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The State of South Carolina

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July 31, 1990

The Honorable Denny Woodall Neilson
Member, House of Representatives
304A Blatt Building
Columbia, South Carolina 29211

Dear Representative Neilson:

You have requested an opinion from this Office as to the constitutionality of H.4960. That bill authorizes certain drug and alcohol testing of prospective State employees.

This Office has previously opined: "Drug testing in the workplace has become perhaps one of the most controversial facets of the current war against drugs. [Citations omitted.]" S.C. Op. Att'y Gen., Apr. 19, 1989. Employers generally argue that drug testing helps them protect their employees by providing a productive and safe workplace and limits their liability for negligent hiring or employment of workers who prove to be dangerous. Id.

One of the most obvious legal challenges to drug testing is an allegation that it violates the fourth amendment prohibition against unreasonable searches and seizures. Accord, id. On March 21, 1989, the United States Supreme Court squarely addressed such a challenge in two landmark decisions. Nat'l Treasury Employees Union v. Von Raab, ___U.S.___, 109 S.Ct. 1384 (1989), and Skinner v. Ry. Labor Executives' Ass'n, ___U.S.___, 109 S.Ct. 1402 (1989). In Von Raab and Skinner, the Court concluded that breath-testing and urine-testing procedures are searches under the fourth amendment; however, the tests used in these two cases were deemed to be reasonable. In these two decisions, the Court announced "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. Att'y Gen., Apr. 19, 1989. In Von Raab, the Court recognized and applied a balancing test:

> 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, supra at ___, 109 S.Ct. at 1390.

Several federal courts have subsequently applied the Court's analysis contained in Von Raab and Skinner to fourth amendment challenges to employment drug testing. Four cases decided by the United States Court of Appeals for the District of Columbia Circuit address this issue. In Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), the court, guided by Von Raab and Skinner, held that the government's interest in protecting top secret national security information justified the random testing of employees holding top secret national security clearances but the government's interest in integrity of the work force and public safety did not justify the testing of prosecutors, employees with access to grand jury proceedings, and personnel holding top secret national security clearances. The court in Harmon stated:

> Our analysis centers on the two decisions recently issued by the Supreme Court. Of the two, Von Raab is more closely on point. In Skinner, the Court upheld regulations under which drug testing would be contingent on an event - such as a train accident or a rule violation by a particular employee - which furnished an indication that some dereliction of duty had occurred. Although post-accident testing requires no individualized suspicion of any particular employee, it at least requires concrete evidence that events have not gone as planned. The testing program upheld in Von Raab, by contrast - like the program at issue here - included no such requirement. Moreover, Skinner relied entirely on a single governmental interest: the protection of the public safety. Portions of Von Raab relied on that interest, but the Court also discussed the circumstances under which the state's need to ensure the integrity of its workforce, or the necessity of preventing the disclosure of confidential information, might justify the testing of public employees.

