STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

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ATTORNEY GENERAL OPINION NO. 87-49

Charles A. Peckham
Rawlins County Attorney
Atwood, Kansas 67730

Re: Constitution of the United States -- Fourth Amendment -- Searches and Seizures

Constitution of the State of Kansas -- Bill of Rights -- Search and Seizure

Synopsis: The Fourth Amendment to the United States Constitution gives people the right to be free from "unreasonable searches and seizures." Mandatory drug testing of county employees, without regard to job performance, would violate the Fourth Amendment prohibition against "unreasonable searches and seizures." However, the testing of such an employee is permissible if based upon "reasonable suspicion." Therefore, there is no constitutional bar to the testing of a county employee where circumstances give the employer a reasonable, objective basis to suspect illicit drug use by that employee.

Mandatory drug testing of applicants, without regard to job requirements, would violate the Fourth Amendment. However, testing of an applicant is permissible if it is in furtherance of a bona fide effort to learn whether an applicant is physically capable of performing the duties of a particular job. Accordingly, mandatory drug testing of all applicants for public safety positions is permissible. Cited herein: K.S.A.

19-101; K.S.A. 1986 Supp. 19-101a; U.S. Const., Fourth Amend.; Ks. Const., Bill of Rights, § 15.

* * *

Dear Mr. Peckham:

As Rawlins County Attorney, you request our opinion on the legality of a proposed drug testing plan in Rawlins County. You inform us that details of the plan are as follows. All county employees, other than elected officials, would be subject to drug testing with little or no advance warning. They would also be required to sign an agreement that as a condition of continued employment by the county, they would not use drugs while county employees. According to the plan, if it is found that a county employee is using drugs, the employee would be required to attend a drug/alcohol treatment program. Finally, if an employee refuses to attend the treatment program after it is found that he or she is using drugs or alcohol, or an employee who attended the program is subsequently found to be using drugs or abusing alcohol, then the employee would be subject to termination of employment by the county.

Kansas presently has no statutes related to drug testing. Thus, it is necessary to examine the constitutionality of the proposed plan under both the United States and Kansas Constitutions. The Fourth Amendment to the United States Constitution states in its entirety:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added).

This language is repeated almost word for word in the Bill of Rights of the Kansas Constitution, which provides at § 15:

> "The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath

> or affirmation, particularly describing the place to be searched and the persons or property to be seized." (Emphasis added).

Thus, both the Fourth Amendment to the United States Constitution and § 15 of the Bill of Rights of the Kansas Constitution prohibit "unreasonable searches and seizures." Since Kansas case law has yet to address the issue of drug testing as a search and seizure, this opinion will deal only with the Fourth Amendment, as applied to the states through its incorporation in the Due Process Clause of the Fourteenth Amendment. This includes counties and county officials. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed. 2d 1081 (1961); Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949).

The fundamental legal question you ask is whether drug testing in the workplace is compatible with the protection of personal privacy embodied in the Fourth Amendment's prohibition of "unreasonable searches and seizures." Drug testing programs are being instituted widely today as a result of public and political reaction to highly publicized drug abuse tragedies. Not surprisingly, such programs are often challenged in court by the affected employees. The case law is still developing and is unsettled. Therefore, we cannot predict with certainty what the courts, and especially the United States Supreme Court, will do.

In our opinion, the Board of County Commissioners of Rawlins County has the authority, via its home rule powers (K.S.A. 19-101; K.S.A. 1986 Supp. 19-101a), to establish a drug testing program for applicants and current employees alike, assuming the commission finds a link between drug abuse and the requirements of particular job categories. However, the commission's exercise of this authority must be grounded in the finding of a link between drug abuse and job performance. In our view, the county commission does not have statutory authority to undertake a massive drug testing program in pursuit of broader social goals, however desirable, such as deterring drug abuse. Moreover, the commission's authority must be exercised in conformity with constitutional requirements. We will address these necessary constraints below.

