Firehouse Lawyer

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Inside This Issue

Random Drug Testing: Constitutional… Or Not?

Although random drug testing for firefighters has never reached the U.S. Supreme Court, recent state court decisions do provide some insight into the constitutionality of random drug testing in the fire service. This article does not deal generally with drug testing programs commonly used in Washington and other states, wherein a drug test is only given when reasonable suspicion exists that drug use may be occurring. Our focus in this article is only on random drug testing, which is uncommon but not unprecedented in Washington, as I am aware of one fire department (a client of mine) that employs this practice.

Alaska's highest court recently held that a random drug testing policy was unconstitutional as applied to firefighters. The court upheld the other portions of the program, where drug testing was required upon initial application for employment, for promotion, demotion or transfer, and also after an accident. It should be noted that, in Alaska, the constitution creates a "right to privacy", which is not expressly contained in the federal constitution, but has been judicially created. The Alaska Supreme Court stated that this express privacy right creates a stronger protection in that state against unreasonable search and seizure.

The Alaska Court cited U.S. Supreme Court cases to support its analysis. In particular, the Alaska Court noted that in prior U.S. Supreme Court cases, that Court stressed the importance of a documented history of substance abuse to show a "special need" for random drug tests.

Very recently, the U.S. Supreme Court declined to review the Arizona Supreme Court decision in *Petersen v. City of Mesa*, No. CV-03-0100-PR (2004), in which that state's highest court struck down the city's random drug testing program for its firefighters. Unlike the Alaska case, the Arizona Court relied solely on the federal constitution. The city's program included one component allowing for drug tests "on an unannounced and random basis spread reasonably throughout the calendar year." Those to be tested are selected randomly by a computer. One of the stated purposes of the program is to deter drug and alcohol use.

The Arizona Court of Appeals upheld the program's random searches, stating that the City had a "compelling need" to discover specific but hidden conditions representing grave risks to the health and safety of the firefighters and the public, and that this need outweighed the privacy interests of the firefighter. The Arizona Supreme Court reversed, holding the search (a urinalysis is considered a search) was unreasonable under the Fourth Amendment to the U.S. Constitution.

The Court stressed that ordinarily searches, to be constitutional, must be based on some "individualized suspicion" of a person's behavior, but recognized that the U.S. Supreme Court had allowed some exceptions when "special needs" called for that. The analysis the High Court uses involves weighing privacy rights against the proffered governmental interest to see how compelling that might be. In the Mesa case, the City argued that these are safety-sensitive positions. However, the Court asked, "Has the City identified a real and substantial risk?" If so, will the proposed program further the City's interest in deterrence? Based upon our review of the Mesa decision, this is where the City fell short of satisfying the Court—the record was woefully inadequate. The Arizona Supreme Court said the record provided "little information" about the City's reasons for the program and "no evidence" at all to explain the need to conduct such testing, stating:

> "As the City conceded at oral argument, the record is devoid of any indication that the City has ever encountered any problem involving drug use by its firefighters. The record lacks not only evidence of even a single instance of drug use among the firefighters to be tested but also any evidence of accidents, fatalities, injuries, or property damage that can be attributed to drug or alcohol use by the City's firefighters. No evidence of record suggests that the firefighters asked for or consented to the testing policy, and the record includes not even an allegation or rumor that the City's firefighters used or abused drugs or alcohol."

Given that factual backdrop, it is no wonder that the Court found no real or substantial risk of a threat to public safety from drug or alcohol abuse by the City's firefighters. After that discussion, there was little need for the Court to explore the corollary questions, such as whether the program was effective to accomplish its purpose or whether the program was "calibrated" to deal with the nature or degree of the problem. In short, there was no problem demonstrated, as far as the Court could tell.

This Arizona Supreme Court decision, and the U.S. Supreme Court's apparent satisfaction with it (by not granting certiorari) can be quite instructive to those fire departments and local governments contemplating adoption of random drug testing, or those who already have such programs in place. A random drug testing program, including suspicionless testing, needs to be justified with a written description of its intent or purpose. In other words, what is the department trying to accomplish with this aspect of the program? More importantly, absent some factual support showing the need for such a program, it may not be upheld. Therefore, any disciplinary matter involving abuse of drugs or alcohol (on or off duty) needs to be well documented. Because a department should have in place a detailed accident prevention program, including a safety committee and post-accident review board, all on-the-job accidents and injuries should be thoroughly investigated. If drugs or alcohol are found to be involved, that should be documented in the records of the Safety Officer.

If your department already has a drug testing program of any kind (even without random drug testing) any positive drug or alcohol test results should also be placed into the files to support your case that a random drug testing program is justified. Although it may be uncommon that firefighters would ask for a random drug testing program, wellness and safety efforts in recent years have made it clear to many that a firefighter may be seriously endangered if his/her co-workers are impaired, especially when immediately working in hazardous conditions. However, if there is a collective bargaining agreement in place, which contains a bargained-for clause providing for random drug testing, that would probably be considered highly relevant to show consent to the program. After all, labor precedents would suggest that other concessions were made by the employer to achieve that knowing and voluntary consent.

