MEMORANDUM

FROM: Melissa A. Ashburn, MTAS Legal Consultant

RE: May an employee be dismissed for refusal to take polygraph?

DATE: January 4, 2011

It is my understanding that the city has been experiencing break ins at its water plant, and city employees questioned about the circumstances have given inconsistent stories. The city now wants to order the employees to take polygraph tests, and suspects that at least one employee will refuse to take the test. The city asks if an employee can be dismissed for refusal to take a polygraph.

Unfortunately, I cannot provide a strong yes or no answer to this question. There is no definitive case in Tennessee on the issue concerning a public employee who is not in a safety sensitive position, and courts in other states have varied greatly in their opinions.

A state statute which is relevant to this analysis is the Polygraph Examiners Act, T.C.A. §§ 62-27-101 through 129. This law governs the conduct of persons administering polygraph exams, and requires that persons tested sign a form stating that the he or she is voluntarily submitting to the test, and has the right to refuse to take a polygraph, or to refuse to answer any specific question posed by the examiner. The law further contains the statement "No employer may take any personnel action based solely upon the results of a polygraph examination." T.C.A. § 62-27-128. There is some disagreement in our courts about the application of this law, and whether or not the statute grants employees the right to refuse to take a polygraph.

One Court held that no right to refuse an exam is granted by the law, in Etheridge v. City of Brentwood, 887 F.2d 1086 (CA6 1989). In this unpublished opinion from the Sixth Circuit U.S. Court of Appeals, a police officer was suspended and terminated for his refusal to take a polygraph test. The facts of the case are that local newspaper reported that several on-duty and off-duty officers became drunk and disorderly at a party, and the city manager investigated the incident. The city manager directed the plaintiff to take a polygraph test, and the plaintiff refused and was subsequently suspended and later terminated. He then sued the city, the city manager and others involved individually. The Court of Appeals examined the Polygraph Examiner's Act, and concluded it had limited applicability:

> we turn to the question whether Ethridge was denied his rights under Tennessee state law. If Ethridge's right to refuse to take a polygraph examination was not "clearly established," the individual defendants had qualified immunity from liability for damages. *Harlow v. Fitzgerald,* 457 U.S. 800, 815 (1982). The relevant test is whether the "official could be expected to know that certain conduct would violate statutory or

> constitutional rights." *Id.* at 819. Ethridge claims the right was clearly established by Tenn.Code Ann. § 62-27-125: "... (1) Each prospective examinee shall be required to sign a notification.... (B) That he has the right to refuse to take a polygraph examination." We find that under this statute Buttrey and Clifton could not reasonably be expected to know that the conduct in question was impermissible. The section on which Ethridge relies is directed at polygraph examiners, and it is by no means clear that the section was meant to apply to employers as well. The sections that deal specifically with employers do not provide a right to refuse the examination. *See* Tenn.Code Ann. 62-27-123(d) and 128. Further, the statute does not explicitly ban the use of polygraph examinations in personnel matters, as other statutes have done. *See* N.J.Stat.Ann. § 2C; 40A-1; 18 Pa.Stat.Ann. § 7321(a); W.Va.Code § 21-5-5b. Far from finding the right clearly established, a Tennessee appellate court has held that an employee may be discharged for refusal to take a polygraph examination. *Tinsdale v. Kayo Oil Co.,* No. 88-244-II, slip op. (Tenn.App. Jan. 25, 1989). Clifton and Buttrey are entitled to immunity.
> Ethridge v. City of Brentwood, Tenn., 887 F.2d 1086 (6th Cir. 1989)

The Court ruled the discharged employee had no claim against the individual defendants, and therefore the federal claim he filed could not be maintained against the city.

You will note that the Sixth Circuit Court mentions the case Tinsdale v. Kayo Oil Company, No. 88-244-II, slip op (Tenn. App. Jan. 25, 1989) for the assertion that an employee may be discharged for refusal to take a polygraph in Tennessee, but it is unclear when reading that opinion that the Court actually made such a ruling. In the unreported Tisdale case, the Tennessee Court of Appeals, Middle Section, considered whether an employee at will may sue his employer for wrongful discharge when he is terminated for refusal to sign a consent form for a polygraph test, containing a full release of liability for the employer and test examiner. The lower court dismissed the employee's suit, and the Court of Appeals reversed, finding the waiver of liability may be in violation of public policy, in light of the rights granted under the Polygraph Examiners Act. The Court states:

> This case presents a novel question in this State relating to relief for wrongful discharge of an employee at will where the termination involves a claimed violation of public policy. See *O'Sullivan v. Mallon,* 160 *N.J.Super.* 416, 390 A.2d 149 (Law Div.1978). We note in this regard that a growing minority of jurisdictions has created an exception to the traditional employment at will rule, which generally bars an action for wrongful discharge, so as to permit recovery where the employment termination contravenes a clear mandate of public policy.
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> Arguably, the time may have arrived to permit recovery, predicated either on a theory of contract or of tort, for the terminated at-will employee where the circumstances involving the discharge contravene a clear and important public policy. We do not now decide whether any such new doctrine should be adopted in this State or whether this case presents the appropriate vehicle in which to determine that question.