Id. at 488. In Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989), the court, upon remand by the United States Supreme Court to consider the case in light of Von Raab and Skinner, 1/ held that drug testing by urinalysis of a school bus attendant did not violate the fourth amendment. The court in Nat'l Fed'n of Fed. Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), applied Von Raab and Skinner to hold that the drug testing of civilian employees who occupied positions in aviation, police and guard, and direct service staff who were primarily drug counselors did not violate the fourth amendment but the drug testing of laboratory workers and those in specimen chain of custody did violate the fourth amendment. In Am. Fed'n of Gov't Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989), the court guided still by Von Raab and Skinner, held that mandatory, suspicionless drug testing of certain Department of Transportation employees was reasonable and consistent with the fourth amendment. The United States District Court for the District of Columbia in Hartness v. Bush, 712 F. Supp. 986 (D.D.C. 1989), narrowly interpreted Von Raab and Skinner in considering a suit to enjoin the government from performing random and mandatory urine testing for drugs upon various civilian employees. In Hartness, the court held that mandatory drug testing could not proceed as the plans did not show that the testing of particular classes were based on a generalized suspicion that special circumstances existed warranting the testing of the class and the program for the testing of employees suspected of drug abuse could not be implemented because of lack of provisions in the plan that testing must be based on a reasonable, articulable, and individualized suspicion of the use on or off duty causing a reasonable suspicion that a specific employee may be under the influence of drugs while on duty. In Am. Fed'n of Gov't Employees v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989), the United States District Court for the District of Columbia relied on Von Raab and Skinner to hold that random urinalysis testing of Department of Education motor vehicle operators pursuant to the Department's drug testing plan was constitutionally permissible but the Department of Education failed to demonstrate a compelling interest in subjecting data processors, who did not have access to truly sensitive information, to random testing. Guided by Von Raab and Skinner in Nat'l Treasury Employees Union v. Watkins, 722 F. Supp. 766 (D.D.C. 1989), the United States District Court for the District of Columbia held that a federal sector labor union was entitled to a preliminary injunction against the Department of Energy's random drug testing of employees classified as motor vehicle operators and as computer and communications specialists or assistants but not entitled to a preliminary injunction against "reasonable suspicion" testing of all employees. Relying on Von Raab as well as Harmon v. Thornburgh, supra, the United States District Court for the District of Columbia in Willner v. Thornburgh, ___F.Supp.___, 1990 W.L. 71227 (D.D.C. May 15, 1990), considered a challenge to the Department of Justice's drug testing plan by an

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1/ Jenkins v. Jones, ___U.S.___, 109 S.Ct. 1633 (1989).

attorney who was a prospective employee and held "that the requirement compelling all attorneys accepted for employment in the Department's Antitrust Division to submit to a pre-screening urine drug test in the absence of any basis for individualized suspicion of drug use offends the Fourth Amendment and is invalid as applied to Willner." In the First Circuit, the United States District Court for the District of Massachusetts, in Am. Postal Workers Union v. Frank, 725 F. Supp. 87 (D. Mass. 1989), applied the balancing test contained in Von Raab to conclude that the United States Postal Service's required urinalysis drug screening of job applicants without individualized suspicion violated the fourth amendment. In Frank, the court stated:

> The Supreme Court predicated both Skinner and Von Raab on the government's compelling need to protect public safety within the highly regulated industry of railroads, and to maintain the integrity of the United States Customs Service.
>
> That is not the case here. The United States Postal Service is not a highly regulated industry like the railroads. We are not dealing here with the compelling need to provide safe public transportation. Major accidents with high fatalities just do not occur within the Postal Service. Although some of plaintiff union members do operate special delivery crafts, and others maintain vehicles which requires precision and alertness, the government does not set forth a good enough reason to intrude upon each applicant's privacy interests. APWU workers are not required to carry firearms, nor are they involved in drug interdiction. Furthermore, a review of the law, albeit scanty, on the distinction between prospective employees and current employees does not convince me that job applicants should be accorded lesser Fourth Amendment protections. In addition, urinalysis drug screening when part of a medical examination is not doctrinally distinct from a compelled urinalysis. In sum, I simply cannot extend the breadth of the recent Supreme Court decision to persons seeking employment in an industry such as the Postal Service for the sake of research.

Id. at 90. The United States District Court for the Western District of New York in the Third Circuit considered a bus driver's fourth amendment challenge to a regional transit authority's mandatory drug testing policy, applied the balancing test of Von Raab, and concluded that the bus driver's "privacy expectations, though

far from insignificant, were clearly outweighed by [the authority's] compelling interest in the safe and efficient transportation of its passengers." Moxley v. Regional Transit Services, 722 F. Supp. 977, 981 (W.D.N.Y. 1989). Upon remand for consideration in light of Von Raab and Skinner, 2/ the United States Court of Appeals for the Third Circuit in Transport Workers' Union v. Southeastern Pennsylvania Transp. Auth. ["SEPTA"], 884 F.2d 709 (3d Cir. 1989), stated.

