City Attorney's Office
City of Burbank

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Memorandum

Date: March 29, 2006

To: Honorable Mayor and City Council Members

From: Juli C. Scott, Chief Assistant City Attorney

Subject: Drug Testing of City Council Members, Appointed, and other Elected Officials

Questions Presented

(1) Can the City legally require suspicionless *mandatory* drug and alcohol testing of City Council Members, Elected Officials and Appointed Officials?

Answer: No. The City cannot legally require drug and alcohol testing for elected or appointed officials. The City can (and does) require pre-employment drug testing for the appointed officials. Both the United States Supreme Court and the California Supreme Court have unequivocally determined that mandatory and suspicionless drug testing of elected officials constitutes an unwarranted invasion of privacy and an unreasonable search, in violation of the Fourth Amendment to the United States Constitution. Elected officials do not occupy high risk, safety sensitive positions, nor do they engage in law enforcement related activities such as direct drug interdiction efforts. As such, the courts have held there is no compelling governmental interest which would outweigh the Constitutional privacy and search protections.

(2) Can the City establish a drug and alcohol testing process for City Council Members to voluntarily participate in?

Answer: Yes. The City Council can establish a process for Council Members to voluntarily submit to drug and alcohol testing subject to certain restrictions set forth below. The City Council cannot *require* appointed and other elected officials to also submit to this process because of course then it would not be voluntary. The City Council could request that appointed and other elected officials volunteer to be tested, however, cannot attach any type of penalty or stigma should they

decline to do so. They cannot require the appointed or other elected officials to disclose the results of any test to them or any other person.

The City Cannot Require Suspicionless Post-Employment Drug and Alcohol Testing of City Employees

We begin our analysis by noting that from a legal perspective, drug testing of any type is considered by the highest courts in both California and the United States to constitute an invasion of the highly guarded privacy rights of the individual and by extension, the Fourth Amendment right to be free from unreasonable search and seizure. While we typically think of search and seizure issues in a criminal context, both the California Supreme Court and the United States Supreme Court have dealt at length *specifically* with the validity of mandatory drug testing under these very same Fourth Amendment standards.

Both privacy and search and seizure were addressed at length in the seminal California Supreme Court decision in *Loder v. Glendale* (1997) 14 Cal.4th 846 and two United States Supreme Court decisions, *Skinner v. Railway Labor Executives Assn.* (1989) 489 U.S.602 (*Skinner),* and *National Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656 (*Von Raab*). Both blood and urine testing are considered by the courts to intrude, without question, on an individual's right to privacy and to thus to constitute a "search" within the meaning of the Fourth Amendment. 'There are few activities in our society more personal or private than the passing of urine… It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.' [Citation.] *Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeal have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.*" (*Skinner, supra,* at p. 617, italics added.)

While the Fourth Amendment does not prohibit all searches, it does prohibit "unreasonable" searches and seizures. What is "unreasonable" is dependent on the circumstances surrounding the search and the nature of the search itself. The courts have tried to balance the intrusion into an individual's Fourth Amendment interests against the promotion of legitimate governmental interests. In the criminal context, the courts require probable cause and/or a warrant. In the drug testing context, the Courts have recognized two circumstances in which the governmental interest in testing outweighs the intrusion on privacy rights. One is where there is individualized suspicion -- where an employee exhibits signs of being under the influence of drugs and/or alcohol in the workplace. The second is where there is a compelling governmental interest which justifies the intrusion into the employees' privacy rights in the form of random, suspicionless drug testing.

While there are cases where the Courts have found that the compelling governmental interest exists for purposes of the drug testing, the job duties described in those cases typically involve significant public safety interests, e.g., operating heavy equipment, handling hazardous or nuclear materials, aviation

