



American Civil Liberties Union of West Virginia Comments On Proposed Kanawha County Board of Education Workplace Drug Testing Policy and Procedure

The American Civil Liberties Union objects to the Kanawha County Board of Education's proposed "Workplace Drug Testing Policy and Procedure." The policy unreasonably expands suspicionless drug testing to nearly every employee of the school district in violation of the Fourth Amendment to the United States Constitution and art. III § 6 of the West Virginia Constitution. The policy should not be implemented because

- it denies to the school district's public employees protections that West Virginia accords to employees in the private sector,
- it overidentifies teaching and other positions as "safety sensitive,"
- it provides inadequate protection for confidentiality of test results, and
- less intrusive methods can better assess impaired job performance.

"There are few activities in our society more personal or private than the passing of urine." ¹ Analysis of a person's urine can disclose many details about that person's private life other than drug use, including personal medical information. It can tell an employer whether an employee or job applicant is being treated for a heart condition, depression, epilepsy, or diabetes. It can also reveal whether an employee is pregnant. For this reason, the United States Supreme Court has found that urine testing, like blood testing, constitutes a search under the Fourth Amendment.

Rather than implementing this overly intrusive policy, the Board should forgo random testing and implement performance testing as needed to assess employees when there is a reasonable, good faith, objective suspicion that their job performance is impaired.

● The Proposed Policy Denies Public Sector Employees Protections West Virginia Accords Private Sector Workers

In *Twigg v. Hercules Corp.*,² West Virginia's Supreme Court of Appeals ruled that it is contrary to public policy for a private employer to require employees to submit to drug testing because "such testing portends an invasion of an individual's right to privacy." The court recognized two exceptions to its rule, holding that drug testing by private employers does not violate public policy where it "it is based upon *reasonable good-faith*

¹ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) quoting *Nat'l Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987).

² 185 W.Va. 155, 406 S.E. 2d 52 (1991)

objective suspicion of an employee’s drug usage, or “where an employee’s job responsibility involves public safety or the safety of others.” (Emphasis added.)

In a later case, the court held that individuals in a pre-employment context have a lower expectation of privacy, and thus while the court “strongly affirm[ed] [its] holding in *Twigg*,” found that a private employer’s requirement of a pre-employment drug test did not impermissibly invade a prospective employee’s privacy.³ Note, however, that a public employer may be held to a higher standard. In striking down a statute requiring pre-employment testing of all applicants for state employment, a federal court noted that even if applicants had a diminished expectation of privacy under the Fourth Amendment *vis-a-vis* existing employees, the state still had an “obligation to articulate a substantial government interest served by testing *all* job applicants.”⁴ The court went on to hold that it was not enough to base a comprehensive drug testing program on a “generalized governmental interest in maintaining a drug-free workplace.”⁵

Twigg barred suspicionless drug testing by private employers. In fairness, the same standard should apply to the State’s public employees, who should not be subjected to intrusive suspicionless random tests to which private employees are immune. The Kanawha County School Board should recognize and share the Court’s commitment, as stated in *Baughman*, to “protecting the individual’s private life and ‘space’ from well-intentioned but ultimately oppressive, insulting, degrading, and demeaning intrusions—whether these intrusions come from the omnipresent forces of the state, or from the equally omnipresent and inescapable forces of the market.”⁶

The *Twigg* court approvingly quoted earlier cases holding that “the right to privacy is an individual right that should be held inviolate” and “we refuse to allow an employer to intrude upon this right of his employee absent some showing of reasonable good faith objective suspicion, unless the employer can articulate either a public safety concern or concern for the safety of other employees.” Further, “to hold otherwise would effectively render an employee’s right to privacy meaningless.”

The overbroad testing policy now proposed for the employees of the Kanawha County school system effectively renders meaningless the privacy rights of the public employees to which it applies.

