Approved 3/14/88
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by SENATOR EDWARD F. REILLY, JR. at
Chairperson

11:00 a.m./~~p.m.~~ on MARCH 2, 1988 in room 254-E of the Capitol.

All members were present except:

Senator Anderson and Senator Vidricksen were excused.

Committee staff present:

Mary Galligan, Legislative Research
Mary Torrence, Assistant Revisor of Statutes
June Windscheffel, Committee Secretary

Conferees appearing before the committee:

Mr. Galen Davis, Special Assistant on Drug Abuse to the Governor
Mr. Stephen McCoy, for the Kansas State Troopers Association

The Chairman announced that Fiscal Notes were before the Committee concerning SB598, farm wineries; and SB643, drug testing for applicants for and current employees in safety sensitive positions. (Attachment #1 and Attachment #2)
Today's meeting is to be a hearing on SB643. The Chairman welcomed Mr. Galen Davis, of the Governor's staff.Mr. Davis presented his testimony to the Committee. A copy of his written statement is attached. (Attachment #3) Mr. Davis also submitted a copy of Attorney General Opinion No. 87-49, dated March 19, 1987, concerning searches and seizures. (Attachment #4)

Mr. Davis spoke in favor of SB643. Safety sensitive positions means state law enforcement officers who are authorized to carry firearms and state correctional officers. Others who would be tested, as set out in the bill, would be to establish the executive branch of state government as an example of a drug-free work force. The statement includes: Introduction; Purpose and General Guidelines; Specific Minimal Guidelines; Other State and Local Drug Screening Criteria; Synopses of Leading Court Cases on Drug Screening; and Conclusion.

The conferee also said that Kansas Bureau of Investigation Director, Mr. David Johnson, and two members of his Laboratories Staff were present to address any technical things. Mr. Davis also introduced Ms. Susan Irza, Director of Persnnel Services, and Ms. Linda Fund, Legal Counsel, both from the Department of Administration. They were also present to assist in answering any questions.

A member mentioned that the statement included two specific drugs, marijuana and cocaine, but there was no reference to alcohol. Mr. Davis said they took a look at what drugs the federal government is looking at: the two drugs referred to are the most misused illicit drugs. He said many of the supervisors are aware of the abuse of alcohol that might carry over into the work force and might be able to better take care of that situation. The member continued on as to the problems caused by alcohol: billions of dollars to the employers in the work force, and the toll it takes on families. Mr. Davis said they are considering training and education of supervisors in general.

Another member stated that the way the bill is written quite a bit of this would be done in rules and regulations. He asked if the conferee would have any opposition to adding alcohol to the list of drugs to be tested for. Mr. Davis said he would have no opposition from a personal standpoint. However, in terms of what it might cost and other related issues he did not know at this time.

There was discussion concerning the numbers of employees who would be tested and the agencies. Mr. Davis said they primarily looked at those in the K.B.I., Liquor Control Investigators, Kansas Highway Patrol, University Police and the Capitol Area Security.

A member asked if there would be objection to removing the word "illegal" on line 27, so as to address the real problem. Not only in government but in the private work force. Mr. Davis asked Ms. Irza if she saw any problem with adding alcohol to this. Ms. Irza said it is her understanding that using a urine test does not show alcohol abuse, and the way one determines that is through a blood test. In some areas blood tests have been considered unconstitutional. A urine test is not considered too invasive. The member then asked about breathing. Ms. Irza said they would have to look at the literature. Another member pointed out that alcohol is a legal drug. Another member said that removing the word "illegal" would, he felt, not make sure it mandates testing for alcohol. He thinks the whole thing is a permissive piece of legislation, which means they can establish whatever they want to establish. This is just giving the authority to establish some kind of program they figure they need. Another member said that the bill does give the authority to establish the screening program. It does not limit it to any type of system. There was more discussion.

The Chairman thanked Mr. Davis for his appearing.

The next conferee was Mr. Stephen McCoy. His statement was handed out to the Committee. (Attachment #5) He represented the Kansas State Troopers Association, which supports Governor Hayden's drug screening program addressed in the bill. They request if a drug test is requested of an officer that the testing be performed by the officer's personal physician. This physician would then work with the patrol doctor to determine if additional tests are needed or provide an acceptable rehabilitation program. They request strict guidelines be established in the bill or agency policy to administer the original test, the retest and the treatment procedures to eliminate the problem.

There were no questions at that time from the Committee. The Chairman thanked Mr. McCoy for appearing. That will conclude the hearing on SB643. The Committee will take it under advisement.

The meeting was adjourned at noon.

598

Fisc ote Bill No.
1988 Session
February 24, 1988

The Honorable Edward F. Reilly, Jr., Chairperson
Committee on Federal and State Affairs
Senate Chamber
Third Floor, Statehouse

Dear Senator Reilly:

SUBJECT: Fiscal Note for Senate Bill No. 598 by Committee on Federal and State Affairs

In accordance with K.S.A. 75-3715a, the following fiscal note concerning Senate Bill No. 598 is respectfully submitted to your committee.

