EXHIBIT 1 09-331

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
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May 30, 2007

The Honorable Martin Frantz
Wayne County Prosecuting Attorney
115 West Liberty Street
Wooster, Ohio 44691

Re: 2007OPR003
Drug or Alcohol Testing of County Employees and Job Applicants

Dear Prosecutor Frantz:

You have requested an opinion concerning the institution of drug/alcohol testing by various county appointing authorities of their employees. Your specific questions are as follows:

1. Can county level public entities conduct suspicionless pre-employment drug/and or alcohol testing as a condition of employment?

2. If pre-employment drug testing is permissible under R.C. [Chapter 124], can it be sought from employees who will not be employed in "safety sensitive" positions?

3. Based upon current Ohio case law, which positions are currently regarded as safety sensitive?

4. Where drug testing is conducted for other than diagnostic reasons (such as pre-employment testing), are the results a "public record" under R.C. 149.43, as interpreted in *State ex rel. Multimedia v. Snowden*, 72 Ohio St. 3d 141?

5. Is a "report" of drug or alcohol use by a public employee to be considered a "public record," if it is committed to writing or e-mail (as where one employee reports alleged drug abuse by another employee?)

6. Can a county public employer ever conduct "suspicionless" testing of employees in non-safety sensitive positions? If so, under what circumstances?

7. As for post-accident testing, is reasonable suspicion met where there is merely speculation that a worker "may" have caused or contributed to an on the job accident?

8. Under R.C. [Chapter 4117], could a public employee union, by collective bargaining agreement, waive the due process rights of bargaining unit employees; and agree to random drug testing for non-safety sensitive positions?

As you indicated in your opinion request, there are numerous United States Supreme Court cases, as well as cases decided in varying ways by different United States Circuit Courts, that have addressed different aspects of governmental actors conducting drug or alcohol testing of individuals, including employees. In addition, there are a variety of Ohio Supreme Court cases that must also be considered when addressing various aspects of governmental entities conducting such tests, whether pre-employment or during employment. Because the United States Supreme Court has not addressed the constitutionality of numerous aspects of such alcohol or drug testing programs, and because the circumstances and manner in which such programs are implemented may affect the determination of the permissibility of any such program, *see generally, e.g.*, *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991), it is not possible within the scope of an opinion of the Attorney General to provide definitive answers to all of your questions. Consequently, we are providing you the following informal guidance.

You have informed us that your concerns about the county's possible implementation of a drug-testing program for current and potential county employees arises from the county commissioners' desire to qualify for lower premium rates from the Bureau of Workers' Compensation (BWC) through participation in the Bureau's drug-free workplace discount program (DFWP), 10A Ohio Admin. Code 4123-17-58. Because it appears that county appointing authorities do not have authority to comply with the requirements for the county's participation in the Bureau's DFWP, it is not necessary to address each of the concerns presented by your specific questions.

We begin with a brief discussion of the manner in which a county participates in the workers' compensation program.[1] In accordance with R.C. 4123.38, each public employer,

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[1] The state's workers' compensation scheme was enacted pursuant to Ohio Const. art. II, § 35, which states, in part:

> For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to

including a county, has a duty to contribute to the public insurance fund an amount determined by the Administrator of Workers' Compensation under R.C. 4123.39, which states, in pertinent part:

> The administrator of workers' compensation shall determine the amount of money to be contributed under [R.C. 4123.38] by the state itself and each county and each taxing district within each county. In fixing the amount of contribution to be made by the county, for such county and for the taxing districts therein, the administrator shall classify counties and other taxing districts into such groups as will equitably determine the contributions in accordance with the relative degree of hazard, and also merit rate such individual counties, taxing districts, or groups of taxing districts in accordance with their individual accident experience so as ultimately to provide for each taxing subdivision contributing an amount sufficient to meet its individual obligations and to maintain a solvent public insurance fund.

The BWC offers various methods for employers to reduce the amount of their BWC premiums. Your concern is with the Drug-Free Workplace Policy, which is "the bureau's rate program which offers a premium discount to eligible employers for implementing a program addressing workplace use and abuse of alcohol and other drugs, including prescription, over-the-counter, and illegal drug abuse." Rule 4123-17-58(A)(1). *See generally* rule 4123-17-58 (stating, in part, "[p]ursuant to [R.C. 4123.34(E)], the administrator may grant a discount on premium rates to an eligible employer that meets the drug-free workplace (DFWP) program requirements under the provisions of this rule").

In order to participate in the Bureau's DFWP, an employer must meet various eligibility requirements and implement a policy that includes all the components prescribed by rule 4123-17-58, in part, as follows:

> (C) Eligibility Requirements.
>
> The DFWP program under this rule is available in the form of technical assistance and support to all private and public employers. However, *eligibility*

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be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.

for the discount is limited to state fund employers,[2] with the per cent of discount based on an employer's participation in one or more alternate rating programs. . . .