> In the case before us, SEPTA presented extensive evidence of a severe drug abuse problem among its operating employees, which had been linked to accidents involving injuries to persons and which SEPTA's prior suspicion-based program had proved insufficient to curtail. [Citation omitted.] We found that in light of, inter alia, this evidence of a serious safety hazard caused by employee drug use, the careful tailoring of the program to cover only employees in safety-sensitive positions, and the existence of random selection procedures to protect against abuse of discretion by implementing officials, SEPTA's program was constitutionally permissible.

Id. at 711-2. In Thomson v. Marsh, 884 F.2d 113 (1989), the United States Court of Appeals for the Fourth Circuit relied upon Von Raab and Skinner to hold that the governmental interest in safety at a chemical weapons plant clearly outweighs the expectations of privacy of certain civilian employees and that the drug tests at issue did not violate the fourth amendment. In the Sixth Circuit, two district court decisions have addressed this issue. The United States District Court for the Northern District, Western Division, in Brown v. Winkle, 715 F. Supp. 195 (N.D. Ohio 1989), took "the position that mere use of drugs or alcohol, not necessarily abuse, under the ruling laid down by the Supreme Court in Von Raab, [ ] and that Court's reasoning, should disqualify persons seeking to become fire departmental personnel." The court in Winkle held that the requirement that candidates for selection as fire fighters test negative on an urinalysis drug screen to be selected for training in employment did not violate the fourth amendment. Similarly, the United States District Court for the Eastern District of Michigan, Southern Division, in Brown v. City of Detroit, 715 F. Supp. 832 (E.D. Mich. 1989), analyzed the interpretation of Von Raab and Skinner contained in Harmon v. Thornburgh, supra, to conclude that the city police department's random drug testing program did not, on its face, violate the fourth amendment. In Taylor v. O'Grady, 888 F.2d 1189, 1194 (7th

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2/ Transport Workers' Union v. Southeastern Pennsylvania Transp. Auth., ___U.S.___, 109 S.Ct. 3208 (1989).

Cir. 1989), the United States Court of Appeals for the Seventh Circuit stated, concerning the Von Raab and Skinner decisions:

> While the import of both decisions is obvious, and general principles on the constitutional framework with which to analyze urinalysis programs such as the one before us can now be articulated with confidence, nonetheless factual distinctions exist from program to program. Those distinctions comprise the critical border between an employer's reasonable intrusion upon its employees' privacy under the fourth amendment and an unconstitutional foray. . . .

The court in Taylor also observed:

> In both Von Raab and Skinner, the Court chose not to articulate a concrete analytical framework for this type of case. Consequently, the test of constitutionality still depends on a balancing of the individual's privacy expectations against the government's interest to be served by the test. Courts must therefore scrutinize the procedures used by the government and the specific interests allegedly served by testing a particular category of employees, as the D.C. Circuit has done on two recent occasions. American Federation of Government Employees v. Skinner, 865 F.2d 884 (D.C. Cir. 1989); National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989).

Taylor, supra at 1196. Upon applying the Von Raab balancing test, the court in Taylor concluded:

> The Supreme Court required that the category of employees directly encompass those who implicate the governmental interest . . . . [O]nly those employees who come into regular contact with prisoners, or who have opportunities to smuggle drugs to prisoners are implicated by the Department's interests.
>
> As to the other, administrative personnel, the governmental interest is not sufficient to overcome their privacy interests. The only legitimate interest advanced by the Department for testing these employees is to protect the general integrity of the work force. This is not enough. A generalized interest in the integrity of the work force

> will not sustain suspicionless urinalysis testing, and therefore the injunction is sustained as to these officers.
>
> As for those officers who come into regulate contact with prisoners, however, the injunction cannot be sustained in the face of Von Raab. . . . [T]he Department has two substantial interests in testing these officers. Prisoners can be potentially violent and many of the guards are armed. A momentary lapse of alertness could lead to irreparable harm. In addition, the intrusion into the officer's privacy is designed to be minimal and is in line with the intrusion authorized by Von Raab. Balancing these interests, we are compelled by Von Raab to find the [city police department's] program reasonable as to these officers.

