

Academic Component Institutions  
The University of Texas at Austin  
The University of Texas at Dallas  
The University of Texas at El Paso  
The University of Texas at San Antonio  
The University of Texas at Tyler  
The University of Texas at Brownsville  
The University of Texas at Permian Basin  
The University of Texas at San Marcos  
The University of Texas at Austin  
The University of Texas at Austin  
The University of Texas at Austin



Health Component Institutions  
The University of Texas Health Science Center at Houston  
The University of Texas Health Science Center at San Antonio  
The University of Texas Health Science Center at Dallas  
The University of Texas Health Science Center at Austin  
The University of Texas Health Science Center at Tyler  
The University of Texas Health Science Center at Brownsville  
The University of Texas Health Science Center at Permian Basin  
The University of Texas Health Science Center at San Marcos  
The University of Texas Health Science Center at Austin  
The University of Texas Health Science Center at Austin  
The University of Texas Health Science Center at Austin

THE UNIVERSITY OF TEXAS SYSTEM

Office of General Counsel

201 WEST SEVENTH STREET AUSTIN, TEXAS 78701

TELEPHONE (512) 499-4462

11D#12059  
MJ

RQ 115

Ray Farabee  
Vice Chancellor

June 28, 1991

The Honorable Dan Morales  
Attorney General for the  
State of Texas  
Office of the Attorney General  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711  
Attn: Madeleine Johnson, Chairperson Opinion Committee

RECEIVED  
JUL 0 1 91  
Opinion Committee

Re: Drug Testing Policy - The University of Texas  
Health Center at Tyler

Dear General Morales:

On behalf of the University of Texas Health Center at Tyler,  
your opinion is requested concerning the legality of a proposed  
drug testing policy (see attached).

The proposed policy applies to employees who are applicants  
for or are employed in health care and security sensitive positions  
with duties or activities that involve:

- A. the diagnosis, treatment, or care of patients;
- B. the operation of equipment or the performance of a test  
or analysis that is utilized in the diagnosis and  
treatment of patients;
- C. access to controlled substances;
- D. access to cash; or
- E. the lawful use or possession of a firearm.

With regard to applicant testing, the proposed policy provides  
that the drug testing program will give advance notice, that any  
offer of employment will be contingent upon consent to drug and  
alcohol testing, and that the Department of Health and Human  
Services' Mandatory Guidelines for Federal Workplace Drug Testing  
Programs will be utilized.

ACCOMPANIED BY ENCLOSURES —  
FILED SEPARATELY

FILED SEPARATELY  
— ACCOMPANIED BY ENCLOSURES

With regard to employee testing, the proposed policy provides that testing will be required under the following circumstances:

1. When selected pursuant to a random process determined by the University, if an employee performs duties in the diagnosis, treatment, or care of patients, duties which require access to controlled substance, or duties which require carrying firearms (A., B., C., and E. above).
2. When involved in an on-the-job incident that results in the death or injury of a person or damage to property in excess of \$50,000.
3. When observed using or possessing alcohol or illegal drugs on the job.
4. When a supervisor who has participated in a program that provides training in the recognition of the physical appearance and behavior of persons under the influence of alcohol or illegal drugs observes an employee exhibiting such appearance and behavior on the job.

In Skinner v. Railway Labor Executives' Association, 109 S.Ct. 1402 (1989) and National Treasury Employees Union v. Von Rabb, 109 S.Ct. 1384 (1989), the United States Supreme Court laid the foundation for drug testing. The Court held that in limited circumstances where an important governmental interest was furthered and where the privacy interest implicated by a search was minimized, a search could be reasonable without individualized suspicion.

The Court in Skinner held that post-accident testing without reasonable cause passed constitutional muster. The Court identified several governmental interests advanced by testing railroad crew members whose duties could lead to substantial injuries. It found that the government had a compelling interest in assuring itself that employees occupying safety-sensitive positions were free from the effects of drugs or alcohol. Second, drug testing would have the effect of deterring drug use which might have disastrous consequences. Finally, drug testing would help railroads obtain information about the causes of accidents. It further found that the individual privacy interest of employees was diminished by the fact that they were employed in a highly regulated industry and by the reasonableness of the testing procedures. It concluded the analysis by balancing the legitimate governmental interest of protecting public safety against the employees' diminished expectation of privacy and found that the

Honorable Dan Morales  
June 28, 1991  
Page 3

drug testing was constitutional.

