



February 25, 2010

**AMERICAN CIVIL  
LIBERTIES UNION OF  
ALASKA**

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The Honorable Wes Keller  
Co-Chairs, House Health & Social Services Committee  
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Via email: [Representative Bob Herron@legis.state.ak.us](mailto:Representative_Bob_Herron@legis.state.ak.us) &  
[Representative Wes Keller@legis.state.ak.us](mailto:Representative_Wes_Keller@legis.state.ak.us)

**Re: House Bill 259**  
**Constitutional Issues**

Chairmen Herron & Keller:

Thank you for the opportunity to submit written testimony regarding House Bill 259. As you know, the American Civil Liberties Union of Alaska (“ACLU) represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. From that perspective, we have several concerns with the proposed legislation, House Bill 259.

**Receipt of Cash Assistance Does Not Allow Unreasonable Search**

CS for House Bill No. 259 improperly conditions the receipt of cash assistance upon submission to testing for use of alcohol or illegal drugs. The testing scheme proposed in the bill would constitute an impermissible search. *Anchorage Police Department Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001), police department’s drug screening policy “unquestionably requires employees to submit to ‘searches.’”

As a search, the testing for alcohol or drugs must be “reasonable.” The touchstone for reasonableness is pre-approval by a court in the form of a warrant. Alternatively, reasonableness may be based on “special needs,” balancing the government’s interest on one hand versus the burden placed on the constitutional rights of the individual.

Here, the State’s need to prevent drug use among cash assistance recipients would not be more compelling than its interest in preventing drug abuse among the general population. Welfare recipients do not perform a special position of public trust, such as the customs agents in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1972), nor are they closely related to public safety, as the railway workers in *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602 (1989). Neither have welfare recipients knowingly sacrificed some of their privacy, nor does the state bear them a special *parens patriae* responsibility, as the schoolchildren in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

“The touchstone of a compelling state interest, then, is simply that ‘[the] right [to privacy] must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare.’” *Anchorage Police Department Employees Association*, 24 P.3d at 555. Recipients of cash assistance are not uniquely positioned relative to the health, safety, rights, or privileges of others, nor are largely undifferentiated from the general population in that respect, such that their privacy interests must yield.

### **Testing Standards in Employment Context**

Most drug testing cases take place against the background of employment. An employee who does not wish to participate in an employment-based drug testing program has the right to avoid the program by quitting his or her job. Drug testing is proposed in most of these cases as a “condition” of employment (or in *Vernonia*, of participation in school extracurricular activities). We know of no case, at the federal or state level, that has endorsed a program of compulsory drug testing for a category of citizens such as “those receiving cash assistance.”

Generally, regulations and statutes mandating drug testing of public employees have been approved by federal courts in unique circumstances, such as after traffic accidents, or for employees in tightly regulated industries or positions of great public trust. The federal courts have also approved drug testing requirements for public school students participating in extracurricular activities. However, the interest of the state must be “substantial” and must be based in either an obvious risk or a pattern of substance abuse problems. *Chandler v. Miller*, 520 U.S. 305, 318 (U.S. 1997).

In Alaska, the courts have taken a narrower view of the constitutionality of testing. In *Anchorage Police Department Employees Association*, the court approved drug testing at particular times – for instance, prior to a promotion or after a traffic accident – but prohibited the use of random drug testing for officers.

The Alaska decision in *Anchorage Police Department Employees Association* shows the manifest unconstitutionality of the proposed legislation. The Alaska Supreme Court found that police and firefighters in fact “undeniably hold safety-sensitive positions in extensively regulated fields of activity where they ‘discharge duties fraught with risks of injury to others that even a momentary lapse of attention can have disastrous consequences.’” *Id.* at 555.

Despite finding that the firefighters and police officer plaintiffs fit the heavily-regulated standard justifying the strongest special needs analysis, the court *still* found that random drug testing lacked sufficient justification, because of the added invasion of privacy of the randomness of the screenings, the subjective fear or disruption caused by an unplanned, unannounced drug test, and the diminished state interest in unprompted drug testing. *Id.* If the municipality of Anchorage had an insufficient state interest in invading the privacy of its employees who drive government vehicles, carry government-issued firearms, and are charged with protecting the safety of citizens of the municipality to justify a random drug testing regime, the state of Alaska likewise has an insufficient interest in invading the privacy of cash assistance recipients not engaged in any of these sensitive, safety related activities.

### **Alternatives to Testing**

In addition to the consideration of the constitutional rights of cash assistance recipients, the constitutionality of the state’s proposed practice depends in part upon the alternatives available to vindicate its interest. Here, a simple alternative would be for the state to dedicate more resources to the treatment of substance abuse in the community. Under this alternative, cash assistance recipients who require treatment could obtain it whenever needed. This plan would better vindicate the state’s interests.

Under the scheme proposed in HB 259, recipients would be denied assistance but remain in the community, and remain addicted to drugs or alcohol. In all likelihood, the untreated addicts in our community would create more need for public services. Consider the serious problems around the state with homelessness. In Anchorage, the Municipality pays millions of dollars a year to address emergency medical and police calls for the homeless, many of whom must live in the parks and shelters and subsist by panhandling and through charities. More costs are imposed on the public in the hospital services for these individuals. Similar problems are seen in Fairbanks, Juneau, and Nome. Denying assistance to those suffering from addiction problems will not increase sobriety nor create actual public savings.

### **Conclusion**

While the ACLU of Alaska takes very seriously the issue of substance abuse, and supports public policy proposals to provide treatment, given that HB 259 would be found unconstitutional and that it would not be effective in reducing the burdens of substance abuse placed on the state, we urge the Committee to appropriately revise or vote against the Bill.

Thank you again for the opportunity to share our concerns. And please feel free to contact the undersigned should you require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "J. A. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman  
*Executive Director*  
ACLU of Alaska

cc: Representative Tammie Wilson, Vice Chair,  
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