Id. at 1199. Also in the Seventh Circuit, the United States District Court for the Northern District of Illinois, Eastern Division, in Dimeo v. Griffin, 721 F. Supp. 958 (N.D. Ill. 1989), considered a fourth amendment challenge to the Illinois Racing Board's substance abuse rule which provided for random drug testing and individualized suspicion drug testing of licensees including outriders, parade marshals, starters, assistant starters, drivers, and jockeys and held that the licensees had a substantial likelihood of success on the merits to allow the granting of preliminary injunctive relief with respect to random drug testing but the individualized suspicion drug testing that granted limited discretion to stewards was justified by the Board's interest in preserving the integrity and safety of the sport. Finally, in Am. Fed'n of Gov't Employees, AFL-CIO, Council 33 v. Thornburgh, 720 F. Supp. 154, 155 (N.D. Cal. 1989), the Ninth Circuit's United States District Court for the Northern District of California could not justify a plan for mandatory, random drug testing of all employees of the Federal Bureau of Prisons and stated:

> Unlike the testing schemes approved in Skinner and Von Raab, the urinalysis testing program proposed by the Federal Bureau of Prisons, at issue in this case, calls for mandatory, random testing of all Bureau employees regardless of job function. [Citation omitted.] The Bureau's asserted justifications for implementation of mass urinalysis testing are not supported by objective evidence, as in Skinner, nor targeted at employees who perform specific job functions justifying the high level of governmental intrusion, as in Skinner and Von Raab. [Citation and footnote omitted.] The Bureau simply has not demonstrat-

> ed the special need for its indiscriminate testing program, as required by the Supreme Court, that "in certain limited circumstances . . . is sufficiently compelling to justify the intrusions on privacy entailed by conducting such searches without any measure of individualized suspicion." [Citations omitted.]

Id. at 155.

Similarly, several state courts have analyzed the decisions in Von Raab and Skinner concerning similar issues. The Supreme Court of Georgia in Dep't of Corrections v. Colbert, ___ S.E.2d ___, 1990 W.L. 68565 (Ga. May 24, 1990) relied upon Von Raab and Skinner to conclude that a random drug testing policy for the Georgia State Prison was not unconstitutionally overbroad because the state's interest in preventing illegal drug use by the prison employees outweighs the privacy rights of those employees. The Court of Appeals of Louisiana, Third Circuit, in Chiles Offshore, Inc. v. Adm'r, Dep't of Employment Sec., 551 So. 2d 849 (La. App. 3 Cir. 1989), relied in part upon Von Raab and Skinner to conclude that the fourth amendment restrictions do not apply to a private employer's drug testing program, but are limited to governmental intrusion. In City of Annapolis v. United Food and Commercial Workers, Local 400 317 Md. 544, 565 A.2d 672, 683 (1989), the Court of Appeals of Maryland considered a fourth amendment challenge to a mandatory, suspicionless postemployment drug testing program for police officers and fire fighters and concluded:

> the circuit court erred in enjoining the City "from implementing and enforcing the mandatory drug testing program at issue in this case." In so holding, we do no more here than find that the proposed drug testing program of police and fire personnel, as set forth in the Appendix to this opinion, is not facially at odds with the Fourth Amendment simply because it is not based on reasonable suspicion of illegal drug use by covered employees.

The Commonwealth Court of Pennsylvania relied upon Von Raab and Skinner in Singleton v. Unemployment Compensation Bd. of Review, 558 A.2d 574 (Pa. Cmwlth. 1989), to state: "Drug testing as a precondition to a safety-related job promotion bears a reasonable analogy to drug-testing as a precondition to re-employment in a safety-related public service position." Also acknowledging that Singleton had waived his fourth amendment rights when he voluntarily submitted to the urine test, the court in Singleton held that the public transit authority's policy of requiring a drugs screen as part of a reinstatement physical examination was not violative of the fourth amendment.