The Court underwent a similar analysis in National Treasury Employees Union v. Von Rabb, 109 S.Ct. 1384(1989). In this case the Court upheld the testing of all U.S. Customs employees who applied for jobs that were directly involved in drug interdiction or that required carrying firearms. It found that employees occupying positions that require carrying deadly weapons pose a serious threat to public safety if they are impaired by drugs. It also found that employees involved in drug interdiction must be drug free in order to preserve the integrity of the Department and accomplish Departmental purposes. The Court balanced the compelling governmental interest of public safety and preserving the integrity of the workforce with the employees diminished expectation of privacy. The Court concluded that the government had a compelling reason to test and that a reasonable person would expect that employees for such positions are subject to scrutiny, and found that the drug testing was reasonable.

Since Skinner and Von Rabb, numerous courts have upheld drug testing similar to that proposed by the Health Center.

In Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989), the Court found that the governmental interest in safety at chemical weapons plants outweighed the privacy expectations of a research biochemist and a pipefitter who had received security clearance for work involving chemical weapons, and held that random drug testing was not violative of the Fourth Amendment.

In National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), the Court held that random drug-testing of civilian employees occupying positions with duties in aviation, police and guard, and drug counseling is not a violation of the Fourth Amendment. The Court held that the government had a compelling safety interest in ensuring that employees who fly and service airplanes and helicopters are not drug impaired because of the substantial risk to human lives. Relying on Von Rabb, it further held that the risk to human life that drug impaired police and guard employees creates is substantial and concluded that this risk assessment weighs heavily, if not determinatively, in favor of reasonableness. Finally, the Court upheld drug testing of personnel involved in rehabilitation of drug offenders. It stated that drug use in such positions is so dissonant with the responsibilities that an employee in these positions should reasonably expect to provide extraordinary assurances of trustworthiness and probity. The Court concluded that the diminished expectation of privacy along with the compelling governmental interest of insuring that its efforts to eradicate drug usage are not frustrated, balanced in favor of the

Honorable Dan Morales  
June 28, 1991  
Page 4

reasonableness of the testing. Although it was a factor in the courts' analysis, the existence of less intrusive alternatives to drug testing did not tip the balance against the reasonableness of the testing.

In American Federation of Government Employees, AFL-CIO vs. Skinner, 885 F.2d 884 (D.C. Cir. 1989), the Court upheld random drug testing of hazardous material inspectors, aircraft mechanics and motor vehicle operators who had secret security clearance. Even though the hazardous material inspectors did not have routine access to dangerous nuclear power facilities they were required to verify proper packaging and handle hazardous material shipments. The Court concluded that the public should not bear the risk that results from employees whose perception and judgment may be impaired by drugs or alcohol. With respect to aircraft mechanics, the Court followed Cheney in upholding drug testing stating that a single drug related lapse could have calamitous consequences. The Court also found drug testing reasonable with respect to motor vehicle operators who required secret or top secret security clearance.

Finally, in Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990), the Court consolidated and considered petitions for review filed in the Ninth, Fifth and D.C. Circuits. The Court held that random drug testing of airline personnel in safety-sensitive positions was not an unreasonable search in violation of the Fourth Amendment. The Court said that the constitutionality of the testing program should be determined by balancing the government's interests against the employees' privacy interest. In the balancing analysis, the Court found that the governmental interest in preventing drug use by persons holding safety sensitive positions in the aviation industry was at least as compelling as the testing proposed in Von Rabb because of the governmental interest in insuring safe airline travel for the public. In proceeding with the balancing analysis, the Court found that since the FAA proposed random testing some weight should be added to the "invasion of privacy" side of the balance. However, in conclusion, the Court found that the weight was insufficient to tip the scales against the FAA drug testing program and held the drug testing program was constitutional.<sup>1</sup>

---

<sup>1</sup> It is interesting to note that the regulations proposed by the FAA also required pre-employment testing, post-accident testing, testing based on reasonable cause, and testing after return to duty following a positive test or a refusal to test; however, these tests were not challenged.