Senate Bill No. 598 amends K.S.A. 1987 Supp. 41-308a to provide for the direct sale of wine by a Kansas farm winery to clubs, drinking establishments and caterers. The bill also authorizes the import of small quantities of wine for educational and scientific tasting programs which will be exempt from the tax imposed by K.S.A. 41-501. A new section is created by this bill requiring the State Board of Agriculture to establish a grape growing and wine making advisory program to aid in the technology, promotion and marketing of Kansas grape growing and Kansas farm wineries.

The State Board of Agriculture indicates that additional State General Fund expenditures would be required upon passage of this act. Estimated expenditures of $54,651 would provide for one Agricultural Program Coordinator and one Secretary I needed to provide additional technical expertise and education to assist farm wineries. Other operating expenditures of $23,338 would provide the necessary support costs for these positions, including $6,200 for travel, $6,000 for consulting contracts and one-time capital outlay items totaling $3,154. Other operating expenditures in FY 1990 are anticipated to decrease to an estimated $17,091.

The State Fair indicates that it would anticipate additional expenditures from the State Fair Fee Fund of approximately $1,000 for prizes which would be awarded during wine testing demonstrations. The State Fair also anticipates increased revenues to the State Fair Fee Fund of approximately $1,000 from booth and exposition fees.

Revenues to the State General Fund could be reduced as a result of the exemption of small quantities of wines imported for educational and scientific tasting. However, the amount of any such reduction cannot be reliably estimated at this time.

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Attachment #1

Any change in expenditures and revenues resulting from the passage of this act are not reflected within the FY 1989 Governor's Report on the Budget.

Michael F. O'Keefe
Director of the Budget

MFO:WD:pks

cc: Sam Brownback, Secretary, Board of Agriculture
Robert Gottschalk, Executive Secretary, State Fair

2146

643
Fiscal Note Bill No.
1988 Session
February 26, 1988

The Honorable Edward F. Reilly, Jr., Chairperson
Committee on Federal and State Affairs
Senate Chamber
Third Floor, Statehouse

Dear Senator Reilly,

SUBJECT: Fiscal Note for Senate Bill No. 643 by Committee on Federal and State Affairs

In accordance with K.S.A. 75-3715a, the following fiscal note concerning Senate Bill No. 643 is respectfully submitted to your committee.

Senate Bill No. 643 would authorize the Director of the Division of Personnel Services of the Department of Administration to establish and implement a drug screening program for persons currently holding safety sensitive positions in state government based upon reasonable suspicion of illegal drug use by any such person. Safety sensitive positions are defined as state law enforcement officers who are authorized to carry firearms, state correctional officers, the Governor and Lieutenant Governor, head of state agencies who are appointed by the Governor, and employees on the Governor's staff.

Since Senate Bill No. 643 simply authorizes the establishment and implementation of a drug screening program, passage of the bill would not directly result in a fiscal impact. However, the provisions of Senate Bill No. 643 would provide for the implementation of the Governor's recommendation that such a program be established, effective July 1, 1988. The following table summarizes the recommendations included in the FY 1989 Governor's Report on the Budget to support the implementation of a drug screening program in accordance with the provisions of Senate Bill No. 643.

Personnel Management Specialist IV and Office Assistant IV	$ 56,029[a]
Operating Expenses and Equipment	15,494
Testing Labs	150,000
TOTAL	$221,523

[a]Includes four percent salary adjustment

The amount of $221,523 would be financed from the State General Fund and is included in the FY 1989 Governor's Report on the Budget.

Michael F. O'Keefe
Director of the Budget

MFO:DW:pks
cc: H. Edward Flentje, Secretary of Administration

2395

Senate FSA
3/2/88
Attachment #2

STATE OF KANSAS

OFFICE OF THE GOVERNOR
State Capitol
Topeka 66612-1590
(913) 296-3232

Mike Hayden *Governor*

Testimony Concerning SB 643
Presented To
The Senate Federal and State Affairs Committee
March 2, 1988
By
Galen E. Davis
Governor's Special Assistant on Drug Abuse

Mr. Chairman, members of the committee, I appreciate the opportunity to appear before you today to speak in favor of Senate Bill 643, concerning drug screening of applicants for and current employees in safety sensitive positions in state government. As is noted in this bill, safety sensitive positions means state law enforcement officers who are authorized to carry firearms and state correctional officers. Screening of current safety sensitive employees would be based upon reasonable suspicion of illegal drug use.

Additionally, the Governor and Lieutenant Governor, heads of state agencies who are appointed by the Governor and employees on the Governor's staff would be tested to establish the executive branch of state government as an example of a drug-free work force.

I. Introduction

Although America leads the world in many positive ways it is also unfortunately true that America is the leader in the use of illicit drugs. It is estimated that Americans now consume 60 percent of the worlds production of illicit drugs. Sadly, there are many statistics that reinforce this fact. It is estimated that:

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Attachment #3

* 23 million Americans use marijuana regularly

* 20 million have tried cocaine and 5 million use it regularly

* 2/3's of the people entering the workforce have used illegal drugs and 44 percent have used them in the past year

* 10 to 23 percent of American employees use illicit drugs

* The U.S. Chamber of Commerce estimates that, "Today in the U.S., 5,000 Americans will try cocaine for the first time; nearly 2,000 Americans will be arrested for drug related crimes and more than 2,700 boats and planes will smuggle illegal drugs into the country."