> We merely hold that the grant of the summary judgment here was premature and a determination of the significant novel question projected by plaintiff, with respect to which such judgment was granted, should have been based upon a full record at a trial. Only in this fashion may the trial court, and if necessary, an appellate court render an appropriate decision on the issue thus presented.
> Tisdale v. Kayo Oil Co., 88-244-II, 1989 WL 4981 (Tenn. Ct. App. Jan. 25, 1989)

The employee's claim against the employer for wrongful discharge was actually reinstated by the Court of Appeals in Tisdale, so the Sixth Circuit Court of Appeals opinion in which the Tisdale case is cited for the proposition that an employee can be discharged for refusal to take a polygraph seems to be in error. It therefore appears there is some doubt in our state about whether an employee may be discharged for refusal to take a polygraph.

The Tennessee Attorney General opined that Department of Correction employees who fail a polygraph, or who refuse to take a polygraph, may not be disciplined, in Opinion no. 86-05. However, this Attorney General Opinion examines the law under which prisoners were drug tested, T.C.A. § 41-1-120, and the requirement that if a positive result is received, Department of Correction employees working in those prison areas must take polygraph tests. This statute, which has been repealed, provided authority to discipline those employees who refused the tests, but the Attorney General relied on the Polygraph Examiner's Act to conclude that such action is not legal. Specifically, the AG cited the following language: "No employer may take any personnel action based solely upon the results of a polygraph examination." T.C.A. § 62-27-128. This opinion is in conflict with the Sixth Circuit case Etheridge v. City of Brentwood discussed above, in which the Court determined the prohibitions contained in the Polygraph Examiners Act apply to polygraph examiners, not to employers, and no right to refuse is created by the law.

As it is unclear whether or not a public employee may be terminated for refusal to take a polygraph in Tennessee, it is helpful to examine national trends and determine what other jurisdictions have ruled on the issue. Following are excerpts from legal treatises on the subject of whether or not a public sector employee, who is not in a safety sensitive position (police or fire) may be terminated for refusing to take a polygraph examination.

One issue which arises frequently in cases involving polygraph testing is the Fifth Amendment right against self-incrimination. In the treatise State and Local Government Employment Liability, it states:

> Challenges to public sector polygraph testing raised under the banner of the Fifth Amendment have in large measure fallen flat. Unless the public employer threatens to use the fruits of polygraph testing in an ensuing criminal proceeding or threatens to discipline the employee for refusing to waive the privilege, the government is entitled to take noncriminal disciplinary steps against employees on the strength of polygraph testimony.[20] Moreover, employees who refuse to undergo polygraph testing may be dismissed without violating the Fifth Amendment.[21] Of course, the scope of polygraph

questioning must bear on the employee's fitness for employment.[22] Apparently, the fit between the questions posed and the job duties of the employee may be quite loose when it comes to polygraph testing of law enforcement personnel.[23]
Some courts say the employer owes a duty to assure employees of the following before the court will dismiss a Fifth Amendment challenge to polygraph testing:

- 1. The questions are tailored to the employee's job duties;
- 2. Information elicited is inadmissible against the respondent in any ensuing criminal prosecution;
- 3. Refusal to undergo testing is grounds for dismissal.[24]
- St. Loc. Emp. Liab § 6:11.

The cases cited in this treatise for the assertion that dismissal for refusal to take a polygraph is proper are cases from federal appellate courts [Hester v. City of Milledgeville, 777 F2d 1492 (CA11, 1985)(testing of firefighters suspected of illegal activities); Gulden v. McCorkle, 680 F2d 1070 (CA5 1982), cert denied 459 US 1206 (1983)(public works employees testing sought concerning bomb threat)]. Both of these cases examined the failure of the employer to provide immunity to those employees from criminal prosecution based on their answers in the polygraph tests, and the courts found no requirement that such immunity be provided.