industry professionals, etc. and many law enforcement and national security type positions. The following is a list of the types of employment positions where the Courts have found justification for mandatory suspicionless drug testing: (1) *Intern. Broth. of Teamsters v. Dept. of Transp.* (9th Cir.1991) 932 F.2d 1292 (random testing of commercial drivers of vehicles in excess of 26,000 pounds, vehicles with 15 or more passengers, or drivers who transport hazardous materials); (2) *IBEW, Local 1245 v. Skinner* (9th Cir.1990) 913 F.2d 1454, 1456 (random drug testing of natural gas and hazardous liquid pipeline employees); (3) *Hartness v. Bush* (D.C.Cir.1990) 287 App.D.C. 61, 919 F.2d 170, 173 (random testing of government employees with "secret" national security clearances); (4) *Bluestein v. Skinner* (9th Cir.1990) 908 F.2d 451, 454-458 (random testing of aviation personnel); (5) *Taylor v. O'Grady* (7th Cir.1989) 888 F.2d 1189, 1199 (yearly random test of correctional officers who have contact with prisoners); (6) *American Federation of Gov. Employees v. Skinner* (D.C.Cir.1989) 280 App.D.C. 262, 885 F.2d 884, 889-893 (random testing of transportation employees in positions with direct impact on public health and safety); (7) *IBEW, Local 1245 v. U.S. NRC* (9th Cir.1992) 966 F.2d 521, 526 (random testing of nuclear power plant workers who have unescorted access to "protected areas" of nuclear facilities); (8) *National Treasury Employees Union v. Yeutter* (D.C.Cir.1990) 287 App.D.C. 28, 918 F.2d 968, 971-972 (random testing of Department of Agriculture employees operating motor vehicles carrying passengers); (9) *Thomson v. Marsh* (4th Cir.1989) 884 F.2d 113 (random testing of civilian employees of chemical weapons plant who have access to areas in which experiments are performed); (10) *Jones v. Jenkins* (D.C.Cir.1989) 279 App.D.C. 19, 878 F.2d 1476 (drivers of and attendants on school buses for handicapped children; testing was conducted as part of routine medical examination); (11) *National Federation of Federal Employees v. Cheney* (D.C.Cir.1989) 280 App.D.C. 164, 884 F.2d 603, 610, 613 (civilian employees within the army who were in critical positions, including air traffic controllers, pilots, aviation mechanics, flight attendants, civilian police and guards); (12)*Piroglu v. Coleman* (D.C.Cir.1994) 25 F.3d 1098, 1102-1104 (emergency medical technician trainees); (13) *Intern. Broth. of Teamsters v. Dept. of Transp.* (9th Cir.1991) 932 F.2d 1292 (commercial truckdrivers); (14) *IBEW, Local 1245 v. Skinner, supra,* 913 F.2d 1454 (natural gas pipeline workers); (15) *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (Students who participate in school athletic programs).

While the Courts have not created a hard line test, you will note that none of the cases listed above involve elected or appointed officials who are not directly involved in high risk public safety or national security-type issues. As set forth below, the U.S. Supreme Court specifically found that elected officials have no such high risk or safety sensitive responsibilities or duties and no corresponding compelling interest sufficient to allow mandatory drug testing of these officials.

Loder v. City of Glendale – Seminal California Supreme Court Case Upheld Pre-Employment Drug Testing of All City Employees

In all of these drug testing cases, the court have instructed that "for purposes of the Fourth Amendment's 'reasonableness' inquiry, the strength or importance of the governmental interest that is necessary to render a search reasonable generally will depend upon the relative intrusiveness of the governmental conduct on reasonable expectations of privacy: *The more the conduct intrudes upon reasonable expectations of privacy, the more important or compelling the governmental interest must be to render the intrusion reasonable."* *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 876.

The *Loder* Court upheld pre-employment testing "*administered in a reasonable fashion as part of a lawful pre-employment medical examination that is required of each job applicant.* The court rejected, however, the City's arguments in support of post-employment pre-promotional testing, that there was a compelling state interest in testing all government employees sufficient to overcome the privacy rights of the individual. The *Loder* court relied on the Supreme Court's *Von Raab* decision which contrasted the privacy expectation of general government employees with the privacy expectations of those employees in specific positions, such as the customs officers, who were involved in drug interdiction, carried firearms and had access to classified materials. The Supreme Court in *Von Raab* also noted that these customs officers were already subjected to intense background investigation, medical evaluations and other significant intrusions into their personal lives. *Von Raab* rejected random testing of the other government employees in the department.

The *Loder* court likewise specifically rejected the argument that the "operational realities of the workplace", including a legitimate interest in a drug-free workplace provided sufficient justification for the pre-promotional testing. (*Loder*, supra, at 882.) Under these clearly established legal standards, the City Manager and City Attorney cannot be subjected to mandatory post-employment drug testing.