* $100 billion is spent annually on illicit drugs and another $100 billion is lost to our economy due to drug related accidents, lowered productivity, police, court and hospital costs.

In a response to our societies drug abuse dilemma, Governor Mike Hayden outlined his approach to this problem in the March 26, 1987 Special Message to the Legislature entitled, Toward a Drug-Free Kansas. In this message and in the Governor's Legislative Message Presented To The 1988 Legislature, Governor Hayden requested your assistance and support for a variety of programs. This comprehensive set of programs includes drug legislation, education, prevention, intervention, treatment, law enforcement and state employee drug screening. All are necessary elements to prevent and reduce illicit drug use in our state.

II. Purpose and General Guidelines

No employer can consider themselves immune to the overwhelming evidence of illicit drug use in this society. Public employers as well as their counterparts in business and industry are learning that they have a significant role to play in addressing this nations drug problem.

Illicit drug use can have serious adverse effects on users, their productivity, their dependents and co-workers. Additionally, drug abusing employees in certain positions can also affect the safety of the general public. As the states largest employer, state government can and must address this problem.

For these reasons Governor Hayden has called for:

* State employee education about drug abuse

* Supervisor training to identify characteristics of a drug abusing employee and methods of referral for assessment and treatment when necessary

* An enhanced employee assistance program for state employees and

* Legislation authorizing drug screening of certain state employees

Today, we are requesting your approval for this legislation authorizing drug screening for specified state employees. The Governor's Special Assistant and Coordinator of Drug Abuse Programs, Chief Counsel, Department of Administration Attorneys, and the Director of the Division of Personnel Services have coordinated with members of the Attorney General's staff to design a constitutional drug screening program for certain state employees. A safer Kansas, safer working conditions, early intervention and rehabilitation, if necessary, are goals of the Governor's drug screening proposal.

Drug screening is an accepted method of ascertaining and intervening in illicit drug use in the work place. In 1983, only 3 percent of the Fortune 500 companies had a drug screening program. By 1986, that number had increased to 30 percent with an estimate of 50 percent by the end of 1988. Private industries that utilize drug screening include Kodak, Du Pont, General Motors, General Electric, The New York Times, and United Airlines. In the public sector federal, state and local units of government have established drug screening programs.

The legislation before you today is the product of a great deal of research. Each element in this bill has been carefully selected based on research, court decisions, and the experience of other public employers.

Courts have generally found that the drug screening of applicants for safety sensitive positions is constitutional. Further, courts have found constitutional the drug screening of current employees in safety sensitive positions when there is reasonable suspicion that the employee is using an illicit substance.

The Governor is specifically defining safety sensitive positions as state law enforcement officers who are authorized to carry firearms and state correctional officers.

Although this bill authorizes the director of the division of personnel services to establish and implement the drug screening program we are prepared to discuss guidelines that we would include to assure the drug screening integrity, accuracy, and fairness.

III. Specific Minimal Guidelines

The specific minimal guidelines for the state employee drug screening program includes:

1. A formal written state employee policy statement on illicit drug use and drug screening, which includes:

   a)The states commitment to a drug-free work place

   b)Consequences of violation of the substance abuse policy

   c)Circumstances of conducting drug screening

   d)Consequences of refusal to participate in drug screening

   e) statement that safety and rehabilitation if necessary, not punishment, are the goals of the drug screening program.

2. Prior notice of applicants relative to the required pre-employment drug screen

3. Positions of current state employees subject to drug screening will be specifically defined and communicated prior to implementation of the screening program

4. Current employee screening only for reasonable suspicion of illicit drug use

5. Providing an employee assistance program for employees with problems

6. Providing the use of accumulated leave for rehabilitation if necessary

7. Define marijuana and cocaine as the minimum illicit drugs to be screened for in this program. Optional illicit drugs that can be added to the screen will be listed.

8. Screening procedures will be establi[illegible] to ensure:

a)Confidentiality of results

b)A questionnaire to rule out possible positive readings for over the counter and prescription medications

c)Accurate, unobserved collection of a urine sample which minimizes the invasion of the employees privacy

d)Proper chain of custody

e)Primary screen with positive screens verified through gas chromatography / mass spectrometry (GC/MS)

f)Retention of positive specimens

g)Rechecking of screening procedures prior to reporting of a positive result

h)Employees right to explain why they have tested positive for drugs which includes medical review of statements

i)Employees right to rehabilitation for first positive screen results

9. The selection of drug screening laboratories that meet scientific and technical guidelines for drug testing programs as prescribed by the U.S. Department of Health and Human Services.