A preliminary question we address is whether the collection and testing of a urine specimen is a "search" or "seizure" within the meaning of the Fourth Amendment. Since other types

of testing are subject to Fourth Amendment constraints, Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1833, 16 L.Ed. 2d 908, 918 (1967) (blood); State v. Berker, 391 A.2d 107, 111 (R.I. 1978) (breath), it seems clear that a urine test likewise amounts to a search or seizure within the meaning of the Fourth Amendment. Courts have held this to be true. See National Treasury Employees Union v. VonRaab, 649 F. Supp. 380 (E.D. La. 1986); Lovvorn v. City of Chattanooga, Tenn., 647 F. Supp. 875 (E.D. Tenn. 1986); Shoemaker v. Handel, 608 F.Supp. 1151 (D.N.J. 1985), Aff'd, 795 F.2d 1136 (3d Cir. 1986); Capua v. City of Plainfield, 643 F.Supp. 1507 (D.N.J. 1986); McDonnell v. Hunter, 612 F.Supp. 1122 (D.C.Iowa 1985); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985). We conclude that urine testing is a search within the meaning of the Fourth Amendment.

Although the taking of urine specimens for drug testing purposes is a search under the Fourth Amendment, it is not a per se violation of that amendment. Only "unreasonable searches and seizures" are prohibited. Carroll v. United States, 267 U.S. 132, 147, 45 S.Ct. 280, 283, 69 L.Ed. 543, 549 (1925). Accordingly, it is necessary to make a determination of reasonableness, which requires a balancing of the need to search against the invasion of the individual which the search entails. New Jersey v. T.L.O., 469 U.S. 325, 336, 105 S.Ct. 733, 740, 83 L.Ed.2d 720, 731 (1985). The Supreme Court has said that:

> "The test of reasonableness under the fourth amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447, 481 (1979).

There can be no doubt that Rawlins County has a compelling interest in having its employees free from drugs. Balanced against this interest is the extent of the invasion of the individual's privacy rights by the kind of urine testing proposed by the county.

Before an individual may invoke the protections of the Fourth Amendment, he or she must have a reasonable or legitimate expectation of privacy. Smith v. Maryland, 442 U.S. 735, 739, 99 S.Ct. 2577, 2579, 61 L.Ed.2d 220, 226 (1979). Accordingly, we first examine the extent to which the intrusion of drug testing, in the context of county employment, compromises reasonable or legitimate expectations of privacy. An expectation of privacy is "legitimate," in Fourth Amendment terms, if (1) the individual actually (subjectively) expects privacy; and (2) the individual's subjective expectation of privacy is one which society is prepared to recognize as reasonable. Smith v. Maryland, 442 U.S. at 740, 99 S.Ct. at 2580; Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576, 588 (1967).

A determination of whether county employees have an actual, subjective expectation of privacy entails a subjective evaluation of the intrusiveness of the urine test itself. At least one court has found the urine test to involve a high degree of bodily intrusion. Capua v. City of Plainfield, 643 F. Supp. at 1514. Other courts have not found the urine tests to be so intrusive. Shoemaker v. Handel, 619 F. Supp. at 1101, Aff'd 795 F.2d at 1142; Mack v. United States, No. 85 Civ. 5764 slip op. at 6 (S.D.N.Y. 1986).

In our view, the degree of intrusion engendered by a urine test varies greatly depending upon the individual being tested. However, we conclude that county employees as a group have a certain degree of subjective expectation of privacy in the act of urination. See McDonnell v. Hunter, 612 F.Supp. at 1127. The proposed testing program would, therefore, interfere to some degree with the county employees' subjective expectation of privacy.

We next consider whether this group's expectation of privacy is one that society is prepared to recognize as "reasonable" under the Fourth Amendment. Whether an intrusion is reasonable must be evaluated in the context of an individual's place of employment. McDonnell v. Hunter, 612 F.Supp. at 1128. Since the county has never had a drug testing program, it seems clear that, at least at the time of hiring, current county employees had no reason to believe they would be subjected to a urine test for drugs while on the job. Furthermore, assuming an employee's job performance is satisfactory, he or she would have little reason to expect an investigation by the county into his or her personal life. Therefore, we find the county employees' subjective expectation of privacy to be reasonable.

In light of these personal privacy interests, we next examine the governmental interests which could make such an intrusion necessary. The county's interest which might justify the testing of all county employees would be the desire to promote efficiency by detecting those whose drug abuse poses a risk of diminished job performance. However, the merits of the county's efforts to assure that all county employees are free from drug-induced impairments and capable of performing their public service is not the issue to be decided. See Capua v. City of Plainfield, 643 F.Supp. at 1516. Rather, the question to be answered is whether the means chosen by the county to achieve this laudable goal are "reasonable" within the meaning of the Fourth Amendment. Id. We are compelled to conclude that the county's legitimate goal of achieving a drug-free work force does not justify the use of a blanket drug testing program, as such a program would violate the protections afforded an individual under the Fourth Amendment. See National Treasury Employees Union v. Von Raab, 649 F.Supp. at 387; Lovvorn v. City of Chattanooga, Tenn., 647 F.Supp. at 881; Capua v. City of Plainfield, 643 F.Supp. at 1517.

