' final offers, documents submitted during arbitration, the testimony of witnesses, and post-hearing statements of position.^{3/} Additionally, on August 11, 2016, I observed a polygraph test being administered by the Employer at a testing facility in Washington, D.C. and my observations have influenced my conclusion on one of the issues that remain at impasse.

BACKGROUND

The Employer's mission is to prevent terrorists and terrorist weapons from entering the U.S. It also is charged with the interdiction of drugs and other contraband, and the prevention of individuals from illegally entering the country.

3/ I requested a conference call with the parties' representatives, on August 16, 2016, to discuss the likely outcome should a final decision be necessary to resolve the remaining issues, and afford the parties a final opportunity to reach a voluntary resolution prior to my decision. A second conference call was scheduled, for August 18, 2016, during which it was expected that the parties would inform the arbitrator whether they could reach agreement based upon the discussions of August 16, 2016. On August 18th, the Employer's representative asked to defer the call until the next day in order for her to confer with other Agency officials. Due to scheduling conflicts, that conference call was set for August 22. Shortly before the call was scheduled to take place on August 22, the Employer submitted a newly revised written statement of position in which it alleged, for the first time since the mediation-arbitration proceeding began, that all remaining Union proposals were outside the duty to bargain because they either interfere with a reserved management right under 5 U.S.C. § 7106(a)(1) to determine internal security practices; interfere with management's right to select employees for positions under 5 U.S.C. § 7106(a)(2)(C); involve a permissive subject of bargaining under 5 U.S.C. § 7106(b)(1) to which the Employer has elected not to bargain further; or concern a prohibited personnel practice, under 5 U.S.C. § 2302(b), because a proposal would conflict with management's right to determine the suitability of an applicant for employment.

The Union represents approximately 26,000 professional and non-professional employees stationed in the United States and foreign countries; most are CBP officers who screen passengers and cargo at more than 300 ports of entry. The parties' are covered by a master collective-bargaining agreement (MCBA) that was to expire, on May 11, 2014, but remains in effect until a successor is implemented.

Four years ago, on August 21, 2012, management notified the Union that, under the Anti-Border Corruption Act of 2010 (Act), the Employer is required to implement polygraph testing as part of the application process for the position of CBP Officer. Current CBP Officers would not have to be tested, but any BUE who applies for the position, and has not previously passed the polygraph test, would undergo testing. The Act required compliance, by January 4, 2013, and the Employer has implemented polygraph testing pursuant to the law. Additionally, the Employer requested and was granted authority by the Office of Personnel Management (OPM) to make polygraph testing part of the application process for the position of Agricultural Specialist, Import Specialist and Seized Property Specialist; testing of BUEs for those positions, however, has been delayed until the parties complete the bargaining process.

ISSUES AT IMPASSE

The parties disagree over three matters: (1) whether an employee-applicant may have a Union representative observe the polygraph test; (2) whether an employee who receives a polygraph result of "No Opinion-Counter Measure" may retest only after a 2-year waiting period; and (3) the information to be provided to the employee and/or Union concerning an employee's polygraph results and the situations under which the information should be provided.

JURISDICTIONAL QUESTIONS

As noted, the Employer now raises threshold questions concerning its obligation to bargain further over the Union's last best offers on the remaining issues. In my view, these belated assertions are counterproductive to the entire process for which the parties have been engaged since July 5, 2016, that being, to resolve on the merits the issues at impasse. While I have considered the Employer's claims, I find it unnecessary to relinquish jurisdiction because my determination on the issues is not based on imposing any of the Union's final offers but,

rather, upon alternative wording fashioned in part from both parties' proposals as well as my own judgement and conclusions on the issues. The resolution of the issues trumps the relatively minor inconveniences placed on the Agency and are appropriate arrangements and procedures for employees adversely affected by the exercise of a management right.

POSITIONS OF THE PARTIES

1. Observers

A. The Union's Position

The Union proposes the following:

In order to receive the benefits of a disinterested observer, an employee applicant, upon request, will be permitted to bring an NTEU representative to a polygraph examination who will be permitted to observe the entire polygraph examination that will permit the representative to view and listen to the entire examination. The representative can be available for consultation as long as it does not interfere with the administration of the polygraph process. This information will be provided to employee-applicants in the advance written notice provided to applicants as reflected in provision 6 above and in the 'CBP Background Investigation and Polygraph Examination Frequently Asked Questions.'