IV. Other State and Local Drug Screening Criteria

California - (San Francisco) reasonable grounds

Connecticut - Applicants; reasonable suspicion; random with safety sensitive

Iowa - Pre-employment for peace officers and correctional officers

Maryland - Public safety employees under reasonable suspicion

Minnesota - Reasonable suspicion

North Carolina - (Raleigh) applicants for public safety positions

Rhode Island - Reasonable grounds

Utah - Fair and equitable testing

Vermont - Applicants as a part of pre-employment physical; probable cause for current employees

Virginia - Reasonable suspicion

V. Synopses of l ing Court Cases on Drug ening

While the courts have remained divided on the issue of drug screening, those courts with negative rulings have been with programs that conducted random drug screening and those that commenced screening without prior notice to employees about the screening program. Neither of these elements would apply to the screening program that we are proposing in this bill.

The Fourth Amendment to the Constitution provides for the right of people to be secure against unreasonable searches. In deciding whether a drug screening program violates the Fourth Amendment, courts attempt to establish if the search was reasonable.

Generally:

1)Courts attempt to balance the interest of the individual subject to the test with the right of the employer to have a drug-free work place, and to provide for the safety of co-workers and the public

2)Courts generally have not required probable cause or a search warrant for administering a drug screen.

3)Courts have upheld programs based on individualized suspicion of drug use and programs based on the nature of the jobs being performed.

4)Courts have reviewed the procedures to ensure accuracy of the drug screen. We are proposing that:

a)all federal guidelines on drug screening laboratory procedures follows

b)retest of all initial positive results utilizing a methodology as accurate as the GC/MS

Enclosed in addendum 1 are court cases on drug screening. I believe you will see that our proposed program is reflected in the cases that have been upheld and that our proposed program does not contain the elements of those cases that were not upheld.

Conclusion

Governor Hayden has said that Kansas state employees "are the state's most valuable asset." The Governor recognizes the many positive professional and personal contributions that state employees make to the state of Kansas. It is further understood that the health of the employee is paramount to the carrying out of their responsibilities.

In the March, 1988 Kansagram the Governor announced Healthcheck '88 a free health risk appraisal program designed exclusively for state employees. This confidential individualized appraisal is designed to help state employees identify potential threats to their health before they become serious illnesses. Additionally, the Governor's staff is working to design an expanded employee assistance program for state employees.

In addition to his concern for the health of state employees the Governor values and seeks to protect the rights of state employees. The Governor has consistently stated that he and his staff will work with the Attorney General to ensure that the drug screening program will be constitutional. The Attorney General in responding to measures in the bill before you stated, "This proposal, in my opinion, falls within the constitutional guidelines for drug testing established in numerous court decisions. In addition, it complies with the drug testing guidelines set forth in Attorney General Opinion No. 87-49."

Public policy requires that government be responsive to societal concerns and responsible for the actions of its employees. Drug screening where legal and appropriate is a useful tool in combatting the adverse consequences of illicit drug use by employees and potential employees. Drug screening of applicants will help to ensure that the state is hiring drug-free safety sensitive employees. Drug screening of current safety sensitive employees when their is reasonable suspicion of drug use is a scientifically reliable method of substaniating concerns that the employee is using drugs. Drug screening further ensures the safety of the public, the safety of co-workers, and rehabilitation for drug abusing employees.

We encourage your positive support for adding responsible drug screening to this state's comprehensive approach to prevent and reduce illicit drug use.

Thank you Mr. Chairman and members of the Committee for considering our comments on this bill.

ADDENDUM I

National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir., 1987) - The Fifth Circuit upheld the drug testing program of the United States Customs Service which tests applicants and current employees seeking positions involving the interception of drugs. The courts believed that the government had a strong interest in ensuring that individuals working in drug enforcement not be drug users.

McDonnell v. Hunter, 809 F.2d 1302 (8th Cir., 1987)- The Eighth Circuit ruled that random testing of corrections department employees who have regular contact with prisoners in medium or maximum security prisons was reasonable.

Testing of other employees must be based on individualized suspicion.

Jones v. McKenzie, 1 IER Cases 1076 (DC Cir. 1987)- The District of Columbia Circuit decided that drug testing was reasonable as part of a routine medical examination where the duties of employees involved direct contact with school children and the employer had a legitimate safety concern. The school system had a compelling governmental interest in ensuring the safety of handicapped children and could require drug testing for Transportation Branch employees as a part of routine employment-related medical examinations. The court believed that the EMIT test was not sufficiently reliable to serve as the sole basis for adverse action against an employee who tested positive.

Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District, 510 NE2d 325 (NYctApp. 1987) - The Court of Appeals of the State of New York has ruled that drug testing of probationary teachers could only be required where there was reasonable suspicion to believe that the individuals were drug users. In balancing the government's concerns that its teachers not be drug users with the privacy rights of teachers, the court concluded that reasonable suspicion was the appropriate standard.

Capua v. City of Plainfield, 643 F. Supp. 1507 (D.C. NJ, 1986) - The United States District Court for the District of New Jersey has declared the surprise drug testing of firefighters an unconstitutional violation of the Fourth Amendment's protection against unreasonable searches and seizures. The Court criticized the city for failing to develop procedural guidelines and to take precautions to ensure the confidentiality of the test results. The court believed, that to be constitutional, drug tests must be based on reasonable suspicion.