It is our opinion that the Fourth Amendment allows the county to demand urine of an employee "only on the basis of a reasonable suspicion predicated upon specific facts and reasonable inferences drawn from those facts in light of experience." See Capua v. City of Plainfield, 643 F.Supp. at 1517; McDonnell v. Hunter, 612 F. Supp. at 1130. The reasonable suspicion standard requires individualized suspicion, specifically directed to the person who is targeted for the search. Capua v. City of Plainfield, 643 F.Supp. at 1517. Stated another way, the use of a "reasonable suspicion" standard allows testing if there is a "reasonable, objective basis to suspect that a urinalysis will produce evidence of an illegal drug use. . . ." Turner v. Fraternal Order of Police, 500 A.2d 1005, 1009 (D.C.App. 1985).

Courts have frequently applied the "reasonable suspicion" standard to the drug testing of public employees. In fact, all courts which have ruled upon the validity of urine tests for public employees have required as a prerequisite some articulable basis for suspecting that the employee was using illegal drugs, usually framed as "reasonable suspicion." Capua v. City of Plainfield, 643 F.Supp. 1507 (D.N.J. 1986) (fire fighters); City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla.App. 5 Dist. 1985) (police officers and fire

fighters); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C.App. 1985) (police officers); McDonell v. Hunter, 612 F.Supp. 1122 (S.D.Iowa 1985) (correctional officers); Allen v. City of Marietta, 601 F.Supp. 482 (N.D.Ga. 1985) (employees of City Board of Lights and Water working around high voltage electric wires); Patchogue-Medford Congress of Teachers v. Board of Education, 505 N.Y.S.2d 888 (N.Y.App. Div. 1986) (teachers); Jones v. McKenzie, 628 F.Supp. 1500 (D.D.C. 1986) (school bus drivers); Caruso v. Ward, 506 N.Y.S.2d 789 (N.Y.Sup.Ct. 1986) (police officers in special organized crime control bureau).

Most recently, the "reasonable suspicion" standard for the drug testing of public employees was applied in a decision of the district court for the eastern district of Tennessee, Lovvorn v. City of Chattanooga, Tenn., 647 F.Supp. 875 (E.D. Tenn. 1986). The Lovvorn court, which examined the validity of a mandatory drug testing plan for city fire fighters, concluded that "while probable cause would not be required for the city to conduct urine tests, the balancing of the interest of the City and the individual requires some quantum of individual suspicion before the tests can be carried out." Id. at 880. The court denoted this quantum as "reasonable suspicion."

While it is impossible to define "reasonable suspicion" in the abstract, as a comparative matter "reasonable suspicion" is less stringent than "probable cause," the traditional prerequisite to a Fourth Amendment search and seizure. This more relaxed standard is applied by the courts to persons who have not entirely surrendered their Fourth Amendment rights, but who nevertheless have a diminished expectation of privacy. For example, the Lovvorn court applied this standard to Chattanooga fire fighters because:

> "While Chattanooga fire fighters do not entirely surrender their fourth amendment rights when they become City employees, they nevertheless as employees, as opposed to the general citizenry, have a somewhat diminished expectation of privacy. Allen v. City of Marietta, 601 F.Supp. 482 (N.D.Ga. 1985); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C.App. 1985); Mack v. United States, No. 85 Civ. 5764 slip op. at 7." 647 F.Supp. at 880.

Two questions must be answered before a search may be found "reasonable" under the Fourth Amendment. "First, one must consider 'whether the . . . action was justified at its inception,' . . . second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justify the interference in the first place,' . . . ." Lovvorn v. City of Chattanooga, Tenn., 647 F.Supp. at 882, citing New Jersey v. T.L.O., 469 U.S. 325, 340, 105 S.Ct. 733, 743, 83 L.Ed.2d 720, 734 (1985).

The drug testing plan proposed by Rawlins County does not require any finding of "reasonable suspicion" by the employer prior to the testing of an employee. In fact, the county has failed to point to any objective facts concerning deficient job performance or physical or mental deficiencies on the part of county employees which might lead to a finding of "reasonable suspicion" upon which tests could be based. Therefore, we find the proposed blanket testing program to be unjustified at its inception, thus failing the first requirement for a search to be "reasonable" under the Fourth Amendment.

