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8 JUN 1981

MEMORANDUM FOR DANIEL C. SCHWARTZ

General Counsel, Central Security Service
National Security Agency

This responds to your request of March 11, 1981 for our opinion whether a New Jersey polygraph statute, prohibiting employers from requiring submission to a lie detector test as a condition of employment, precludes the National Security Agency (NSA) from conducting polygraph examinations of individuals employed by a NSA contractor located in New Jersey. If the New Jersey statute does not preclude such polygraph examinations 1/ you ask whether the Department of Justice would provide representation to employees of NSA contractors who process employees in accordance with the NSA program in the event the State of New Jersey brings a criminal prosecution under its polygraph statute against such employees. We have concluded that the New Jersey polygraph statute may not be applied to employees of NSA contractors who process employees in accordance with NSA procedures, 2/ if the administration of such polygraph

1/ Any person who as an employer shall influence, request or require an employee to take or submit to a lie detector test as a condition of employment or continued employment, is a disorderly person.

N. J. Stat. Ann. § 2A: 170-90.1

A disorderly person offense is a petty offense. N. J. Stat. Ann. § 2 C: 1-4(b).

2/ It is not clear that New Jersey's polygraph statute would, even absent its interference with NSA's program, apply to IDA/CRD employees who process employees because, from the facts furnished us, submission to the test does not appear to be a condition of employment or continued employment. Indeed, DoD Directive 5210.48 III B.(6)(d) and NSA/CSS Reg. No. 122-3(5)(C)(8) expressly prohibit taking any adverse action against persons refusing to undergo a security interview with the aid of a polygraph. We do not undertake in this opinion, however, to interpret New Jersey's statute; that is a function which should be performed by the appropriate officials in New Jersey. For the purpose of our analysis, we address here only the question of the validity of the statute if it is assumed to interfere with the performance of a federal function.

examinations is determined by NSA officials to be necessary to protect sensitive information. We believe your request for representation is premature at this time. Present Departmental policy would preclude representation of government contractors in a state criminal prosecution, and, in any event, the Department would consider such requests only on a case-by-case basis. We suggest that you seek an opinion or ruling from the Attorney General of the State of New Jersey that New Jersey's polygraph statute does not apply to the implementation of NSA's proposed program. In the event you receive an unfavorable opinion, the Civil Division of the Department of Justice would consider a request from NSA to initiate an injunctive action on behalf of the United States against any enforcement of the polygraph statute which would interfere with NSA's polygraph program.

I.

The facts outlined in your request, are as follows. NSA desires to conduct polygraph examinations of all individuals employed by the Institute for Defense Analysis, Communications Research Division (IDA/CRD), an NSA contractor located in Princeton, New Jersey. IDA/CRD works solely on federal contracts and all its employees are exposed to Sensitive Compartmented Information (SCI) while working on NSA contracts. The proposed polygraph examination of IDA/CRD employees will be conducted by NSA employees at Fort Meade, Maryland.

The proposed polygraph program at IDA/CRD will apply to all personnel, both professional and non-professional. The polygraph examination will consist of Special Access Examination questions, which are questions designed to determine whether a person has compromised classified information, had contacts with foreign intelligence services or committed espionage; and two additional questions, one question to verify that the individual being interviewed is the same individual whose Personal History Statement was submitted and another question which would inquire into the individual's involvement in unlawful activities. You indicated that the questions asked during the polygraph examination are limited to what is clearly relevant to insuring that classified material will be protected by those who have access to it.

The polygraph examination administered by NSA will not be used as a substitute for less intrusive investigative measures, but will be used in addition to other investigative measures to enhance the quality of access determinations. You state that the polygraph examination is the best method

to detect (1) individuals who have already been recruited by hostile intelligence services before they apply for a clearance, but whose personal history statements are otherwise correct; and (2) those individuals who, with the assistance of a hostile intelligence service, have developed an entirely false identity which will stand up under the scrutiny of a background investigation. For these reasons, NSA believes that the interview conducted with the aid of a polygraph is an essential part of the access investigation.

II.

It is a fundamental principle of constitutional law that, by reason of the Supremacy Clause, Article VI, cl. 2, the States may not regulate the activities of the federal government. Mayo v. United States, 319 U.S. 441, 445 (1943). This prohibition extends to state regulation of federal contractors when such regulation would defeat a legitimate federal purpose or frustrate a federal policy or function. See United States v. Georgia Public Service Comm'n, 371 U.S. 285, 292-93 (1963); Leslie Miller, Inc. v. Arkansas, 352 U.S. 187, 190 (1956). The determinative question, therefore, is whether the state's regulation of a federal contractor conflicts with federal legislation or with any discernible federal policy. See Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 257, 271 (1943).

Protection of sensitive intelligence information is required by Executive Order No. 12065 and clearly is a legitimate federal function. See §§ 4-101, 4-103, 4-201, and 4-105, 43 Fed. Reg. 28949 et seq (1978). Furthermore, Executive Order No. 12036 specifically charges NSA with the responsibility of protecting "the security of its institutions, activities, information and personnel by appropriate means including such investigations of applicants, employees, contractors, and other persons with similar associations with the NSA as are necessary . . ." 43 Fed. Reg. 3683 (1978). Although the proposed polygraph program sweeps broadly in examining all employees of IDA/CRD, it is our view that, if NSA officials have carefully reviewed the proposed program as described above and have determined that it is necessary to examine all IDA/CRD's employees to protect sensitive information, the proposed program is a legitimate federal program with which the States may not interfere. Once such a determination is made, the State of New Jersey may not enforce N. J. Stat. Ann. § 2A: 170-90.1 against IDA/CRD or its employees in a manner which would interfere with NSA's polygraph program.

We believe your request for a commitment from the Department of Justice to provide representation to any IDA/CRD employee who may be prosecuted by the State of New Jersey for processing employees in accordance with NSA polygraph procedures is premature. As a policy matter, the Department does not generally provide representation to non-government personnel in state criminal prosecutions and, in any event, would consider such requests only on a case-by-case basis. We suggest that, in order to avoid the possibility of criminal prosecutions of IDA/CRD personnel, either NSA or IDA/CRD seek an opinion or ruling from the Attorney General of the State of New Jersey that N.J. Stat. Ann. § 2A: 170-90.1 is not applicable to IDA/CRD employees implementing NSA's proposed polygraph program. If the Attorney General of the State of New Jersey renders an unfavorable ruling, we suggest NSA contact the Civil Division of the Department of Justice to discuss the possibility of initiating an injunctive action on behalf of the United States against any enforcement of N. J. Stat. Ann. § 2A: 170-90.1 by the State of New Jersey that would interfere with NSA's polygraph program.

Theodore B. Olson
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Office of Legal Counsel