

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

AMERICAN FEDERATION OF TEACHERS, *et al.*,

Petitioners,

and

WEST VIRGINIA EDUCATION ASSOCIATION;
and DALE LEE, its President; on behalf of its
members and similarly situated individuals,

Petitioner-Intervenors,

v.

Civil Action No. 08-MISC-421

KANAWHA COUNTY BOARD OF EDUCATION;
KANAWHA COUNTY SCHOOLS; and RONALD
DUERRING, Superintendent,

Respondents.

MEMORANDUM OF PETITIONER-INTERVENORS IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

For the past 160 years, Kanawha County has safely managed its public schools without subjecting its school personnel to suspicionless searches of their bodily fluids.¹ However, starting January 1, 2009, the Kanawha County Board of Education seeks to compel and analyze its employees' urine without any suspicion that these dedicated public servants have engaged in any wrongdoing. Petitioners, a membership organization of public-school employees and its President, respectfully request that this Court enjoin the implementation of Respondents' policy providing for these unlawful, dragnet searches.

Respondents' random and suspicionless drug-testing policy involves no ordinary search. Rather, Respondents will compel and analyze the bodily fluids of their teachers and other employees—revealing their employees' medical conditions and effectively peering into their medicine cabinets—without any suspicion that the employees are using drugs. Such compulsion of bodily fluids is unreasonable and degrades these dedicated public servants. In light of the imminent and serious privacy invasions the suspicionless drug-testing policy will inflict on school employees, combined with Kanawha County's 160-year history of successfully operating its public schools without imposing random drug testing of most of its employees, this Court should enjoin implementation of the unlawful program until final adjudication of this case.

FACTS

Respondents currently implement a modest and unchallenged drug-testing policy. They drug test their employees whose work performance they suspect has been affected

¹ In 1847 Kanawha County adopted an act establishing "free schools." State Superintendent of Free Schools, *History of Education in West Virginia* 209 (1904).

by the use of illegal drugs or alcohol. Compl., Exh. A, pp. 5-6 (“For Cause Testing”). Furthermore, they conduct suspicionless drug testing of successful job applicants as part of a “post-offer, pre-employment physical,” Compl. Exh. A, p.4 (“Pre-Employment Substance Testing”), as well as a narrow group of employees who are classified as “safety sensitive”: anyone who operates dangerous machinery or county-owned vehicles, who regularly drives his or her own vehicle on school business, or who administers medication to students as part of his or her job responsibilities, Compl. Exh. A, pp. 3-4.

Starting January 1, 2009, however, Respondents will significantly expand the definition of “safety sensitive,” subjecting nearly all school employees to suspicionless testing of their bodily fluids. Without explanation, Respondents have added 43 more job classifications to the list of “safety sensitive,” including clearly non-safety-sensitive positions such as Administrative Assistant, Cook, Counselor, Teacher, Locksmith, and Warehouse Clerk. Compl. Exh. B, pp. 3-4. Under this policy, more than 3,000 Kanawha County school employees who have never used drugs—and who have never been suspected of using drugs—may be required to produce their urine for inspection and analysis.

School employees selected for random and suspicionless drug tests will have their urine analyzed through a two-step process. Their urine first will be “screened,” and second, if the screen reports a “positive finding,” will be analyzed through a mass spectrometry and gas chromatography (“MS/GC”) test. Compl. Exh. C, p. 2. These tests do not detect current drug impairment because both the screening test and the confirmation MS/GC test do not detect drugs, but rather metabolites, or byproducts, of drugs. Declar. of Lewis L. Maltby ¶ 6. Furthermore, because the screening test is non-specific, it fails to distinguish between metabolites for controlled substances and legal

substances—often reporting a “positive result” for, say, an illegal opiate when the metabolite was actually for a legally used prescription medication. *Id.* at ¶ 7. For this reason, drug-tested individuals are often required to disclose their prescriptions and medical conditions when they hand over their urine for inspection. *Id.*

In response to this troubling new policy, West Virginia Education Association, along with its President, filed the instant lawsuit on behalf of their school-employee members who will be subject to suspicionless searches of their bodily fluids. Petitioners seek declaratory relief and a permanent injunction to stem these suspicionless, unlawful searches of its members. They now respectfully move for preliminary relief to enjoin the implementation of Respondents’ unlawful search policy.