Feliciano v. City of Cleveland, 661 F. Supp. 578 (D.C. N. Ohio, 1987) - The United States District Court for the Northern District of Ohio has ruled that the surprise drug testing of police cadets violated the Fourth Amendment since there was no reasonable, individualized suspicion of drug use. The court believed that such a standard would protect the Fourth Amendment rights of cadets without impairing the ability of the city to remove drug users.

National Association of Air Traffic Specialists v. Elizabeth Dole, Secretary of Transportation, Civil Action No. A-87-073, (D.C. Alaska, 1987) - The United States District Court for the District of Alaska has upheld a drug testing program for flight service specialists which was conducted as part of an annual medical examination. The court based its opinion on the national interest in air safety which justified the intrusion into the legitimate expectation of privacy by the employees.

American Federation of Government Employees v. Elizabeth Dole, Secretary of Transportation, Civil Action No. 87-1815, (D.C. DC, 1987) - The United States District Court for the District of Columbia upheld a drug testing program for employees who worked in jobs concerned with public health, safety, national security and law enforcement. The court believed that the duty to ensure the public safety justified the drug testing. The court found that the program "reflects a high degree of concern for employee privacy interests and is carefully tailored to assure a minimal amount of intrusion."

Mulholland v. Department of the Army, 660 F. Supp. 1565 (D.C. E. Va., 1987) The United States District Court for the Eastern District of Virginia concluded that the random testing of employees who worked in aviation-related jobs was reasonable due to the safety-related nature of the jobs.

Taylor v. O'Grady, Civil Action No. 86 C 7179, (D.C. N. Ill., 1987) - The United States District Court for Northern Illinois ruled that the annual drug testing of every correctional department employee violated the Fourth Amendment. The court concluded that absent individualized, reasonable suspicion of drug abuse, trained supervision was equally effective in detecting chronic abusers as well as occasional drug users who come to work impaired.

4

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

March 19, 1987

MAIN PHONE: (913) 296-2215
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ATTORNEY GENERAL OPINION NO. 87- 49

Charles A. Peckham
Rawlins County Attorney
Atwood, Kansas 67730

Re: Constitution of the United States -- Fourth Amendment -- Searches and Seizures

Constitution of the State of Kansas -- Bill of Rights -- Search and Seizure

Synopsis: The Fourth Amendment to the United States Constitution gives people the right to be free from "unreasonable searches and seizures." Mandatory drug testing of county employees, without regard to job performance, would violate the Fourth Amendment prohibition against "unreasonable searches and seizures." However, the testing of such an employee is permissible if based upon "reasonable suspicion." Therefore, there is no constitutional bar to the testing of a county employee where circumstances give the employer a reasonable, objective basis to suspect illicit drug use by that employee.

Mandatory drug testing of applicants, without regard to job requirements, would violate the Fourth Amendment. However, testing of an applicant is permissible if it is in furtherance of a bona fide effort to learn whether an applicant is physically capable of performing the duties of a particular job. Accordingly, mandatory drug testing of all applicants for public safety positions is permissible. Cited herein: K.S.A.

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Attachment #4

19-101; K.S.A. 1986 Supp. 19-101a; U.S. Const., Fourth Amend.; Ks. Const., Bill of Rights, § 15.

* * *

Dear Mr. Peckham:

As Rawlins County Attorney, you request our opinion on the legality of a proposed drug testing plan in Rawlins County. You inform us that details of the plan are as follows. All county employees, other than elected officials, would be subject to drug testing with little or no advance warning. They would also be required to sign an agreement that as a condition of continued employment by the county, they would not use drugs while county employees. According to the plan, if it is found that a county employee is using drugs, the employee would be required to attend a drug/alcohol treatment program. Finally, if an employee refuses to attend the treatment program after it is found that he or she is using drugs or alcohol, or an employee who attended the program is subsequently found to be using drugs or abusing alcohol, then the employee would be subject to termination of employment by the county.

Kansas presently has no statutes related to drug testing. Thus, it is necessary to examine the constitutionality of the proposed plan under both the United States and Kansas Constitutions. The Fourth Amendment to the United States Constitution states in its entirety:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added).

This language is repeated almost word for word in the Bill of Rights of the Kansas Constitution, which provides at § 15:

> "The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath

> or affirmation, particularly describing the place to be searched and the persons or property to be seized." (Emphasis added).

Thus, both the Fourth Amendment to the United States Constitution and § 15 of the Bill of Rights of the Kansas Constitution prohibit "unreasonable searches and seizures." Since Kansas case law has yet to address the issue of drug testing as a search and seizure, this opinion will deal only with the Fourth Amendment, as applied to the states through its incorporation in the Due Process Clause of the Fourteenth Amendment. This includes counties and county officials. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed. 2d 1081 (1961); Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949).

The fundamental legal question you ask is whether drug testing in the workplace is compatible with the protection of personal privacy embodied in the Fourth Amendment's prohibition of "unreasonable searches and seizures." Drug testing programs are being instituted widely today as a result of public and political reaction to highly publicized drug abuse tragedies. Not surprisingly, such programs are often challenged in court by the affected employees. The case law is still developing and is unsettled. Therefore, we cannot predict with certainty what the courts, and especially the United States Supreme Court, will do.