Elected Officials Cannot Be Mandatorily Subjected To Drug and Alcohol Testing

The United States Supreme Court has also addressed and rejected the constitutionality of mandatory drug testing of elected officials, applying the same legal analysis as in *Skinner* and *Von Raab, supra*. In the case of *Chandler v. Miller* (1997) 520 U.S. 305, the U.S. Supreme Court tackled a Georgia statute requiring all candidates for elective office to present a certificate that they have submitted to a urinalysis test and that the results were negative. The Court walked through the privacy and Fourth Amendment standards previously established in *Skinner* and *Von Raab* cases.

First, they determined that the government-ordered collection and testing of urine was clearly a "search" under the Fourth Amendment. Then, the Court considered whether such a search would be considered "reasonable". The Court noted that

in order to be considered “reasonable” a search must normally be based on individualized suspicion of wrongdoing, except where there exist “special needs” beyond the normal need for law enforcement. Georgia’s argument was that those special needs did exist because of the very nature of high public office, which demands high levels of honesty, clear-sightedness, and clear-thinking; because of the incompatibility of unlawful drug use with holding high state office; and because use of illegal drugs draws into question an official’s judgment and integrity and undermines public confidence and trust in elected officials. While the Court recognized these goals as admirable, they rejected them as a basis to invade the individuals’ privacy and Fourth Amendment rights.

The Court said that the “special need” for drug testing “…must be substantial-important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicions.” (*Chandler, supra,* at 318.) The Court also noted that there was no evidence in the record demonstrating a problem of drug abuse by elected officials. The Court cautioned that while a demonstrated problem of drug abuse is not always necessary to the validity of a testing program (for example the customs officers’ program addressed in the *Skinner* case), in some circumstances, real evidence of drug abuse, when looked at in conjunction with the precise hazards posed by drug use on the job, may help to establish the “special need”. In the two cases in which the Court incorporated evidence of drug abuse into their analysis, one involved testing of railroad employees after an accident – the DOT presented evidence of a direct correlation between drug use and an increase in accidents—and the other involved testing of student athletes – again there was substantial evidence in the record of a sharp rise in students’ use of illegal drugs.

No such evidence of drug abuse by elected officials exists in Burbank. The prosecution of one former councilmember for the *possession* of illegal drugs in her home does not provide the requisite evidence to pass the Supreme Court’s “special need” test. While the circumstances may cause some to question the council member’s judgment regarding personal matters, there is an insufficient evidentiary nexus that her judgments as an elected official were also compromised or influenced by drug *use*. Further, random testing for drugs in an official’s system would not detect whether or not the official was in possession of drugs in their home. The Supreme Court also noted, in rejecting the “special need” for Georgia elected officials to be tested, that ordinary law enforcement methods would suffice to apprehend an elected official who appeared in his or her official capacity under the influence of alcohol or drugs. That same analysis would clearly apply here in Burbank.

The Court noted finally that the elected officials do not perform high risk safety-sensitive tasks and are not directly involved in drug interdiction (as customs officers are). The court stated that the need protected by mandatory drug testing of elected officials was therefore “symbolic” rather than “special”, as required by

case law. The Court acknowledged that the testing mandate was well meaning however, as it diminished personal privacy “for a symbol’s sake”, it was prohibited by the Fourth Amendment. The Court concluded that the Georgia statute was unconstitutional, because where "public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search…” *Id at 323..* [1]

Conclusion

As set forth herein, the law is clear that the City cannot adopt a mandatory drug and alcohol testing program for City Council Members, appointed and other elected officials. City Council Members can, however, volunteer to submit to drug testing. On the basis of the California and Supreme Court’s analysis, we have determined that as long as Council Members volunteer to take the test, volunteer to publicly disclose that they were (or were not) tested and volunteer to publicly disclose the test results, no privacy rights or Fourth Amendment violations would be implicated. It is a fundamental premise of Fourth Amendment jurisprudence that consent to search may be given and if freely given without coercion, the search will be deemed reasonable under the Fourth Amendment, see *Schneckloth v. Bustamonte* (1973) 412 U.S. 218.

The appointed and other elected officials could volunteer to be tested, however, if they did not, they could not be subjected to any discipline or other negative performance rating or other job-related stigma. Further, unless they agree to waive their privacy rights the fact that they either agreed or refused to be tested and any test results could not be publicly disclosed.

[1] In 1998, following the Supreme Court’s *Chandler* decision, a federal district court in Louisiana struck down a Louisiana statute mandating random drug testing for elected officials on the same grounds as stated in the *Chandler* decision. *O'Neill v. Louisiana* 61 F.Supp.2d 485, 496 (E.D.La.,1998)