. . . .

(E) Program requirements – all program levels.

To receive a discount for implementing and operating a DFWP program, *an employer shall fully implement, at a minimum, the following program components* by the applicable dates.

. . . .

(4) Drug and alcohol testing – The DFWP program shall include drug and alcohol testing which, at a minimum, shall consist of a five-panel drug screen with gas chromatography/mass spectrometry (GC/MS) and alcohol testing consistent with federal standards. The employer shall implement and pay for drug and alcohol testing as follows, with the stipulation that all categories of testing shall be clearly described and defined in the employer's written policy.

(a) *Pre-employment/new-hire testing: at one hundred per cent* (drug test required), with testing to be conducted before or within the first ninety days of employment;

(b) Post-accident: *All employees who may have caused or contributed to an on-the-job accident*,[3] as defined in paragraph (A)(3) of this rule, shall submit

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[2] In accordance with R.C. 4123.30, the state insurance fund is divided into the "public fund," into which contributions from public employers are placed, and the "private fund." Self-insuring employers are not state fund employers. *See generally* R.C. 4123.25 (in part, explaining obligations of self-insuring employers).

[3] 10A Ohio Admin. Code 4123-16-58(A) states, in pertinent part:

> (3) "Accident" means an unplanned, unexpected, or unintended event which occurs on the employer's property, during the conduct of the employer's business, or during working hours, or which involves employer-supplied motor vehicles or motor vehicles used in conducting the employer's business, or within the scope of employment, and which results in any of the following:
>
> (a) A fatality of anyone involved in the accident;
>
> (b) Bodily injury requiring off-site medical attention away from the employer's place of employment;
>
> (c) Vehicular damage in apparent excess of a dollar amount stipulated in the employer's DFWP policy; or
>
> (d) Non-vehicular damage in apparent excess of a dollar amount stipulated in the employer's DFWP policy.
>
> As used in this rule, "accident" does not have the same meaning as provided in [R.C. 4123.01(C)], and the definition of this rule is not intended to

> to a drug or alcohol test. This test will be administered as soon as possible after necessary medical attention is received, or within eight hours for alcohol and within thirty-two hours for other drugs. (Emphasis and footnote added.)

Thus, in order for a county, as an employer, to be eligible to participate at any level of discount in the BWC's DFWP, the county must, among other things, conduct pre-employment or new-hire drug testing of *all* county employees, regardless of the nature of the position for which the individual is employed. *See generally* rule 4123-17-58(H) (stating, in part, "[t]he bureau may cancel an employer's participation in the DFWP program for the employer's failure to fully implement a DFWP program in compliance with the approved program level"). It is the requirement established by rule 4123-17-58(E)(4)(a) that presents the most immediately apparent barrier to participation in BWC's DFWP by public employers.

As you mentioned in your opinion request, the United States Supreme Court and other federal courts, as well as the Ohio Supreme Court, have addressed issues presented when governmental entities, or those acting as agents of a governmental entities, conduct warrantless drug and alcohol tests that require taking blood, breath, or urine of private persons.

For example, in *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 97 Ohio St. 3d 504, 2002-Ohio-6717, 780 N.E.2d 981 (2002), the Ohio Supreme Court concluded in the syllabus that: "2000 Am. Sub. H.B. No. 122, which permits the *warrantless* drug and alcohol testing of injured workers *without any individualized suspicion* of drug or alcohol use, violates the protections against unreasonable searches contained in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution." (Emphasis added.)

At issue in the *AFL-CIO* case was the constitutionality of 1999-2000 Ohio Laws, Part I, 749 (Am. Sub. H.B. 122, eff. April 10, 2001), which amended R.C. 4123.54 to establish, for purposes of the workers' compensation system, "a rebuttable presumption that the proximate cause of an injury of an employee, who, through a blood, breath, or urine test, tests positive for the use of alcohol or a controlled substance not prescribed by a physician, is the alcohol or controlled substance." Am. Sub. H.B. 122. At the time, if a worker's use of alcohol or drugs was the proximate cause of the worker's injury, the worker was not entitled to receive workers' compensation benefits for that injury. Am. Sub. H.B. 122 allowed for breath, blood, or urine testing of employees following a workplace injury. If the testing revealed the presence of a prohibited level of alcohol or a controlled substance in the worker's body, a rebuttable presumption was created that the proximate cause of the worker's injury was the influence of the alcohol or controlled substance. The same rebuttable presumption was created for any worker who refused to submit to such testing. As summarized by the *AFL-CIO* court at ¶ 7: "under

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> modify the definition of a compensable injury under the workers' compensation law.

[Am. Sub.] H.B. 122, every Ohio worker injured on the job must submit to an employer-requested chemical test, regardless of whether the employer has any reason to believe that the injury was caused by the employee's intoxication or use of controlled substances."