In our opinion, the Board of County Commissioners of Rawlins County has the authority, via its home rule powers (K.S.A. 19-101; K.S.A. 1986 Supp. 19-101a), to establish a drug testing program for applicants and current employees alike, assuming the commission finds a link between drug abuse and the requirements of particular job categories. However, the commission's exercise of this authority must be grounded in the finding of a link between drug abuse and job performance. In our view, the county commission does not have statutory authority to undertake a massive drug testing program in pursuit of broader social goals, however desirable, such as deterring drug abuse. Moreover, the commission's authority must be exercised in conformity with constitutional requirements. We will address these necessary constraints below.

A preliminary question we address is whether the collection and testing of a urine specimen is a "search" or "seizure" within the meaning of the Fourth Amendment. Since other types

of testing are subject to Fourth Amendment constraints, Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1833, 16 L.Ed. 2d 908, 918 (1967) (blood); State v. Berker, 391 A.2d 107, 111 (R.I. 1978) (breath), it seems clear that a urine test likewise amounts to a search or seizure within the meaning of the Fourth Amendment. Courts have held this to be true. See National Treasury Employees Union v. VonRaab, 649 F. Supp. 380 (E.D. La. 1986); Lovvorn v. City of Chattanooga, Tenn., 647 F. Supp. 875 (E.D. Tenn. 1986); Shoemaker v. Handel, 608 F.Supp. 1151 (D.N.J. 1985), Aff'd, 795 F.2d 1136 (3d Cir. 1986); Capua v. City of Plainfield, 643 F.Supp. 1507 (D.N.J. 1986); McDonnell v. Hunter, 612 F.Supp. 1122 (D.C.Iowa 1985); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985). We conclude that urine testing is a search within the meaning of the Fourth Amendment.

Although the taking of urine specimens for drug testing purposes is a search under the Fourth Amendment, it is not a per se violation of that amendment. Only "unreasonable searches and seizures" are prohibited. Carroll v. United States, 267 U.S. 132, 147, 45 S.Ct. 280, 283, 69 L.Ed. 543, 549 (1925). Accordingly, it is necessary to make a determination of reasonableness, which requires a balancing of the need to search against the invasion of the individual which the search entails. New Jersey v. T.L.O., 469 U.S. 325, 336, 105 S.Ct. 733, 740, 83 L.Ed.2d 720, 731 (1985). The Supreme Court has said that:

> "The test of reasonableness under the fourth amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447, 481 (1979).

There can be no doubt that Rawlins County has a compelling interest in having its employees free from drugs. Balanced against this interest is the extent of the invasion of the individual's privacy rights by the kind of urine testing proposed by the county.

Before an individual may invoke the protections of the Fourth Amendment, he or she must have a reasonable or legitimate expectation of privacy. Smith v. Maryland, 442 U.S. 735, 739, 99 S.Ct. 2577, 2579, 61 L.Ed.2d 220, 226 (1979). Accordingly, we first examine the extent to which the intrusion of drug testing, in the context of county employment, compromises reasonable or legitimate expectations of privacy. An expectation of privacy is "legitimate," in Fourth Amendment terms, if (1) the individual actually (subjectively) expects privacy; and (2) the individual's subjective expectation of privacy is one which society is prepared to recognize as reasonable. Smith v. Maryland, 442 U.S. at 740, 99 S.Ct. at 2580; Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576, 588 (1967).

A determination of whether county employees have an actual, subjective expectation of privacy entails a subjective evaluation of the intrusiveness of the urine test itself. At least one court has found the urine test to involve a high degree of bodily intrusion. Capua v. City of Plainfield, 643 F. Supp. at 1514. Other courts have not found the urine tests to be so intrusive. Shoemaker v. Handel, 619 F. Supp. at 1101, Aff'd 795 F.2d at 1142; Mack v. United States, No. 85 Civ. 5764 slip op. at 6 (S.D.N.Y. 1986).

In our view, the degree of intrusion engendered by a urine test varies greatly depending upon the individual being tested. However, we conclude that county employees as a group have a certain degree of subjective expectation of privacy in the act of urination. See McDonnell v. Hunter, 612 F.Supp. at 1127. The proposed testing program would, therefore, interfere to some degree with the county employees' subjective expectation of privacy.

We next consider whether this group's expectation of privacy is one that society is prepared to recognize as "reasonable" under the Fourth Amendment. Whether an intrusion is reasonable must be evaluated in the context of an individual's place of employment. McDonnell v. Hunter, 612 F.Supp. at 1128. Since the county has never had a drug testing program, it seems clear that, at least at the time of hiring, current county employees had no reason to believe they would be subjected to a urine test for drugs while on the job. Furthermore, assuming an employee's job performance is satisfactory, he or she would have little reason to expect an investigation by the county into his or her personal life. Therefore, we find the county employees' subjective expectation of privacy to be reasonable.