Essentially, the Union contends that a Union representative should be available for consultation with the employee during the polygraph examination and observe the examination to ensure that the individual administering the test does so in a reasonable manner without engaging in any hostile questioning, coercion or intimidation of the employee. According to the Union, too many individuals taking the exam do not receive "passing" results, an indication that something is wrong with the administration of the polygraph. A witness for the Union, who is a bargaining-team member, testified that he has received reports from individuals who have taken the polygraph test that examiners were too aggressive in their questioning. One such individual, who is now a trainee, did not pass the first polygraph examination but, after a second test with a different examiner was administered, was successful in passing the exam. Having a Union representative observe the process likely would discourage any inappropriate behavior on the part of an examiner

and ensure that the polygraph examination is administered fairly.

B. The Employer's Position

The Employer proposes the following:

Applicants may bring a representative of their choosing to the facility where the polygraph examination will take place. The representative will not be allowed to participate, view or listen to any portions of the polygraph examination. However, the representative can be available for consultation, as long as it does not interfere with the administration of the polygraph.

The Employer is willing to permit an employee representative to be available to the employee during a polygraph examination and allow communication between the employee and representative should the employee feel a need to interrupt the examination to consult with the representative. It is opposed, however, to having the representative observe the examination because of the influence such presence, inside or outside of the examination room, may have on the process. Polygraph examiners are skilled in the "craft and trade" of administering polygraph tests and interjecting observers into the examination process may expose investigation techniques and also hinder the administration of the exam. No other Federal agency that performs polygraph tests permits observers. Moreover, the Employer does not have the capability for remote audio/visual observation of polygraph exams. The technology is expensive and, currently, the Employer has audio/visual recording equipment only at one or two of its polygraph testing facilities.

CONCLUSIONS

The decision on this issue is based primarily on my having observed, from a remote location at one of the Employer's few testing facilities where audio/visual observation of polygraph testing is available, a 4-hour polygraph examination administered to a non-employee applicant for a law enforcement position. It was clear to me that the examiner needs to develop a "rapport" with the examinee to put the individual at ease and to help elicit truthful responses to the questions posed during the examination. To that end, dialogue between the two takes place and, in my view, the presence of a Union representative or any third-party in a relatively small room is likely to impede

the ability of the examiner to properly prepare the employee for the examination. Persons tend to be more guarded when they are being watched. It is more important to the process that the examiner and examinee be able to converse without the added tension of a third person in the room. Although the Employer argues against remote observation because it does not have the technology to accommodate audio/visual viewing of polygraph examinations at all of its testing facilities, I shall order the Employer to permit an employee representative to observe a test when the facility has audio/visual equipment that permits viewing from a remote location since the observation would take place outside of the polygraph examination room.

2. Re-Testing

A. The Union's Position

The Union proposes the following:

If an employee-applicant's answer(s) triggers an Inconclusive Response, a No Opinion Response, or a No Opinion-Countermeasures Response, the employee will be given the opportunity to take a subsequent polygraph examination with a different examiner, until a conclusive result. Stated differently, unless it is determined that the employee-applicant has passed the second polygraph examination, the employee will be permitted to take a subsequent polygraph examination(s) until it is determined that the employee has passed the examination, made an admission of criminal or non-criminal misconduct or made a Significant Response where it is determined that the employee-applicant has not passed the polygraph examination.

