Compelled Substance Abuse Testing

By Jack Ryan
Legal & Liability Risk Management Institute

Over the past fifteen years, the United States Supreme Court has shown an extreme degree of approval for "special needs" administrative searches for substance abuse.[1]

At the outset it should be noted that these searches are done for administrative purposes and are not done in an effort to obtain evidence of criminal wrongdoing.

In *Skinner v. Railway Labor*, the United States Supreme Court reviewed rules regarding substance abuse testing by the Federal Railroad Administration. The rules allowed testing under two distinct circumstances. The first circumstance called for testing in certain train accidents (triggering factor) resulting in deaths, injuries or property damage. The involved employees would be tested without any individualized suspicion for the presence of alcohol or drugs in their blood. The second triggering factor would be where a supervisor has reasonable suspicion, based in rule violations or otherwise, to believe that the employee was under the influence of drugs or alcohol.

In its review of these regulations the Court concluded that railroad employees had an objectively reasonable expectation of privacy with respect to these searches. The Court then balanced the government interest in public safety for these "safety sensitive" positions and determined that the searches as authorized by the regulations without a warrant and in some cases without individualized suspicion were nonetheless reasonable under the Fourth Amendment. These searches, like the search of the office in the *Ortega* case were classified as "special needs" searches that are not subject to the same protections as searches for evidence in a criminal investigation.

The same day, the Supreme Court also decided *National Treasury Employees v. Von Raab.* In *Von Raab,* employees of the United States Customs Service challenged a drug screening program implemented by the Customs Service. The program required that

[1] See E.g., *Board of Education of Independent Schools District 92 of Pottawatomie County v. Earls,* ___U.S.___ , slip opinion # 01-332 (2002), *Vernonia School District 47 v. Acton,* 515 U.S. 646 (1998), *National Treasury Employees Union v. Von Raab, Commissioner, United States Customs Service,* 489 U.S. 656 (1989), *Skinner, Secretary of Transportation v. Railway Executives' Association,* 489 U.S. 602 (1989).

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employees seeking promotion or transfer to positions involving drug interdiction or positions requiring the employee to carry a firearm or handle classified material would have to successfully complete a drug screening program before they could be promoted or transferred. The program provided that the result of the screening could not be turned over to any other agency, including criminal prosecutors, without the employee's written consent.

The Supreme Court pointed out that where the government requires its employees to provide urine samples for analysis of illegal drug use, these searches must meet the reasonableness requirements of the Fourth Amendment. Although employees have an expectation of privacy with respect to these types of searches, the Court found that on weighing the government interest against the intrusion on the individual's privacy, these searches did not violate the Fourth Amendment rights of government employees.

Although the Supreme Court has made clear that even random suspicionless drug testing of government employees in safety-sensitive positions does not violate the Fourth Amendment, challenges to drug testing policies are commonplace. In *Byrne v. Massachusetts Bay Transportation Authority,*[2] the MBTA Police Patrol Officers' Association and the MBTA Police Sergeants' Association challenged a provision of the MBTA drug testing policy. Under the policy, the MBTA's medical staff would collect urine specimens from employees with "direct observation" of the collection. The purpose of this provision was to insure the integrity of the specimen. The particular regulation instructed collectors: "As the observer, you must watch the employee urinate into the collection container. Specifically, you are to watch the urine go from the employee's body into the collection container." Under the regulation, these direct observation collections were done only under limited circumstances. The circumstances where direct observation would occur were:

(1) there is no adequate medical explanation for the validity of the prior sample; (2) the prior sample was adulterated or substituted; (3) the temperature of the prior sample suggests adulteration; or (4) there are other indications that the sample has been tampered with. Directly observed collections are also required if the collector detects either that the employee has brought materials to the collection site with the intent to alter the specimen or that the employee engages in conduct that clearly indicates an intent to tamper with the initial specimen. Finally, the collector may observe the collection of a urine sample from an employee who has previously tested positive for prohibited drugs or for alcohol and who is returning to work or providing a follow-up test within the first twelve to sixty months after returning to work. With respect to the last category, referred to as 'return to work' and 'follow-up' tests, observed collections are permitted only when the collector has 'reason to believe that a particular individual may alter or substitute the specimen to be provided. (Internal Cites Omitted).