Petitioners’ members currently face the imminent threat of being forced to hand over their urine to the government for inspection, even though they are not suspected of wrongdoing. These teachers and other school employees are dedicated and dutiful public servants who pose no safety threat whatsoever. They have nothing to hide, but want their privacy respected.

ARGUMENT

The balance of equities militates in favor of temporarily enjoining Respondents’ unlawful and invasive suspicionless drug-testing policy. This Court considers four factors when determining whether to issue a preliminary injunction: “(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff’s likelihood of success on the merits; and (4) the public interest.” *Camden-Clark Memorial Hosp. Corp. v. Turner*, 212 W. Va. 752, 756 (2002). While Petitioners need not satisfy each of these factors in order for an

injunction to issue, *see id.* (noting that courts assess these factors in “flexible interplay”), their claim in fact clears all of these equitable considerations.

I. PETITIONERS’ MEMBERS WOULD SUFFER IRREPERABLE HARM BY THE COMPULSION AND INSPECTION OF THEIR BODILY FLUIDS.

If a preliminary injunction does not issue, the school employees’ injury is irreparable and painfully clear. Privacy violations, much like First Amendment violations, are irreparable injuries. *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). Once an “infringement has occurred,” as the U.S. Court of Appeals for the Fifth Circuit has held, “it cannot be undone by monetary relief.” *Id.*

The inspection and analysis of one’s bodily fluids is a serious infringement of privacy. It can inform the State about a teacher’s most sensitive medical information, such as whether she has certain diseases, takes prescription medication, or is pregnant. *See Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 617 (1989) (“[C]hemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic.”); *see also* Maltby Decl., ¶ 7 (stating that individuals subjected to a drug test are often required to provide their valid prescriptions to explain a “positive” test result). As the federal district court for the District of Columbia noted: “[C]ompulsory urinalysis . . . can provide Government officials with a periscope through which they can peer into an individual’s private life,” highlighting the legal use of prescribed medications and exposing the “intimate details of [an] illness or illnesses.” *Bangert v. Hodel*, 705 F. Supp. 643, 649 (D. D.C. 1989). Of course, once the State learns of this sensitive information, it cannot be “unlearned”; the harm is serious and cannot be undone.

II. RESPONDENTS WILL NOT SUFFER ANY HARM IF ITS UNLAWFUL POLICY IS PRELIMINARILY ENJOINED.

In stark contrast to the imminent privacy incursions that school employees stand to suffer if the suspicionless search policy is implemented, preliminarily enjoining the policy would not harm Respondents. Respondents have been successfully and safely educating their students for approximately 160 years without subjecting their employees to suspicionless drug testing; enjoining the random drug-testing policy until this case concludes would not impose a serious hardship on Respondents.

The lack of harm to Respondents from the issuance of a preliminary injunction is all the more obvious when one considers that education employees are among the least likely workers to use illegal drugs. Maltby Decl., ¶ 9. School employees typically use drugs at even lower rates than computer scientists, managers, healthcare practitioners, and lawyers. *Id.* With 160 years of experience educating Kanawha County's schoolchildren without conducting suspicionless searches of these employees, Respondents will not suffer if this search policy is enjoined for a relatively short period of time.

III. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE BINDING PRECEDENT HOLDS THAT RANDOM AND SUSPICIONLESS DRUG TESTING VIOLATES WEST VIRGINIA PUBLIC POLICY.

Random and suspicionless employee drug testing is presumptively unlawful as a matter of public policy in West Virginia. *Twigg v. Hercules Corp.*, 185 W. Va. 155, 158 (1990). The only exception is for employees who occupy safety-sensitive positions. *Id.*; *see also id.* at 159 (providing that the employer bears the burden of establishing that its employees are safety sensitive). While West Virginia case law does not flesh out the

contours of “safety sensitive,” federal case law makes clear that teachers and other school employees are not safety sensitive for purposes of deviating from the general prohibition on suspicionless searches.