The parties have agreed to permit retesting of an employee when the results of the polygraph are either "Inconclusive" or "No Opinion." The Union argues that a third result, "No Opinion-Counter Measures,"^{4/} should be added to the list and that the

^{4/} During the mediation-arbitration proceeding, the Employer's Deputy Director, Credibility Assessment Division stated that a test result of "No Opinion-Counter Measures" means that the polygraph equipment detected that the individual being tested may be taking some evasive action, either mentally or physically, to "cheat" on the test. For example, movement during questioning can be an indication

employee be granted the opportunity for immediate re-testing. According to the Union, studies have shown that polygraph testing is not a fail-safe means for determining truthfulness. Essentially, it characterizes lie detection as a pseudoscience whose accuracy has been discredited by the American Psychological Association. Polygraph testing is a very subjective process. Charts and data can be interpreted differently by different persons. Merely because an employee "fidgets" during a polygraph test is not a conclusive indication that the individual was being evasive in a response to questioning. Movement by an employee-applicant during a polygraph exam or a change in heart rate could be an indication that the individual is fatigued, uncomfortable due to the apparatus placed on the body, or nervous because the person has been placed in a very stressful situation. It does not necessarily mean that the examinee is taking counter measures to cover up for a lie. Individuals who receive a result of "No Opinion-Counter Measures" deserve an opportunity to be retested immediately. There is a stigma associated when an employee does not pass a polygraph exam; it may affect the employee's current position and/or adversely affect an employee's ability to be considered for other Federal job opportunities. Those who receive a test result of "No Opinion-Counter Measures" should be given the chance to immediately overcome that result.

B. The Employer's Position

The Employer proposes the following:

If an employee-applicant's (sic) results in an 'Inconclusive' or 'No Opinion,' the employee will be given the opportunity to take a subsequent polygraph examination until it is determined that the employee has rendered a conclusive result such as 'No Significant Response,' 'No Opinion-Countermeasures' and/or made an admission of criminal or non-criminal misconduct. The examinee may request a different examiner for the subsequent examination, but will need to notify OPR/CAD personnel prior to the subsequent examination date.

that the examinee is undertaking "counter measures." When an examiner does not understand a response on a chart, and a reviewer in Quality Control also detects a counter measure, it could result in a "No Opinion--Counter Measures" conclusion which means that the examinee did not "pass" the polygraph test.

The Employer maintains that it should retain discretion to determine if and when a re-testing opportunity is given to an employee-applicant who receives a test result of "No Opinion-Counter Measures." According to the Employer's characterization of the Union's proposal, it would require immediate and continual re-testing of an employee-applicant who has such a result on a polygraph test. Moreover, the re-testing opportunities would continue until the employee-applicant receives a "passing" result or is disqualified from further suitability determination because of an admission of criminal or non-criminal misconduct or the individual made a Significant Response where it is determined that the employee-applicant has not passed the polygraph examination. Current CBP policy, however, is to permit applicants for positions, regardless of whether they are current CBP employees or outside applicants, who have "failed" the polygraph examination due to a result of "No Opinion-Counter Measures," to retest after a 2-year waiting period. The Employer contends that the Union has failed to demonstrate why employee-applicants who have a result of "No Opinion-Counter Measures" should be permitted to re-test immediately, and continually, until a conclusive result is achieved. It should be noted that most Federal polygraph programs do not allow applicants opportunities to retest when they have "failed" the polygraph examination based on "deception countermeasures." CBP's policy, on the other hand is "very liberal in allowing applicants to retest after 2 years." Furthermore, the Union's proposal would give employee-applicants a distinct advantage over job applicants from outside CBP because they would be afforded immediate retesting opportunities. In this regard, the Union's proposal is inconsistent with Article 7, Section 2.F of the MCBA,^{5/} which incorporates 5 U.S.C. § 2302, and essentially would require the Employer to engage in a prohibited personnel practice.

5/ Article 7, Protection Against Prohibited Personnel Practices, Section 2.F, provides that the Employer shall not:

Grant any preference or advantage not authorized by law, rule or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

