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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 31, 2000

Cynthia Burns Polk, Esquire
State Accident Fund
P. O. Box 102100
Columbia, South Carolina 29221-5000

Re: Your Letter of October 9, 2000
Random Drug Testing of Public Employees

Dear Ms. Polk:

In your letter, you request an opinion from this Office: "... regarding the constitutionality of random drug testing of public employees." By way of background, you indicated that the "State Accident Fund provides worker's compensation insurance for state agencies and other government entities. [The State Accident Fund] recently received a memorandum ... from an employer defense firm questioning the constitutionality of § 38-73-500 as it relates to random drug testing of public employees ... As the insurance carrier for public employees, [The State Accident Fund] want[s] to ensure compliance with the law ... There are agencies that want to take advantage of the premium credit offered under [§ 38-73-500]."

Your question is very broad. It cannot be answered by a simple "yes" or "no" response. Placed in the setting of § 38-73-500, however, the focus can be narrowed. Section 38-73-500 provides for workers compensation insureds to receive a "credit of at least five percent" when the insured "participates in a program designed to prevent the use of drugs or alcoholic beverages on the job by employees of the insured." § 38-73-500(c) further provides that:

> The testing procedure established by the insurer, employer, or his designee, or, approved by the director, must include a provision for random sampling of all persons who receive wages and compensation in any form from the employer and must provide for a second test to be administered within thirty minutes of the administration of the first test. Positive test results must be provided in writing to the employee within twenty-four hours of the time the employer receives the test results. Each employer must keep records of each test for up to one year.

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With the prescriptions of § 38-73-500(c), the question becomes: Is it constitutional for a state agency to subject all of its current employees to random drug testing?

It is well settled that a public entity requiring a person to provide a urine sample for drug testing constitutes a search under the Fourth Amendment to the United States Constitution. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). Obviously, the Fourteenth Amendment makes applicable the Fourth Amendment to state and local governments. Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Generally, a governmental search requires a showing of probable cause based on individualized suspicion as well as the issuance of a search warrant by some neutral and detached judge. There are, however, circumstances where "warrantless drug testing of public employees without probable cause can be justified by special needs beyond normal law enforcement." Skinner, 489 U.S. at 620.

In the late 1980s drug testing of employees, including public employees, was at the forefront of policy makers' agendas and judicial review. The United States Supreme Court delivered two landmark decisions concerning drug testing of public employees during its1989 term. In Skinner, supra and National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), the Supreme Court held "that the need to detect drug use by persons in safety-sensitive and law enforcement jobs is sufficiently important to allow drug testing of those persons without a search warrant or individualized suspicion. Such drug testing, therefore, does not violate the Fourth Amendment." S.C. Op. Atty. Gen. April 19, 1989. A review of these cases reveals that your question cannot be answered in blanket fashion. Rather, each situation must be judged on a case-by-case basis. The Court in Von Raab, articulated and applied the following balancing test: "our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Von Raab, 109 S.Ct. at 1390-1391.

Situations which courts have found to constitute "special governmental needs" which provide the government with an overriding interest in testing have generally involved jobs which are high risk or safety-sensitive. The following is a list, albeit not exhaustive, of cases in which the federal courts have upheld the constitutionality of random suspicionless drug testing of current employees[1]: Skinner, supra (upheld drug testing for railway employees involved in train accidents and for those who violate particular safety rules); Von Raab, supra (upheld drug testing of U.S. Customs employees seeking promotion or transfer to certain positions involving direct drug interdiction or carrying firearms); Knox County Educ. V. Knox County Bd. of Educ., 158 F.3d 361 (6th Cir. 1998)

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[1] Courts in the past distinguished pre-employment from post-employment testing. See for ex. Wygant v. Jackson Bd. of Education, 476 U.S. 267, "denial of a future employment opportunity is not as intrusive as loss of an existing job." This distinction, however, may no longer be appropriate. See Chandler v. Miller, supra; and, Boran v. City of Hollwood, supra.