While these cases are not exhaustive of the Von Raab and Skinner progeny, they do demonstrate that the ultimate determination of the reasonableness of a governmental drug testing program in the employment setting requires a case-by-case judicial balancing of the intrusiveness of the search against its promotion of a legitimate government interest. Accord Annot., 86 A.L.R. Fed. 420 (1988 & 1989 Supp.)("Validity, under Federal Constitution, of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by State, local, or federal government").

Of course, such drug testing programs may be challenged on grounds other than an alleged fourth amendment violation concerning an unreasonable search. For example, a plaintiff might allege violations based on grounds such as equal protection, due process, right of privacy, or self-incrimination. See S.C. Op. Att'y Gen., Apr. 19, 1989; 3/ Annot., 86 A.L.R. Fed. 420 (1988). Such challenges have not met with much success in the courts. See, e.g., Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986), cert. denied, 479 U.S. 986 (1986); Rushton v. Nebraska Pub. Power Dist., 653 F. Supp. 1510 (D. Neb. 1987); Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. App. 1985). The United States Supreme Court, however, has not yet addressed these challenges.

H. 4960 would 4/ govern prospective employees of the State and its political subdivisions including their agencies and departments. Section 8-16-80(A) of H.4960 states:

> Upon receipt of a verified or confirmed positive drug test result which indicates the use of this substance by the prospective employee, or upon the refusal of a a prospective employee to provide a sample, an employer may use that test or refusal as the basis for refusal to hire the prospective employee.

Whether or not this bill would survive a legal challenge depends, of course, upon the specific circumstances involved as well as the grounds upon which the challenge is based.

When the validity of a legislative act is questioned, the court will presume the legislative act to be constitutionally valid and every intendment will be indulged in favor of the act's validity by the court. Richland County v. Campbell, 294 S.C. 346, 364

3/ A further discussion of challenges to drug testing in employment situations, including grounds other than the reasonableness of a search, may be found in S.C. Op. Att'y Gen., Apr. 19, 1989.

4/ According to my telephone conversation on June 9, 1990, with the Legislative Council, I understand that H. 4960 was not enacted during this recent legislative session.

S.E. 2d 470 (1988). The courts of this State have the sole province to declare an act unconstitutional or to make the necessary findings of fact prior to finding a legislative act unconstitutional; however, this Office may comment upon potential constitutional problems. S.C. Op. Att'y Gen., May 26, 1989.

H. 4960 is limited to all prospective State employees. A fourth amendment challenge by a prospective State employee for a safety-sensitive or law enforcement job based on the reasonableness of the search pursuant to H. 4960 should be unsuccessful based on Von Raab and Skinner. If a similar challenge were made concerning a job that is not safety-sensitive or law enforcement, a court may hinge its decision on the distinction between applicants and incumbents. Generally, courts have recognized a broader latitude in drug testing of applicants for employment as compared to existing employees. See e.g., Harmon v. Thornburgh, supra; Brown v. Winkle, supra; Singleton v. Unemployment Compensation Bd. of Review, supra. Contra Am. Postal Workers Union v. Frank, supra at 90 ("[A] review of the law, albeit scanty, on the distinction between prospective employees and current employees does not convince me that job applicants should be accorded lesser Fourth Amendment protections."); Willner v. Thornburgh, supra (Considering the distinctions between an incumbent employee and an applicant, the court relied on Harmon v. Thornburgh, supra, to decide that the analysis was the same for applicants and existing employees.). Applying that broader latitude, a court should uphold H. 4960 upon such a challenge. As already noted, however, the court will undoubtedly make its analysis on a case-by-case basis dependent upon the specific circumstances involved. Of course, we make no comment regarding the policy considerations underlying this particular piece of legislation and our comments herein are confined to the legal issue of constitutionality.

I hope the above information will be of assistance. If I can provide any further information, please advise me.

Sincerely,

Samuel L. Wilkins

Samuel L. Wilkins
Assistant Attorney General

SLW/fg

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