- **The Policy Overidentifies Positions as “Safety Sensitive”**

The policy asserts that every school employee in at least 45 positions holds a “safety sensitive” position. But the unsupported assertion that employees in all these positions have jobs that are so safety sensitive that “a single mistake...can create an immediate threat of serious harm to students, to [the employee] or to fellow employees” cannot justify suppressing the rights of all those employees under the Fourth Amendment to the

³ *Baughman v. Wal-Mart Stores, Inc.*, 215 W.Va. 45, 592 S.E. 2d 824 (2003)

⁴ *Georgia Ass’n of Educators v. Harris*, 749 F.Supp. 1110, n. 5 (N.D. Georgia, 1990).

⁵ *Id.* at 1114.

⁶ *Baughman* at 49, 828.

United States Constitution and article III § 6 of the West Virginia Constitution to be free of searches conducted without a reasonable suspicion of wrongdoing.

The Board acknowledges that the proposed policy represents a substantial change to the current “Drug Screening Program.” That program more reasonably limits screening to applicants for “safety sensitive” positions that include, for the most part, employees involved in transportation of students and maintenance and repair of vehicles, and permits “reasonable suspicion” screening for individuals holding those positions.

The current policy identifies six “safety sensitive” positions that are subject to drug testing based upon a reasonable suspicion of improper drug or alcohol use by employees in those positions. The proposed policy identifies *forty-five* positions as safety sensitive and, in addition to testing based on “reasonable suspicion,” would subject employees in such positions to suspicionless random testing as well. Since the new list of safety sensitive positions starts with the superintendent and includes counselors, teachers, aides, cooks, custodians, groundsmen, locksmiths, painters, and plumbers, it is difficult to imagine many positions to which the new policy will not apply.

This sweeping definition does not comport with the overwhelming authority of courts that have weighed employees’ privacy rights against employers’ understandable desire to have a drug free workplace.

The Supreme Court of Appeals of West Virginia has held that “[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution.”⁷ In a recent case, the Court reminded that “the purpose of article 3, § 6 ‘is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement officers, so as to safeguard the privacy and security of individuals against arbitrary invasions [by government officials].”⁸

Denial of Fourth Amendment protections to so many employees in a school system cannot satisfy a “reasonableness” standard. Typical positions found by courts to be safety sensitive, such as those listed in notes 19 through 22, *infra*, bear little resemblance to the long list of school district positions that will be subject to random testing.

In striking down suspicionless testing of teachers and other school employees injured in the course of employment, the Fifth Circuit held that no special needs exception to the requirement of individualized suspicion applied. “Special needs,” said the court, “are just that, special, an exception to the command of the Fourth Amendment. It cannot be the case that a state’s preference for means of detection is enough to waive off the protections of privacy afforded by insisting upon individualized suspicion....[a]s

⁷ Syl. Pt. 2, Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979).

⁸ State v. Mullens, ___ S.E. 2d ___, 2006 WL 4099850 (W.Va.) (2007)

destructive as drugs are and as precious are the charges of our teachers, special needs must rest on demonstrated realities.”⁹

Although at least one court has found that school district employees fill safety sensitive positions,¹⁰ such a decision goes against the weight of authority and is not without its critics. In striking down a city’s suspicionless pre-employment drug testing program, the Court of Appeals of Washington took issue with *Knox*, referring to ‘an impertinent statement’ in the Sixth Circuit’s decision that “[a]nybody who has stood in line in men’s room urinals at sports stadiums, public arenas, theaters or public bars understands that the act of urination is not always an altogether private one.”¹¹ The Washington court went on to say that “many job applicants do not ‘stand in line in men’s room urinals’” and “[i]n any event, the privacy afforded in football stadium restrooms is not the measure by which we judge whether the government may intrude.”¹²

In *Patchogue-Medford Congress of Teachers v. Bd. Of Educ. of the Patchogue-Medford Union Free Sch. Dist.*¹³ the court concluded that “ordering of a urine test for drug abuse was an act of pure bureaucratic caprice,” when the defendants “failed to show an objective, factual basis for inferring that any one of the subject teachers uses, or has used illegal drugs.”¹⁴

The Board may find useful guidance regarding “special need” drug testing in a school setting in *Tannahill v. Lockney Independent Sch. Dist.*¹⁵ The court ruled that the school environment is not comparable those in which a special need for suspicionless testing has been found, opining that

Attending school is not akin to participation in a highly regulated industry as is the work place for railway employees, customs agents, residents who practice medicine, or even elementary school custodians A student’s tools of pens, notebook paper, and protractors have never been equated with locomotives, the hazardous chemicals and equipment of a custodian, the firearms or interdiction efforts of a customs agent, or the prescription pads and EKG machines used by a physician.