(upheld suspicionless drug testing of public school teachers and administrators); Rushton v. Nebraska Pub. Power Dist., 844 F.2d 567 (8th Cir. 1988) (upheld drug testing of nuclear power plant engineers); Intern. Broth. of Teamsters v. Dept. of Transp., 932 F.2d 1292 (9th Cir. 1991) (random testing of commercial drivers of vehicles in excess of 26,000 pounds, vehicles with 15 or more passengers, or drivers who transport hazardous materials); IBEW, Local 1245 v. Skinner, 913 F.2d 1454, 1456 (9th Cir. 1990) (random drug testing of natural gas and hazardous liquid pipeline employees); Hartness v. Bush, 287 App.D.C. 61, 919 F.2d 170, 173 (D.C.Cir. 1990) (random testing of government employees with "secret" national security clearances; Bluestein v. Skinner, 908 F.2d 451, 454-458 (9thCir. 1990) (random testing of aviation personnel); Taylor v. O'Grady, 888 F.2d 1189, 1199 (7th Cir. 1989) (yearly random test of correctional officers who have contact with prisoners); American Federation of Gov. Employees v. Skinner, 280 App.D.C. 262, 885 F.2d 884, 889-893 (D.C.Cir. 1989) (random testing of transportation employees in positions with direct impact on public health and safety); IBEW, Local 1245 v. U.S. NRC, 966 F.2d 521, 526 (9th Cir. 1992) (random testing of nuclear power plant workers who have unescorted access to "protected areas" of nuclear facilities); National Treasury Employees Union v. Yeutter, 287 App.D.C. 28, 918 F.2d 968, 971-972 (D.C.Cir. 1990) (random testing of Department of Agriculture employees operating motor vehicles carrying passengers); Thompson v. Marsh, 884 F.2d 113 (4th Cir. 1989) (random testing of civilian employees of chemical weapons plant who have access to areas in which experiments are performed); Jones v. Jenkins, 279 App.D.C. 19, 878 F.2d 1476 (D.C. Cir. 1989) (drivers of and attendants on school buses for handicapped children; testing was conducted as part of routine medical examination); and National Federation of Federal Employees v. Cheney, 280 App.D.C. 164, 884 F.2d 603, 610, 613 (D.C.Cir. 1989) (random testing of civilian employees within the army who were in critical positions was found constitutional. The tested employees included air traffic controllers, pilots, aviation mechanics, flight attendants, civilian police and guards.).

The Court's analysis is not necessarily confined to an agency-by-agency determination. Rather, courts have undertaken their review on a specific position-by-specific position basis. In fact, the Court in Von Raab did not ratify a blanket testing program for all U.S. Customs agents. The Court found constitutional random drug testing of those employees who are directly involved in drug interdiction and who carry firearms, while returning to the Court of Appeals the question of whether employees who handle "classified" information should be considered employed in "safety-sensitive" positions. Supra 109 S.Ct. at 1395-1396.

In fact, courts have been reluctant to stamp with approval those government testing programs which require testing of all employees. For example, the United States District Court for the Northern District of Georgia, in granting an injunction against the drug testing policy of the Georgia Board of Education, stated that "[t]he court finds it difficult to even begin applying [the Von Raab] balancing test, however, because the defendants have failed to specifically identify any governmental interest that is sufficiently compelling to justify testing all job applicants. Moreover, defendants remain oblivious to Von Raab's (and indeed the Fourth Amendment's) requirement that it connect its interest in testing to the particular job duties of the applicants it wishes to test." Georgia Association of Educators v. Harris, 749 F.Supp. 1110, 1114 (1990). See also, Boran v. City of Hollywood, 93 F.Supp.2d 1337 (2000) (City failed to show a governmental interest sufficient to

justify drug testing of all its prospective employees.); Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989) (upholds DOJ policy of drug testing employees exposed to top-secret material, but not all prosecutors).

Moreover, while an exhaustive list of governmental interest allowing for random drug testing may not yet have been compiled, courts have consistently held that drug testing programs instituted simply to preserve the "integrity" of the governmental entity do not pass constitutional muster. See Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) (Georgia's interest in testing all candidates for statewide office merely image related, not "special"); Boran v. City of Hollywood, supra (City's "public integrity sensitive" arguments insufficient to justify drug testing of applicants) Harman v. Thornburgh, supra (DOJ argument that drug test ensures the "integrity of its workforce" finds no support in Von Raab). Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) (generalized interest in integrity of workforce not enough to justify test).

After a review of the relevant case law on the subject, the only opinion that I can express as to your question is: it depends. The constitutionality of random drug tests for public employees depends on the 'safety-sensitive" nature of the employees position. As for an agency being able to satisfy the prescriptions of 38-73-500(c), that agency would have to establish that all positions within the agency are safety sensitive.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

David K. Avant
Assistant Attorney General

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