[2] *Byrne v. Massachusetts Bay Transportation Authority,* 196 F.Supp. 2d 77 (Mass. Dist. 2002)

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Under the policy all direct observation collections had to be done by a collector of the same gender as the employee being observed and "return to work" or "follow-up" direct observations had to be supported by a written explanation by the collector. In all cases of direct observation collections, collectors first need the approval of a higher level supervisor.

In analyzing the reasonableness of the direct observation urine collections, the Federal District Court of Massachusetts recognized that the United States Supreme Court has not decided a case involving such an intrusive collection method. The Supreme Court cases on point have minimized the intrusiveness of urine collection by noting that the methods used have been no more intrusive than urinating in a public rest room.[3] Nonetheless, the Massachusetts Federal District Court found that the direct observation collection did not violate the Fourth Amendment rights of MBTA police officers.

In rationalizing the reasonableness of the policy, the court noted the compelling government interest of insuring that employees in safety-sensitive positions are substance free. In addition the court noted the narrow circumstances under which an employee would be subjected to a direct observation collection. The court was impressed by the fact that of the thousands of drug tests conducted annually, only 5-6 were done by direct observation. Finally the court found that the requirement of a written explanation in some instances and the requirement of supervisory approval in all instances overcame any argument of arbitrariness in the provision. It should be noted that because the MBTA was the recipient of federal mass transportation grants the officers stood no chance of prevailing on claims that the policy violated the Massachusetts Declaration of Rights and the Massachusetts Privacy Act.

Where a local government entity is not subject to federal regulatory control, local government employees may seek to have drug testing policies struck down based on rights granted by state law or state constitutions. Any policy development and implementation in this area must take into account state employment law provisions as well as state court decisions interpreting privacy rights under the state constitution.

The Anchorage Alaska Police Department Employees Association along with the Fire Department union successfully challenged random drug testing for department employees based on the Alaska Constitution.[4] The policy in Anchorage:

Provides for substance abuse testing, by urinalysis, of certain municipal employees (1) upon employment application, promotion, demotion, or transfer; (2) following a vehicular accident; (3) on reasonable suspicion; and (4) at random. All employees are subject to

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[3] See, *Board of Education of Independent Schools District 92 of Pottawatomie County v. Earls,* ___U.S.___ , slip opinion # 01-332 (2002), *Vernonia School District 47 v. Acton*, 515 U.S. 646 (1998).
[4] *Anchorage Police Department Employees Association and International Association of Firefighters, Local 1264 v. Municipality of Anchorage*, 24 P.3d 547 (Alaska Supreme Court 2001).

post-accident testing. Only employees in 'public safety positions' are subject to random testing and to promotion/demotion/transfer testing. A public safety position is defined as a 'position in the Police or Fire Department having a substantially significant degree of responsibility for the safety of the public where the unsafe performance of an incumbent could result in the death or injury to self or others.

In its review of the policy, the Supreme Court of Alaska made a clear statement that its analysis was based upon the Constitution of Alaska, thus, allowing the court to be more significantly restrict the power of government and thereby enhance the privacy rights of employees. The court noted that "Alaska's search and seizure clause is stronger than federal protection because Article I, section 14 is textually broader than the Fourth Amendment, and the clause draws added strength from Alaska's express guarantee of privacy." The Supreme Court of Alaska reviewed the various triggering events justifying drug testing under the policy. The court concluded that the first three triggering events: (1) upon employment application, promotion, demotion, or transfer; (2) following a vehicular accident; (3) on reasonable suspicion were reasonable under the Alaska Constitution. The court held that ongoing random testing allowed under the 4th provision of the policy violated the Alaska Constitution. It should be noted that the United States Supreme Courts pronouncement on ongoing random testing came in the public school setting and not in the employment setting.[5]

A number of lower courts have upheld ongoing random testing in the employment setting.[6]

While there have been a number of broad challenges to drug testing policies by employee representatives, there are often challenges to drug-testing policies based upon department disciplinary and termination cases of individual officers. One recent case is *Carroll v. City of Westminster.*[7]

This case involved police officer Eric Caroll, who was terminated from the City of Westminster Police Department due to a positive drug test indicating heroin use.