CONCLUSIONS

Preliminary, I find it necessary to underscore that the issue stems from the parties' negotiations over the impact and implementation of polygraph testing for law enforcement officers as required by law. It is clear that the Employer has the right to require polygraph testing required by law for applicants for certain positions and, in no way, does the resolution of the dispute prevent or diminish the Employer's right to continue that requirement as part of the job application process. I am persuaded that, given the apparent subjectivity in assessing polygraph test results, particularly when it is suspected that counter measures have been used during the test, I believe it only fair to extend to employees, who have a test result of "No Opinion-Counter Measures," an enhanced opportunity for re-testing which they currently do not have. I reach this result by balancing the Employer's absolute right to use polygraph testing as part of the job application process with the effect a result of "No Opinion-Counter Measures" may have on the employee's career and possibly the employee's reputation. Unless there is a re-testing opportunity, the employee will be saddled with that test result for the remainder of his or her Federal career. Clearly, it has the potential for negatively affecting the individual's future employment prospects within CBP, with other Federal agencies, and for jobs outside Government. I weigh this against what I view is the relatively small discomfort on the part of CBP to retest employees who have a "No Opinion-Counter Measure" result. There is no abrogation of rights because the Employer, of course, may proceed to fill the position, but an employee also should have the opportunity to achieve a "passing" result on a polygraph test given that there is difficulty in conclusively determining that counter measures have been employed to avoid detection of an untruth. Furthermore, I conclude that retesting should be permitted after a shorter waiting period than is the current CBP practice for re-testing opportunities. I shall order, therefore, that re-testing be permitted after a 3-month waiting period following the last test and that the employee-applicant should be given up to two opportunities to overcome an initial result of "No Opinion-Counter Measures."

3. Information

A. The Union's Position

The Union proposes the following:

CBP shall video-record polygraph examinations in their entirety if that is its practice.

Upon request, the information referenced in this Section^{6/} will be provided to an employee applicant and/or his or her NTEU representative under the following circumstances: where the employee is subjected to administrative or criminal proceedings as a result of the polygraph examination or where the employee was not selected for the position in question as a result of the polygraph examination.

In essence, the Union contends that its proposal would bring transparency to the Employer's "secretive examination process." While the Employer maintains that it provides a fair process for determining employee truthfulness, its reluctance to provide the information the Union seeks casts doubt on the purported confidence it claims to have in the scientific underpinnings of polygraph testing. According to the Employer, polygraph results are read by the examiner who administered the test and another Agency employee in "quality control" and the two sometimes interpret charts differently. The subjective nature of evaluating polygraph charts supports that certain conclusions should be reviewed and evaluated independently. An employee who is subject to administrative or criminal exposure or who is not selected for a position because of an adverse result on a polygraph test has "an unimpeachable interest" in the data to contest the personnel or legal actions in question. Union

6/ The parties have agreed to incorporate the following provisions in a Memorandum of Understanding (MOU) on polygraph testing:

- 11.(a) CBP's Credibility Assessment Division will maintain a record, in digital format, of all examination opinions, reports, charts, questions, lists, and other records relating to the polygraph examination.
- (b) The information collected pursuant to 11(a) above will be kept separate from the individual's Official Personnel File. CBP will conform to the provisions of the Privacy Act.
- (c) CBP shall audio-record polygraph examinations in their entirety.

representatives and employees, therefore, should not have to engage in further efforts or litigation pursuant to 5 U.S.C. § 7114 or the Freedom of Information Act to obtain the evidence they will need to defend or rebut certain polygraph test results.

B. The Employer's Position

The Employer proposes that:

In accordance with Article 45: Disciplinary Actions and Article 46: Adverse Actions, the employee will be provided a copy of those portions of all written documents which contain information or evidence relied upon as the basis for the action.

In accordance with Article 41: Merit Promotion, the employee will be provided a summary of their polygraph examination upon request, and CBP will also release the summary information to his/her designee (with written authorization).

The Employer maintains, essentially, that the Union has threatened to challenge every non-selection of an employee-applicant for a position based upon negative results of the polygraph examination. Such matters, however, are non-grievable under 5 U.S.C. § 7131(c)(4)^{7/} (*sic*), which also is incorporated into the parties' MCBA. Thus, no basis exists for providing the entire record of a polygraph examination when the non-selection is neither grievable nor is a denial of appointment appealable to the Merit System Protection Board (MSPB).^{8/} The contractual provisions in the parties' MCBA already permit the Union to receive information or evidence relied upon as the basis for disciplinary and adverse actions. The Employer also is willing to release the summary results of a polygraph examination, a redacted example of which was produced by the Employer during the mediation-arbitration proceeding. Release of the entire polygraph examination record, as the Union proposes, would be an

^{7/} Under 5 U.S.C. § 7121(c)(4) negotiated grievance procedures shall exclude matters pertaining to "any examination, certification, or appointment."