Under federal law, safety-sensitive employees are “positioned to cause great human loss before any signs of impairment become noticeable to supervisors.” *Chandler v. Miller*, 520 U.S. 305, 315 (1997) (quoting *Skinner*, 489 U.S. at 628). The classic example is a nuclear power plant operator, who could create a catastrophe by misperformance on the job. See *IBEW, Local 1245 v. U.S. Nuclear Regulatory Comm’n*, 966 F.2d 521 (9th Cir. 1992) (upholding random drug testing of nuclear power plant operators). Likewise, operators of natural gas and liquefied natural gas pipelines, *IBEW, Local 1245 v. Skinner*, 913 F.2d 1454 (9th Cir. 1990), truck drivers who transport hazardous materials, *Int’l Bhd. of Teamsters v. Dep’t of Transp.*, 932 F.2d 1292 (9th Cir. 1991), and railroad operators are all safety sensitive, *Skinner*, 489 U.S. 602. For these employees, a drug-induced work error could lead to “extremely lethal” consequences. *Thompson v. Marsh*, 884 F.2d 113, 115 (4th Cir. 1989) (upholding random drug testing of employees of chemical weapons plant, who worked with blister, blood, and nerve agents).

While teachers are vital public servants, the public-health consequences of their job are not as catastrophic as those of nuclear power plant operators. Unsurprisingly, the vast majority of courts that have considered the issue have held that teachers may not be drug tested without suspicion of wrongdoing. See *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853 (5th Cir. 1998) (holding that suspicionless drug testing of teachers is unconstitutional); *Ga. Ass’n of Educators v. Harris*, 749 F. Supp.

1110 (N.D. Ga. 1990) (same); *Bangert v. Hodel*, 705 F. Supp. 643 (D.D.C. 1989) (holding that federal public-school teachers cannot be randomly drug tested); *In re Patchogue-Medford Congress of Teachers v. Bd. of Educ.*, 505 N.Y.S. 2d 888 (App. Div. 1986); *see also Baron v. City of Hollywood*, 93 F. Supp. 2d 1337 (S.D. Fla. 2000) (striking down city’s policy of randomly drug testing all of its employees, including teachers).²

While the government may have the requisite extraordinary need to randomly drug test airline pilots or workers in a chemical-weapons plant, Boeing 757 aircraft and nerve gas are in a different league from erasers and chalk. Petitioners are therefore likely to prevail on their claim that the forced production and inspection of school employees’ urine is unlawful.

IV. THE PUBLIC INTEREST IS SERVED BY SAFEGUARDING PRIVACY RIGHTS AND EFFECTUATING THE PUBLIC POLICY OF THE STATE.

Preliminarily enjoining Respondents’ suspicionless search policy will advance the public interest by safeguarding public servants’ privacy rights and, as announced in *Twigg*, effectuating the public policy of the State. Where a policy threatens fundamental rights, a preliminary injunction per se serves the public interest. *See, e.g., Newsom ex rel. Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (“Surely,

² Petitioners presume that Respondents will erroneously rely on *Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361 (6th Cir. 1998), and *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), both of which are inapposite. *Knox County* assessed only *pre-employment* drug testing, 158 F.3d at 363, an aspect of Respondents’ drug-testing program that Petitioners do not challenge because pre-employment job applicants have lower expectations of privacy than known, trusted veteran employees, *see Baughman v. Wal-Mart Stores, Inc.*, 215 W. Va. 45 (2003). *Jones* is equally distinguishable because it considered a constitutional challenge to a random drug-testing program by bus attendants, 60% of whom used drugs in that particular school district and whose job responsibilities consisted of physically carrying disabled children on and off a bus. 833 F.2d at 336-37.

upholding constitutional rights serves the public interest.”); *WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 512 F. Supp. 2d 424, 447 (S.D. W.Va. 2007) (same). Ensuring school employees’ privacy is imperative. It cannot be in the public interest to require that public-school employees surrender their right to privacy—giving up their freedom from suspicionless searches—as a consequence of their public service.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their motion and preliminarily enjoin Respondents’ suspicionless and random drug-testing policy until final adjudication of this matter.

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