Prior to hire in 1990, Caroll signed the following waiver: "As a condition of employment with the Westminster Police Department, the undersigned employee agree's [sic] that the Police Department may at anytime [sic], with or without cause, require tests relating to the use of any drugs; such tests to include, but not be limited to chemical tests, urinalysis,

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[5] See, *Board of Education of Independent Schools District 92 of Pottawatomie County v. Earls,* ___U.S.___ , slip opinion # 01-332 (2002), *Vernonia School District 47 v. Acton*, 515 U.S. 646 (1998).

[6] See, *Hatley v. Dept. of Navy*, 164 F.3d 602 (Fed. Cir. 1998) (firefighters); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989) (police officers carrying firearms or engaged in drug interdiction); *McCloskey v. Honolulu Police Department*, 71 Haw. 568 (1990) (police officers).

[7] *Carroll v. City of Westminster*, 233 F. 3d 208 (4th Cir. 2000).

polygraph, etc; within the condition as a perquisite [sic] to employment with the Westminster City Police Department."

While on duty in 1993, Carroll went to the hospital complaining of chest pain and fatigue. He was diagnosed with high blood pressure. While Carroll was out of work, the chief of police began receiving information from an identified informant, that Carroll was using heroin. This information matched information that the chief had received five months earlier from a neighboring police chief that indicated that an African-American Westminster Police officer was using heroin. At the time the chief received the initial information, Carroll was the only African-American police officer on the department.

Based on this information and the waiver signed by Officer Carroll when he was hired, the chief called Dr. Middleton, who was retained by the department for pre-employment and fitness for duty evaluations. Carroll was scheduled to see Dr. Middleton so the chief ordered the doctor to drug test Carroll. The doctor asked the chief if he should inform Carroll of the test. The chief told the doctor not to inform Carroll that he was being tested for drugs. Following the positive test, Carroll was terminated. He subsequently brought this lawsuit based upon the surreptitious drug test.

While the court recognized that drug tests are searches within the meaning of the Fourth Amendment. As such, all searches must be reasonable. The court found that the reasonableness of the search in this case could be justified on two grounds. First, the court found that Carroll's pre-employment waiver was valid and therefore he had a diminished expectation of privacy in such drug tests. Since he was subject to testing at anytime, he would not have been in a position to make a claim if he had been notified of the test. The lack of notification did not render the test unreasonable. Secondly, the court found that the chief had received reliable information, which he corroborated supporting probable cause to believe that Carroll was using drugs.

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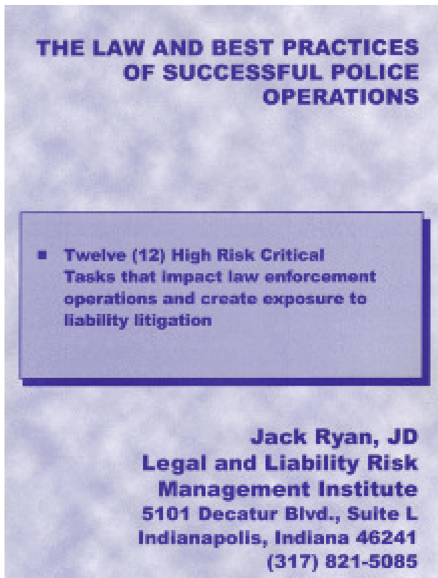

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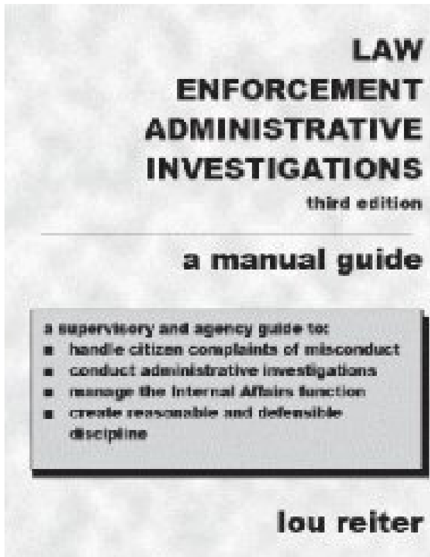

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