This same treatise, State and Local Government Employment Liability, states in a different section:

> Public employees have recovered large damage awards from their government employers over polygraph testing. Some cases find that polygraph testing amounts to a per se violation of privacy,[13] while other cases find the employer's grounds for its use wanting.[14] Still other cases fault polygraph testing by reason of the overly personal nature of some of the questions.[15]
> St. Loc. Emp. Liab § 6:16.

The cases cited in this section of the treatise for the assertion that employees can recover damages for violation of privacy rights are cases from Texas and California [Long Beach City Employees Ass'n v. City of Long Beach. 41 Cal 3d 937 (1986); Texas State Employees Union v. Texas Dept. of Mental Health, 746 SW2d 203 (Tex 1987)].

In another treatise frequently relied upon when analyzing municipal issues, McQuillin Municipal Corporations, the following language appears:

> Some courts hold that, except for police officers or fire fighters who occupy unique law-oriented positions, a requirement that a municipal employee take a polygraph examination may not constitute a condition of employment such that refusal to submit thereto will serve as a basis for dismissal or suspension.[12] However, another court has held that a city manager may properly order municipal employees to submit to polygraph examinations under threat of dismissal, so long as the order is reasonable and not arbitrary or capricious.[13] Moreover, in another case it was held that a municipal employee

> may properly be discharged for refusing to submit to a polygraph examination during an investigation into missing city property.
> 4 McQuillin Mun. Corp. § 12.240.10 (3rd ed.)

One case relied upon in this treatise for the rule that public employees may not be discharged for refusal to take polygraphs is a case from Iowa, Matter of Fairbanks, 287 N.W.2d 579 (Iowa 1980), in which a city auto mechanic was ordered reinstated after being discharged for refusal to take a polygraph. In another case, the Arizona Court of Appeals found that it is not unreasonable, arbitrary or capricious for a city manager to order polygraph testing of employees when there is some question about misuse of city resources or funds. Rivera v. City of Douglas, 644 P.2d 271 (Ariz. App. 1982) In the Rivera case, the city was informed that public works employees installed a grill cover for a home owner while working for the city, and the city manager investigating the matter ordered polygraphs after consulting with the city attorney. The Court found that such action to investigate use of public resources was not arbitrary or unreasonable.

In another section in the McQuillin Municipal Corporations treatise, it states:

> Polygraph examinations inherently intrude upon the constitutionally protected zone of individual privacy.[1] The coercive collection of mental thoughts, conditions and emotions must be justified by a compelling governmental interest.[2] The permissible scope of questioning is necessarily exceeded by control and pretest questions required in connection with a polygraph examination.[3] It also does not matter whether or not available technology involves a physical hookup to the lie detector.[4]
> Since polygraph examinations impinge upon the fundamental right of privacy, the municipality bears the burden to demonstrate that a legislative scheme that protects all private employees and all public safety officers from involuntary polygraph testing, while at the same time leaving all other public employees subject to involuntary polygraph testing, is justified by a compelling governmental interest and that the distinctions drawn are necessary to further that governmental interest.[5] Public employment's special trust position coupled with the right of the public to honest and impartial government are not compelling justifications for invading the privacy of public employees but not private sector employees through mandatory polygraph testing; this is especially so where less intrusive means to investigate alleged wrongdoing is available.
> 3 McQuillin Mun. Corp. § 12.78.25 (3rd ed.)

The discussion above is instructive on the proper use of polygraph testing, in that a compelling government interest must exist which justifies the action, and the city will bear the burden of proving that such interest is compelling and the testing is necessary to protect that interest. If less intrusive means are available to determine the facts in an investigation, then polygraph testing is not appropriate and may result in liability.

Based on the conflicting unreported cases from Tennessee, it is presently unclear whether a public employee may be terminated for refusal to take a polygraph examination, although it does seem the employer has some right to compel testing under certain circumstances. It depends upon the facts, the government's interest in the matter being investigated, and whether any alternative to polygraph testing is available in the investigation.

In your situation, I would advise that the City be very careful in its decision to order polygraph testing. What are the damages suffered by the City as a result of the break ins at the water plant? Are there significant monetary damages, or is it a matter of trust between the City and these employees? If there is a small amount of damage, or if there is an alternative means to determine the facts, then polygraph testing is not warranted in my opinion. Is the City primarily concerned about past break ins, or the prevention of future break ins? Future break ins may be prevented through the installation of security cameras or other such methods, making the use of polygraph testing questionable. It is also important to note that the City cannot use information obtained through a polygraph test in a criminal prosecution. After careful consideration of the facts, and determination of the nature of the City's interest in the matter, if it is a compelling interest then perhaps the testing is reasonable to protect public assets.