In light of these personal privacy interests, we next examine the governmental interests which could make such an intrusion necessary. The county's interest which might justify the testing of all county employees would be the desire to promote efficiency by detecting those whose drug abuse poses a risk of diminished job performance. However, the merits of the county's efforts to assure that all county employees are free from drug-induced impairments and capable of performing their public service is not the issue to be decided. See Capua v. City of Plainfield, 643 F.Supp. at 1516. Rather, the question to be answered is whether the means chosen by the county to achieve this laudable goal are "reasonable" within the meaning of the Fourth Amendment. Id. We are compelled to conclude that the county's legitimate goal of achieving a drug-free work force does not justify the use of a blanket drug testing program, as such a program would violate the protections afforded an individual under the Fourth Amendment. See National Treasury Employees Union v. Von Raab, 649 F.Supp. at 387; Lovvorn v. City of Chattanooga, Tenn., 647 F.Supp. at 881; Capua v. City of Plainfield, 643 F.Supp. at 1517.

It is our opinion that the Fourth Amendment allows the county to demand urine of an employee "only on the basis of a reasonable suspicion predicated upon specific facts and reasonable inferences drawn from those facts in light of experience." See Capua v. City of Plainfield, 643 F.Supp. at 1517; McDonnell v. Hunter, 612 F. Supp. at 1130. The reasonable suspicion standard requires individualized suspicion, specifically directed to the person who is targeted for the search. Capua v. City of Plainfield, 643 F.Supp. at 1517. Stated another way, the use of a "reasonable suspicion" standard allows testing if there is a "reasonable, objective basis to suspect that a urinalysis will produce evidence of an illegal drug use. . . ." Turner v. Fraternal Order of Police, 500 A.2d 1005, 1009 (D.C.App. 1985).

Courts have frequently applied the "reasonable suspicion" standard to the drug testing of public employees. In fact, all courts which have ruled upon the validity of urine tests for public employees have required as a prerequisite some articulable basis for suspecting that the employee was using illegal drugs, usually framed as "reasonable suspicion." Capua v. City of Plainfield, 643 F.Supp. 1507 (D.N.J. 1986) (fire fighters); City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla.App. 5 Dist. 1985) (police officers and fire

fighters); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C.App. 1985) (police officers); McDonell v. Hunter, 612 F.Supp. 1122 (S.D.Iowa 1985) (correctional officers); Allen v. City of Marietta, 601 F.Supp. 482 (N.D.Ga. 1985) (employees of City Board of Lights and Water working around high voltage electric wires); Patchogue-Medford Congress of Teachers v. Board of Education, 505 N.Y.S.2d 888 (N.Y.App. Div. 1986) (teachers); Jones v. McKenzie, 628 F.Supp. 1500 (D.D.C. 1986) (school bus drivers); Caruso v. Ward, 506 N.Y.S.2d 789 (N.Y.Sup.Ct. 1986) (police officers in special organized crime control bureau).

Most recently, the "reasonable suspicion" standard for the drug testing of public employees was applied in a decision of the district court for the eastern district of Tennessee, Lovvorn v. City of Chattanooga, Tenn., 647 F.Supp. 875 (E.D. Tenn. 1986). The Lovvorn court, which examined the validity of a mandatory drug testing plan for city fire fighters, concluded that "while probable cause would not be required for the city to conduct urine tests, the balancing of the interest of the City and the individual requires some quantum of individual suspicion before the tests can be carried out." Id. at 880. The court denoted this quantum as "reasonable suspicion."

While it is impossible to define "reasonable suspicion" in the abstract, as a comparative matter "reasonable suspicion" is less stringent than "probable cause," the traditional prerequisite to a Fourth Amendment search and seizure. This more relaxed standard is applied by the courts to persons who have not entirely surrendered their Fourth Amendment rights, but who nevertheless have a diminished expectation of privacy. For example, the Lovvorn court applied this standard to Chattanooga fire fighters because:

> "While Chattanooga fire fighters do not entirely surrender their fourth amendment rights when they become City employees, they nevertheless as employees, as opposed to the general citizenry, have a somewhat diminished expectation of privacy. Allen v. City of Marietta, 601 F.Supp. 482 (N.D.Ga. 1985); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C.App. 1985); Mack v. United States, No. 85 Civ. 5764 slip op. at 7." 647 F.Supp. at 880.

Two questions must be answered before a search may be found "reasonable" under the Fourth Amendment. "First, one must consider 'whether the . . . action was justified at its inception,' . . . second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justify the interference in the first place,' . . . ." Lovvorn v. City of Chattanooga, Tenn., 647 F.Supp. at 882, citing New Jersey v. T.L.O., 469 U.S. 325, 340, 105 S.Ct. 733, 743, 83 L.Ed.2d 720, 734 (1985).

The drug testing plan proposed by Rawlins County does not require any finding of "reasonable suspicion" by the employer prior to the testing of an employee. In fact, the county has failed to point to any objective facts concerning deficient job performance or physical or mental deficiencies on the part of county employees which might lead to a finding of "reasonable suspicion" upon which tests could be based. Therefore, we find the proposed blanket testing program to be unjustified at its inception, thus failing the first requirement for a search to be "reasonable" under the Fourth Amendment.