^{8/} According to OPM's revised suitability regulations, "denial of appointment" has been removed from the list of actions appealable to the MSPB. See 5 C.F.R. 731.202; *Alvarez v. Department of Homeland Security*, 112 MSPR 434 (2009).

overly burdensome requirement without the Union even demonstrating a particularized need for the data it seeks.

CONCLUSIONS

Having considered the parties' proposals and positions, I conclude that the impasse should be resolved on the basis of a modified version of the Employer's proposal. The parties' collective-bargaining agreement already requires the Employer to release to the Union data which it may use to challenge disciplinary and adverse actions and I see no reason not to import that requirement into the parties' MOU. While the Employer also proposes to provide the summary statement of an employee-applicant's polygraph results, I do not believe that such a bare bones document, an example of which was submitted by the Employer during the proceeding, sheds any light as to how the results of the polygraph examination were reached. In my view, an audio recording of the polygraph examination process, which the Employer makes for every polygraph test, would provide the Union with relevant data to help assess whether the exam was administered fairly. Accordingly, I shall order that the Employer provide the Union with the audio recording of a polygraph test when an employee is not selected for a position as a result of the polygraph examination. The Union should exercise its recourse under 5 U.S.C. § 7114(b)(4) of the Statute to obtain any additional data.

DECISION

Having carefully considered the arguments and evidence presented in this case, I conclude that the parties shall adopt the following wording to resolve the impasse:

1. Observers

Adopt a modified version of Employer proposal #19:

Applicants may bring a representative of their choosing to the facility where the polygraph examination will take place. The representative will not be allowed in the room where the testing takes place but the representative can be available for consultation, provided it does not interfere with the administration of the polygraph. At those facilities where the Employer has observation rooms and an on-going polygraph test may be viewed via audio/visual

equipment, the employee's representative may observe the testing from that location.

2. Re-testing of an Employee-Applicant Who Receives a "No Opinion-Counter Measures" Conclusion on a Polygraph Test

Adopt a compromise solution regarding Employer and Union proposals 13.d:

If an employee-applicant's polygraph test results in an 'Inconclusive' response or 'No Opinion' response the employee will be given the opportunity to take subsequent polygraph examinations until it is determined that the employee has passed the examination, made an admission of criminal or non-criminal misconduct, or made a 'Significant' response which indicates that the employee-applicant has not passed the polygraph examination. Where an employee-applicant receives a result of 'No Opinion-Counter Measures,' the employee will be given a re-testing opportunity, but the re-testing shall take place only after a 3-month waiting period. If the re-testing also results in a 'No Opinion-Counter Measures' determination, the employee will be given a second and final re-testing opportunity, but that re-testing shall take place only after another 3-month waiting period.

Employee-applicants who re-test may request a different examiner and will need to notify OPR/CAD personnel prior to the subsequent examination date.

3. Information

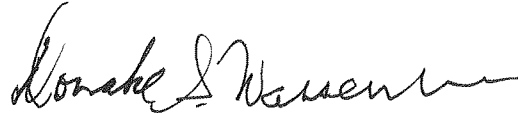
Adopt the Employer's proposals in 11(d) and 11(e) and add 11(f):

11(d) In accordance with Article 45, Disciplinary Actions and Article 46, Adverse Actions, the employee will be provided a copy of those portions of all written documents which contain information or evidence relied upon as the basis for the action.

11(e) In accordance with Article 41, Merit promotion, the employee will be provided a summary of the polygraph examination upon request, and CBP also will release the summary information to the employee's

designated representative upon written authorization of the employee.

11(f) Upon request by the employee, CBP will provide the audio recording of the employee's polygraph examination to the employee or the employee's designated representative when an employee is not selected for a position as a result of the polygraph examination.

A handwritten signature in cursive script, appearing to read "Donald S. Wasserman".

Donald S. Wasserman
Arbitrator

September 8, 2016
Washington, D.C.