For the majority of school district employees, as for the students in *Tannahill*, the warning of Justice Brandeis in his dissent in *Olmstead v. United States*¹⁶ is still well worth considering: “[I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the

⁹ *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 857 (1998).

¹⁰ *Knox County Educ. Ass’n v. Knox County Bd. of Educ.*, 158 F.3d 361 (1998), *cert. denied* 528 U.S. 812 (1999).

¹¹ *Id.* at 380, n. 25.

¹² *Robinson v. City of Seattle*, 102 Wash.App. 795, 821, 10 P.3d 452, 466 (2000)

¹³ 119 A.D.2d 35 (1986)

¹⁴ *Id.* at 40.

¹⁵ 133 F.Supp.2d 919, 930 (N.D. Texas, 2001).

¹⁶ 277 U.S. 438, 479 (1928)

Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

The Policy Provides Inadequate Protection of Test Result Confidentiality

The proposed program puts responsibility for release of test results in the hands of the "Administrative Assistant, Human Resources or his/her designated representative" and permits release of the results on a "need to know" basis. It appears to give unfettered discretion to determine who should receive the results. Even for tests based upon reasonable suspicion and for genuinely safety-sensitive positions, the policy should spell out stringent requirements for the release of information. Only positive results should be reported to the school district, the recipient of the results should be identified by position, and strict rules to ensure confidentiality should be adopted, with appropriate sanctions for their violation.

• Less intrusive methods can better test for impaired job performance

Even a confirmed "positive" does not necessarily provide evidence of present impairment. It merely indicates that a person may have taken a drug at some time in the past. The Board can use other, less intrusive, means than random urinalysis to identify employees whose performance they suspect is impaired. The proposed policy targets not only alcohol and drugs but "other substances...that have known mind altering or function-altering effects upon the human body." Performance tests can show the present effects of these "other substances," such as untested drugs, caffeine, and nicotine, as well as stress and fatigue, without intruding on the privacy of the individuals involved. Performance measures, including computer-based tests, can assess reaction time, alertness, and agility at various tasks. These measures are particularly important when safety and security are at stake.

• Relevant Case Law

Public employee drug testing law generally

The current law of public employee drug testing is generally framed by the Supreme Court's decisions in *Skinner v. Ry. Labor Executives' Ass'n*,¹⁷ and *Nat'l Treasury Employees Union v. Von Raab*.¹⁸ In these companion cases, the Court held that the government is allowed to conduct drug tests without individualized suspicion when there is a "special need" that outweighs the individual's privacy interest. In *Skinner*, the court found that public safety was such a special need. In *Von Raab*, the court found a special need in relation to customs agents who carry firearms or are directly involved in drug interdiction.

¹⁷ 489 U.S. 602 (1989)

¹⁸ 489 U.S. 656 (1989)

The most commonly claimed special need has been public safety. The courts have almost always accepted this argument,¹⁹ and have followed a very similar course where medical professionals were concerned, or where employees were involved in patient care.²⁰

Many municipalities have attempted to establish random drug testing programs for police officers and fire fighters, arguing that such positions are inherently safety sensitive. Such arguments have generally been quickly accepted for police, largely on the basis of the fact that they carry firearms (a factor specifically mentioned in *Van Raab*).²¹

Another common special need claimed by government employers is security. Agencies have attempted to institute random testing programs for employees who handle sensitive information.²²

Testing of applicants for employment

Courts have been more accepting of pre-employment job testing of applicants as a condition of employment than of testing current employees.²³

However, distinctions drawn in *Loder* and other courts between pre-employment testing of applicants and testing of current employees have been called into doubt by the Supreme Court in *Chandler v. Miller*.²⁴ In *Chandler*, the Court struck down a drug testing requirement requiring candidates for public office (in essence applicants) and gave no indication that the plaintiffs were entitled to any less protection than if they already held the positions sought. The justifications for such testing, including preserving the integrity of the office and public confidence and trust were insufficient to allow testing.