Furthermore, as stated above, the scope of a search, and the measures adopted, must be reasonably related to its objectives and not excessively intrusive. New Jersey v. T.L.O., 469 U.S. at 341, 105 S.Ct. at 744, 83 L.Ed.2d at 735. Therefore, if Rawlins County had objective facts indicating drug usage by certain employees, such might be "reasonable suspicion" for testing those employees. See Illionis v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). However, we feel that testing all county employees, based upon specific information related to a select few, would be beyond the permissible scope of such tests. Therefore, the proposed testing plan also fails the second requirement of a reasonable search under the Fourth Amendment.

In light of our above observations, we find the mandatory drug testing plan proposed by Rawlins County for all county employees to be an unreasonable search within the meaning of the Fourth Amendment. While the goal of having county employees free from drugs is legitimate, it is our opinion that the means selected by the county to achieve this goal violates the Fourth Amendment to the United States Constitution, as well as § 15 of the Bill of Rights of the Kansas Constitution.

A related question which you do not ask, but which we will address, is whether applicants for county employment may be subject to mandatory drug testing as part of the evaluation process itself. Since the point of the application process is for the prospective employer to learn facts pertinent to the applicant's ability to perform the job, it is our opinion that applicants are entitled to have relatively little overall expectation of privacy about the hiring process. At the same time, however, we recognize that applicants are entitled to an expectation that their private affairs and bodily integrity will not be searched for reasons unrelated to the needs of the job for which they have applied.

In our view, the county's interest in requiring a drug test for applicants turns on the link between drug abuse and job requirements. Because the county's interest is in ascertaining an applicant's fitness for a given job, wholesale drug testing of all applicants, without regard to job requirements, would violate the Fourth Amendment. However, we see no Fourth Amendment barrier to drug testing if it is in furtherance of a bona fide effort to learn whether an applicant is physically capable of performing the duties of a particular job. McDonnell v. Hunter, 612 F.Supp. at 1130 N.6. ("The Fourth Amendment . . . does not preclude taking a body fluid specimen as part of a pre-employment physical examination or as part of any routine periodic physical examination that may be required of employees . . . .")

In light of McDonnell, it is our opinion that if the physical requirements of a job are so demanding that employees are required to take either an entry physical examination or periodic physicals of which urinalysis is a routine diagnostic component, there is no Fourth Amendment barrier to testing the urine specimen for drugs. Id. In other words, if drug abuse would prevent the performance of the duties of the job or would present a danger to the public or to property, an applicant may be tested to ascertain that abuse. We note, however, that physical examinations of this kind cannot be used as a mere pretext to conduct otherwise improper drug testing.

This approach permits routine testing of all applicants for public safety jobs. In our view, given the potential consequences of drug-induced mistakes, the county has an especially strong interest in assuring that those who are responsible for maintaining the public safety are drug-free and able to think clearly. Accordingly, because of the

obvious link between avoidance of drug abuse and job requirements, we conclude that the Fourth Amendment balancing test permits the county to require drug testing of all applicants for public safety positions.

In regard to "public safety employees," it is impossible for us to delineate in the abstract all types of "public safety" jobs. The necessary line-drawing must be done by the employer after consideration of the particular circumstances involved. However, for purposes of this opinion, "public safety employees" include public employees who are authorized to carry firearms.

In summary, The Fourth Amendment to the United States Constitution gives people the right to be free from "unreasonable searches and seizures." Mandatory drug testing of county employees, without regard to job performance, would violate the Fourth Amendment prohibition against "unreasonable searches and seizures." However, the testing of such an employee is permissible if based upon "reasonable suspicion." Therefore, there is no constitutional bar to the testing of a county employee where circumstances give the employer a reasonable, objective basis to suspect illicit drug use by that employee.

Mandatory drug testing of applicants, without regard to job requirements, would violate the Fourth Amendment. However, testing of an applicant is permissible if it is in furtherance of a bona fide effort to learn whether an applicant is physically capable of performing the duties of a particular job. Accordingly, mandatory drug testing of all applicants for public safety positions is permissible.

Very truly yours,

Robert T. Stephan

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TESTIMONY TO
SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
Senate Bill 643
March 2, 1988

The Kansas State Troopers Association supports Governor Hayden's drug screening program addressed by Senate Bill 643.

Troopers are given a very high degree of public trust and we wish to assure Kansans that we are drug free as we attempt to decrease the flow of illegal drugs into and through our state.

If a drug test is requested of the officer, we would ask that the testing be performed by the officer's personal physician. This physician would then be requested to either work with the patrol doctor to determine if additional tests are needed or provide an acceptable rehabilitation program.

In the event of a test that indicates illegal drugs we would hope that a retest be required to determine the true nature of the drug to see if it is a prescription drug or truly an illegal substance.

Either case should be dealt with in a positive manner that is beneficial to the state and the employee.

Strict guidelines should be established either in the bill

Senate FSA
3/2/88
Attachment #5

itself or through agency policy to administer the original test, the retest and the treatment procedures to eliminate the problem.