Furthermore, as stated above, the scope of a search, and the measures adopted, must be reasonably related to its objectives and not excessively intrusive. New Jersey v. T.L.O., 469 U.S. at 341, 105 S.Ct. at 744, 83 L.Ed.2d at 735. Therefore, if Rawlins County had objective facts indicating drug usage by certain employees, such might be "reasonable suspicion" for testing those employees. See Illionis v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). However, we feel that testing all county employees, based upon specific information related to a select few, would be beyond the permissible scope of such tests. Therefore, the proposed testing plan also fails the second requirement of a reasonable search under the Fourth Amendment.

In light of our above observations, we find the mandatory drug testing plan proposed by Rawlins County for all county employees to be an unreasonable search within the meaning of the Fourth Amendment. While the goal of having county employees free from drugs is legitimate, it is our opinion that the means selected by the county to achieve this goal violates the Fourth Amendment to the United States Constitution, as well as § 15 of the Bill of Rights of the Kansas Constitution.

A related question which you do not ask, but which we will address, is whether applicants for county employment may be subject to mandatory drug testing as part of the evaluation process itself. Since the point of the application process is for the prospective employer to learn facts pertinent to the applicant's ability to perform the job, it is our opinion that applicants are entitled to have relatively little overall expectation of privacy about the hiring process. At the same time, however, we recognize that applicants are entitled to an expectation that their private affairs and bodily integrity will not be searched for reasons unrelated to the needs of the job for which they have applied.

In our view, the county's interest in requiring a drug test for applicants turns on the link between drug abuse and job requirements. Because the county's interest is in ascertaining an applicant's fitness for a given job, wholesale drug testing of all applicants, without regard to job requirements, would violate the Fourth Amendment. However, we see no Fourth Amendment barrier to drug testing if it is in furtherance of a bona fide effort to learn whether an applicant is physically capable of performing the duties of a particular job. McDonnell v. Hunter, 612 F.Supp. at 1130 N.6. ("The Fourth Amendment . . . does not preclude taking a body fluid specimen as part of a pre-employment physical examination or as part of any routine periodic physical examination that may be required of employees . . . .")

In light of McDonnell, it is our opinion that if the physical requirements of a job are so demanding that employees are required to take either an entry physical examination or periodic physicals of which urinalysis is a routine diagnostic component, there is no Fourth Amendment barrier to testing the urine specimen for drugs. Id. In other words, if drug abuse would prevent the performance of the duties of the job or would present a danger to the public or to property, an applicant may be tested to ascertain that abuse. We note, however, that physical examinations of this kind cannot be used as a mere pretext to conduct otherwise improper drug testing.

This approach permits routine testing of all applicants for public safety jobs. In our view, given the potential consequences of drug-induced mistakes, the county has an especially strong interest in assuring that those who are responsible for maintaining the public safety are drug-free and able to think clearly. Accordingly, because of the

obvious link between avoidance of drug abuse and job requirements, we conclude that the Fourth Amendment balancing test permits the county to require drug testing of all applicants for public safety positions.

In regard to "public safety employees," it is impossible for us to delineate in the abstract all types of "public safety" jobs. The necessary line-drawing must be done by the employer after consideration of the particular circumstances involved. However, for purposes of this opinion, "public safety employees" include public employees who are authorized to carry firearms.

In summary, The Fourth Amendment to the United States Constitution gives people the right to be free from "unreasonable searches and seizures." Mandatory drug testing of county employees, without regard to job performance, would violate the Fourth Amendment prohibition against "unreasonable searches and seizures." However, the testing of such an employee is permissible if based upon "reasonable suspicion." Therefore, there is no constitutional bar to the testing of a county employee where circumstances give the employer a reasonable, objective basis to suspect illicit drug use by that employee.

Mandatory drug testing of applicants, without regard to job requirements, would violate the Fourth Amendment. However, testing of an applicant is permissible if it is in furtherance of a bona fide effort to learn whether an applicant is physically capable of performing the duties of a particular job. Accordingly, mandatory drug testing of all applicants for public safety positions is permissible.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Barbara P. Allen

Barbara P. Allen
Assistant Attorney General

RTS:JLM:BPA:bas