The reasoning in *Chandler* was followed in a lower federal court decision invalidating a pre-employment testing program for all applicants for city government positions. In

¹⁹ See *Int'l Brotherhood of Teamsters v. Dep't of Transportation*, 932 F.2d 1292 (9th Cir. 1991) (interstate truck drivers); *Burka v. New York City Transit Auth.*, 739 F. Supp. 814 (S.D.N.Y. 1990) (subway train drivers); *Keaveney v. Town of Brookline*, 937 F. Supp. 975 (D. Mass. 1996) (holders of commercial drivers licenses).

²⁰ See *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997) (emergency room physician); *AFGE v. Derwinsky*, 777 F.Supp. 1493 (N.D. Cal. 1991) (nurses and pharmacists); *Kemp v. Claiborne County Hosp.*, 763 F.Supp. 1362 (S.D. Miss. 1991) (scrub technicians who assisted during surgery); *Piroglu v. Coleman*, 25 F.3d 1098 (D.C. Cir. 1994) (emergency medical technicians).

²¹ See *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (random testing of police and firefighters); *O'Connor v. Police Comm'r of Boston*, 408 Mass. 324, 557 N.E. 2d 1146 (Mass. 1990) (police cadets).

²² See *Hartness v. Bush*, 794 F.Supp. 15 (D.D.C. 1992) (executive department employees with security clearances); *Hartness v. Bush*, 919 F.2d 170 (D.C. Cir. 1990), cert. denied, 501 U.S. 1251 (1991) (holders of "secret" and "top secret" security clearances); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) cert. denied sub nom. *Bell v. Thornburgh*, 493 U.S. 1056 (1990) (random testing of those with top secret clearances, but enjoining testing for other federal prosecutors and other employees with access to grand jury proceedings); *AFGE, Local 1533 v. Cheney*, 944 F.2d 503 (9th Cir. 1991) (navy department employees with top secret security clearances).

²³ See *Willner v. Thornburgh*, 928 F.2d 1185 (C.A.D.C. 1991, cert. denied sub nom. *Willner v. Barr*, 502 U.S. 1020 (1991)); *Transp. Inst. v. U. S. Coast Guard*, 727 F. Supp. 648 (D.D.C. 1989); *Loder v. Glendale*, 14 Cal. 4th 846 (1997).

²⁴ 520 U.S. 305 (1997).

Baron v. Hollywood,²⁵ the court rejected the city's claim that the need to maintain a positive image and provide public assurances was sufficient to meet the "special needs" test. The court found that the city is required to separately address the particular duties of each position to justify a drug test. The court concluded that "without identifying a connection between the jobs and the need for testing, the city cannot meet its burden of showing "special needs."²⁶

Washington's Court of Appeals acknowledged and followed similar reasoning by borrowing 4th Amendment analysis in finding that the state constitution did not support across the board testing of applicants for employment with the city. In *Robinson v. City of Seattle*,²⁷ the city had broadly categorized safety sensitive positions so as to include positions such as ushers and librarians. In addition the city offered justification including concerns such as efficiency and cost-reduction. The court found that drug testing of applicants must be narrowly tailored to meet a compelling state interest and therefore necessitated that only applicants for positions whose duties "genuinely implicate public safety" satisfy the standard.²⁸

Conclusion

The "special needs" test remains the standard by the majority of courts in determining whether a drug testing program for public employees meets Fourth Amendment requirements. Uniformly testing applicants for employment without regard to type of position is inconsistent with principles set by the Supreme Court in *Skinner* and *Van Raab* and confirmed in *Chandler*. The weight of authority does not support either across the board drug testing of applicants for public employment or suspicionless searches of public employees who cannot be shown to be in safety-sensitive positions.

²⁵ 93 F.Supp. 2d 1337 (S.D. Fla, 2000)

²⁶ Id. at 1340-1342.

²⁷ 10 P.3d 452 (2000)

²⁸ Id. at 470