In summary, there should be detailed documentation to support the need for such a program, and we cannot assume that these recent decisions mean that such programs are unconstitutional per se. Quite the contrary. A case can be made that, with an adequate record of drug issues in that workplace, a fire department might well prevail at the U.S. Supreme Court in such a case. We submit that it would not be difficult to convince that Court that firefighting is a dangerous occupation, which frequently involves life-threatening exposure to heavy equipment and other hazardous conditions. It is not unlike other safety-sensitive occupations wherein such testing programs have been upheld.

One fire commissioner I know has suggested that a state-wide survey be done, to ascertain whether there is a real and substantial problem with drug or alcohol abuse among firefighters. The survey may also ask what accidents have occurred that might have been affected by such factors. It seems to me this is a good idea: find out first if there is a problem, and deal with it, but only if it is real, not theoretical. Since drug abuse is not insignificant in the general population in this nation, one might surmise that some percentage of personnel employed in the fire service must be abusers. However, the courts require actual evidence—surmise, rumor or conjecture is not enough to outweigh the right to privacy or the Fourth Amendment protection against unreasonable searches.

RECENT LEGISLATIVE CHANGES:

In a past issue, we discussed some bills in the Washington Legislature of special interest to the fire service. Now, we can update that, because the session is over and some of those bills have now become law or reached the Governor's desk. Here is an update on some of those bills and a few more we may not have discussed before.

SB 5135: This law increases the volunteer firefighter disability payment from $10 to $30 per year, and also clarifies when a person can collect both a volunteer FF pension and another pension (such as PERS) as well—only when no service credit is being received under both systems. No double dipping.

SB 5136/HB1106: This law provides protection from prorationing under RCW 84.52.010 for 25 cents of a fire district's levy capacity, levied under RCW 52.16.140 or 52.16.160 (the second or third fifty cents). Essentially, the statute places that 25 cent increment "outside" of the $5.90 limitation.

SHB 1756: We talked about this bill in the March issue. It establishes a sort of "local standards" rule for levels of service and response times, and also requires annual reporting, to assess achievement of the stated objectives.

SHB 1758: This law would "overrule" the recent *Hangartner* decision, such that a records request cannot be rejected because it is overly broad. Each fire district must appoint a contact person for records requests. By February 1, 2006 the AG must adopt a model rule on such issues.

HB 1000: Special meeting notices may now be sent by e-mail or fax.

SB 5615: Increases disability coverage and payments for LEOFF 2 firefighters who are totally disabled in on duty injury situations.

PUBLIC DISCLOSURE LAW – RCW 42.17.130

In Washington, as many of you know, public funds should not ordinarily be used to support a ballot measure or a candidacy. However, the first exception to the above statute allows members of an elected legislative body to express a collective decision or actually vote on a motion or resolution, expressing their support (or opposition) to a ballot measure as long as two conditions are met. Those two conditions are that (1) the meeting notice must include the title and number of the ballot proposition and (2) equal time for expression of an opposing view is allowed. Many of my fire district clients have used this exception to adopt a resolution expressing support, for example, for their own upcoming EMS levy, lid lift, or other ballot measure.

Now an Attorney General Opinion says that fire districts cannot use this exception, opining that only general local governments such as cities and counties can do so. His opinion, which I think is of questionable validity, is that in this particular statute "legislative body" should be construed to mean only those bodies which pass laws of general application. Since special purpose districts do not have the police power or full powers under Article XI, Section 11 of the State Constitution, he concludes they are not "legislative bodies", even though that term or definition has been applied to elected boards like these for virtually all other purposes. My reasoning is that they pass laws (resolutions are positive laws like statutes) and therefore they are legislative bodies. One could argue that burning permit regulations, applicable to regulate open burning in the district (in at least a few cases) are actually general laws. But I think it is basically wrong to say that "legislative body" means one thing in one statute and something else in a different statute. The common, ordinary meaning of "legislative" should be retained. Basically, that is why such boards have to comply with the Open Public Meetings Act, and several other laws that apply to legislative bodies.

In any event, the PDC will follow or enforce this AGO, so it would be a good idea for now to refrain from passing such supportive resolutions. The AGO admits that there are other exceptions in the law, such as the one allowing expenditures if there is a "normal and regular" practice of the agency. What if your district has made it their normal and regular practice for several years to pass such resolutions of support and then publish the resolution in the regular quarterly newsletter? Would that not qualify under that exception? I think so, but there is a definite risk now.

If anyone would like copies of this April 4, 2005 AGO please let me know. I also have a copy of the PDC "Guidelines for Use of Public Facilities in Election Campaigns" dated April 30, 2005.

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I just wanted to say a few supportive words about our advertisers, so that those not acquainted with them can get to know them a bit more.

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I have worked with Don Owen twice now, and have found him to be very expert in analyzing construction problems like change orders and liquidated damages. As a project manager, he has seen the issues from both sides—representing the contractor and the owner. When your construction project goes even a little sideways, you might consider contacting Don, who has much experience.

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