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The State of South Carolina

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November 7, 1991

The Honorable Jean L. Harris
Member, House of Representatives
317 Market Street
Cheraw, South Carolina 29520

Dear Representative Harris:

By your letter of September 23, 1991, you advised that the Chesterfield County School District proposes to implement a drug screening program for school bus drivers. You asked that we provide guidance or information to you with respect to random drug testing of school bus drivers.

As you noted in your letter, my Office has previously opined concerning the constitutionality of a proposed bill to authorize certain drug and alcohol testing of prospective State employees. Memo. Op. S.C. Att'y Gen., Jul. 31, 1990. That memorandum opinion cited the United States Supreme Court's two landmark decisions which addressed a challenge to drug testing based on the fourth amendment prohibition against unreasonable searches and seizures: Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), and Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989). In Von Raab and Skinner, the Court concluded that breath-testing and urine-testing procedures are searches under the fourth amendment; however, "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." Memos. Op. S.C. Att'y Gen., Apr. 19, 1989, & Jul. 31, 1990.

No appellate cases in South Carolina appear to have analyzed the precise issue that you raise. My research revealed two jurisdictions -- one state and one federal -- that have addressed the precise issue of random drug testing of school bus drivers.

In Independent School Dist. No. 1 v. Logan, 789 P.2d 636 (Okl. App. 1989), the Court of Appeals of Oklahoma analyzed claims involving school bus drivers who were terminated after testing positive for drugs and subsequently applied for unemployment benefits. In Logan, the school bus drivers challenged the taking of urine specimens without cause or suspicion of wrongdoing as violative of the fourth amendment. Addressing that constitutional challenge, the court considered Von Raab, supra, and Skinner, supra. Determining that no fourth amendment violation occurred, the court stated:

> we find the School District has a sufficient safety interest in maintaining a pool of bus drivers free of the effects of drug use to require drug screening as part of the annual physical examination without a particularized suspicion of drug use directed at any one individual employee to be tested. Such drug testing, as part of the annual physical examination for bus drivers, is a reasonable means of deterring and preventing the unsafe operation of school busses by employees under the influence of drugs, thereby insuring the safety of public school students riding public school busses.

Id. at 638.

In 1987 before Von Raab and Skinner were decided, the United States Court of Appeals for the District of Columbia analyzed a suit by a school bus attendant who challenged her discharge resulting from an employee drug-use surveillance program. Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987), vacated sub nom. Jenkins v. Jones, 490 U.S. 1001 (1989), modified, 878 F.2d 1476 (D.C. Cir. 1989). 1/ The school bus attendant was responsible for assisting handicapped children on and off the bus as well as maintaining

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1/ The United States Supreme Court remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989), and Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). On remand in Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989), the court deleted two paragraphs and substituted a paragraph for one of the deletions and otherwise affirmed its prior opinion and judgment reported at Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987). Those deletions and substitution do not disturb the discussion contained in this Opinion.

order during bus trips. Raising a fourth amendment challenge, Ms. Jones attempted to distinguish school "bus drivers, who might constitutionally be subject to drug testing, and bus attendants, who could not be." Id. at 340. The court stated:

> While the safety concern may be somewhat greater for a school bus driver, it is still quite significant in the case of an employee who is responsible for supervising, attending and carrying handicapped children. For example, the danger to a young, handicapped child, should she be dropped by an attendant or ignored while crossing the street, is obvious.

Id. The court thus found:

> It is not unreasonable to require drug testing where an employee's duties involve direct contact with young school children and their physical safety, where the testing is conducted as part of a routine, reasonably required, employment-related medical examination, and where there is a clear nexus between the test and the employer's legitimate safety concern.

Id. at 336.

Federal jurisdictions have addressed random drug testing of other motor vehicle operators. In Transport Workers' Union of Philadelphia, Local 234 v. S.E. Pennsylvania Transp. Auth., 863 F.2d 1110 (3d Cir. 1988), cert. granted and vacated, ___ U.S. ___, 109 S.Ct. 3208, cert. granted and vacated sub nom. United Transp. Union v. S.E. Pennsylvania Transp. Auth., ___ U.S. ___, 109 S.Ct. 572 (1989), on remand 884 F.2d 709 (3rd Cir. 1989), 2/ the

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2/ The United States Supreme Court remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of Skinner, supra, and Von Raab, supra. On remand in Transport Workers' Union of Philadelphia, Local 234 v. S.E. Pennsylvania Transp. Auth., 884 F.2d 709 (3d Cir. 1989), the court stated:

> We therefore see no reason to deviate from our original holding that the random testing program at issue here is constitutionally justified in spite of its lack of a basis in "individualized suspicion." We stress again, as we did in our earlier opinion, that we reach this holding only

[Footnote 2 continues on page 4.]

United States Court of Appeals for the Third Circuit considered a challenge to a public transportation authority's proposed random urinalysis testing of its operating employees for drugs and alcohol. The Southeastern Pennsylvania Transportation Authority ["SEPTA"] operated subways, railroads, buses, streetcars, and trackless trolleys in the five-county Philadelphia metropolitan area. Noting that the Von Raab and Skinner cases were then pending before the United States Supreme Court but did not directly address the issue before it, the court in Transport Workers' Union of Philadelphia Local 234 considered the fourth amendment challenge and concluded that the random drug testing was not facially invalid under the fourth amendment. This conclusion hinged largely upon: "[t]he safety justification for SEPTA's drug testing policy, SEPTA's documentation of a drug use problem among its workforce, the evidence of the deleterious effect of drug use, and SEPTA's showing of positive tests for drug or alcohol by operating personnel at fault in accidents. . . . " Similarly, the United States Court of Appeals for the District of Columbia in Nat'l Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990), considered a union's fourth amendment challenge to a federal employee drug testing program involving motor vehicle operators. Applying the analysis in Von Raab and Skinner, the court in Yeutter, relied in part upon its decision in Jones v. McKenzie , supra, to conclude that safety interests justified random urinalysis drug testing of the motor vehicle operators. Nevertheless, the court in Yeutter also held that the federal employee drug testing program was unconstitutional insofar as its mandatory drug testing of employees who did not hold safety or security-sensitive jobs, absent a reasonable suspicion of on-duty drug use or drug-impaired work performance, as opposed to off-duty drug use.

According to these cases, the safety concern connected with motor vehicle operators was sufficient for the random drug testing programs to pass constitutional muster based on fourth amendment challenges. Thus, reasonable suspicion was not required in these cases. Interestingly, one court transferred this safety concern from the school bus driver to the school bus attendant. Jones v. McKenzie, supra; Nat'l Treasury Employees Union v. Yeutter, supra.

[Continuation of footnote 2.]

> in light of the special circumstances and extraordinarily compelling government interest involved in testing railway operating personnel who "can cause great human loss before any signs of impairment become noticeable to supervisors or others." [Citation omitted.]

Id. at 712.

While no appellate court in this State has examined the issues related to random drug testing of school bus drivers, courts in other jurisdictions have thus upheld such random drug testing against constitutional challenges where such a program is motivated by safety concerns such as school bus safety.

With kind regards, I am

Sincerely,

T. Travis Medlock
Attorney General

TTM/fg