Honorable Dan Morales  
June 28, 1991  
Page 5

The Health Center submits that the compelling governmental interest for testing applicants and employees for the positions involving health care and the use of firearms (A., B., and E. above) is that a drug impaired employee in those positions presents an extraordinary safety hazard to themselves and other persons. The compelling governmental interest for testing those employees with access to controlled substances and cash is that the hospital's integrity and the risk of property loss is substantially impaired by the employment of drug users in such positions. Moreover, with respect to employees who have access to controlled substances, the Health Center has a compelling interest in ensuring that its obligation to safeguard controlled substances is not frustrated.

The Health Center relies on Von Rabb in support of its contention that all applicants for the above mentioned categories of the jobs can be tested. It contends that on balance the compelling governmental interest outweighs the employees diminished expectation of privacy. Further, although there are no Texas cases on point, it is noted that other states have upheld such applicant testing on the ground that job applicants have a lesser expectation of privacy than current employees. Wilkinson v. Times Mirror Corporation, 264 Cal. Rptr. 194 (1989). Moreover, in the case at hand, the policy is designed to minimize the intrusion on the privacy interest of applicants by only testing employees who have been tentatively accepted for employment in the listed categories, by only testing positions that are highly critical to patient care or are considered security-sensitive and subject to background checks pursuant to Texas statutes (See Article 51.215, Vernon's Texas Civil Statutes), and by insuring that applicants know at the outset that a drug test is a requirement of the positions.

The Health Center also contends that the proposed post-accident, reasonable cause and random testing of employees involved in health care is supported by the case law. The testing of health care employees is at least as compelling as the governmental interest set forth in Von Rabb. Further, as in Von Rabb and its progeny, the random testing of these employees does not tip the scales to the side of unreasonableness in light of the reasonable conclusion that random testing will prove a greater deterrent and thus be more effective in ensuring public safety.

Although there is no Texas case law on point, the Office of the Attorney General in JM-1274 stated that the Texas constitutional guarantee of privacy would be violated by random urine testing of deputy sheriffs and jailers. The Attorney General opinion relies on Texas State Employees Union v. Texas Department of Mental Health, 746 S.W. 2d 203 (Tex.1987). Apparently, the defect in the policy under review in JM-1274 was a failure to state

Honorable Dan Morales  
June 28, 1991  
Page 6

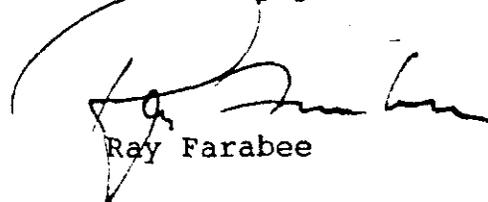
the compelling governmental interest and the reasons why the goals could not be achieved by more reasonable means. In the case at hand, the Health Center has stated the compelling governmental interest for testing. Further, as the courts found in the cases cited above, the existence of less intrusive alternatives does not tip the balance against the reasonableness of the testing. Skinner, Id. p.1419 n. 9; Cheney, Id. p.610. In this case, the fact that employees who are subject to testing under the proposed policy can cause serious injury or death of patients before any signs of impairment become noticeable to supervisors or others and the probability that the drug testing policy will have a deterrent effect on drug use should be given great weight in the balancing analysis toward a finding of reasonableness. The Court in TSEU recognized the great weight to be accorded to the protection of public safety in a balancing analysis. It stated:

[T]he Department [MHMR] serves a different function and stands in a different posture in regard to the public as compared with a police department and [that] the unquestioning obedience required of police officers and members of other quasi-military organizations is not required of Department employees. Texas courts have shown deference to the important interests served by public agencies that are directly involved in the compelling state goal of protecting the safety of the general public.

Id. at 206.

The Health Center submits that when the compelling governmental interest to be protected and the reasonableness of the testing procedure is weighed against the diminished expectation of privacy that employees in the positions subject to testing have, you should conclude that the drug testing policy proposed by the Health Center is reasonable and legal.

Sincerely yours,



Ray Farabee

Attachment

xc: Dr. George A. Hurst  
Dr. Charles B. Mullins