In analyzing the question whether Am. Sub. H.B. 122 violated workers' rights to be free from unreasonable governmental searches and seizures, the *AFL-CIO* court first determined that the state's entanglement with employers, both public and private, in the workers' compensation system was so great that the action of private employers in requiring the drug and alcohol testing mandated by R.C. 4123.54 constituted state action for purposes of fourth-amendment analysis.[4]

The *AFL-CIO* court then determined that the drug and alcohol tests required by R.C. 4123.54 were "searches" for purposes of the fourth amendment to the United States Constitution. In considering whether these searches violated the constitutional rights of the individuals tested to be free from unreasonable searches and seizures, the *AFL-CIO* court, at ¶¶ 24-28, utilized the following analysis:

> In general, the reasonableness of a particular search or practice "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402, 103 L.Ed.2d 639, quoting *Delaware v. Prouse* (1979), 440 U.S. 648, 654, 99 S.Ct. 1391, 59 L.Ed.2d 660. What we commonly think of as a necessary element of a reasonable search, a warrant based upon probable cause, is not a prerequisite to every search. The Supreme Court has held that "[a] search unsupported by probable cause can be constitutional * * * 'when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'" *Vernonia School Dist. 47J v. Acton* (1995), 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564, quoting *Griffin v. Wisconsin* (1987), 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709.

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[4] As explained by the court in *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 97 Ohio St. 3d 504, 2002-Ohio-6717, 780 N.E.2d 981 (2002), at ¶¶ 18-19:

> [R.C. 4123.54] sets forth the consequences for the employees' refusal to take an employer-requested test. Without this legislation, an employer could not withhold an employee's workers' compensation for failure to take a drug test. The rebuttable presumption created by the state is the hammer that forces an employee to take an employer-directed drug test. It is a complete entanglement of private and state action.
>
> We therefore find that the state of Ohio's significant promotion of drug testing through its exercise of coercive power creates the close nexus between the state and the challenged action required to constitute state action.

Thus, as long as the government interest behind the drug testing is not merely to fight crime, i.e., when the results of testing are not used to procure criminal convictions, governmental special needs can be enough to obviate the general requirement of probable cause or individualized suspicion of wrongdoing:

> "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402, 103 L.Ed.2d 639.

The "special needs" analysis includes a consideration of the practicalities of achieving the government's objectives through the ordinary means of securing a warrant based on probable cause. If securing a warrant is impracticable, then the government's special needs are weighed against the individual's privacy interest:

> "Our precedents establish that the proffered 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 suspicion." *Chandler v. Miller* (1997), 520 U.S. 305, 318, 117 S.Ct. 1295, 137 L.Ed.2d 513.

Based upon a review of seminal United States Supreme Court cases addressing government-required suspicionless and warrantless drug testing of individuals, the *AFL-CIO* court described three categories of constitutionally permissible suspicionless searches: 1) the tested individuals have a demonstrated history of drug abuse, *see, e.g., Skinner v. Ry. Labor Executives' Assn*, 489 U.S. 602 (1989) (railroad employees) and *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (student athletes); 2) the tested individuals hold unique positions in which safety issues are critical, *see, e.g., Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (U.S. Customs positions that involve drug interdiction or enforcement of related laws, the carrying of firearms, or the handling of classified materials); 3) the tested individuals hold positions in which the use of drugs would cause a serious danger to workers or co-workers or to the general public, *see, e.g., Von Raab, Skinner*. As concluded by the *AFL-CIO* court, at ¶ 46, "[s]uspicionless testing can be applicable to certain carved-out categories of workers, but not to all workers."

As characterized by the *AFL-CIO* court, Am. Sub. H.B. 122's drug and alcohol testing requirement was not targeted at any specific group or groups of employees who fit within any of the three categories of individuals for whom the government's demonstrated special needs outweighed the individuals' constitutional rights to be free of unreasonable government searches and seizures. Moreover, the *AFL-CIO* court stated at ¶ 47: "Even if there were special needs successfully asserted by the state, the expectation of privacy of Ohio's workers would outweigh

them." As a final matter, the *AFL-CIO* court determined that the drug testing requirements of Am. Sub. H.B. 122 also violated "the Ohio Constitution, which prohibits unreasonable searches and also contains special considerations[5] for Ohio's workers." 97 Ohio St. 3d 504, ¶ 53 (footnote added).

Although the *AFL-CIO* case does not directly address the constitutionality of a public employer's implementation of BWC's DFWP, as described in rule 4123-17-58, its conclusions indicate that a BWC program that requires 100% of a county's employees to undergo pre-employment or new-hire drug or alcohol testing, regardless of the position the individual was employed to fill, does not pass the "special needs" test articulated in the *AFL-CIO* case. Such a requirement is similar to the policy addressed in the *AFL-CIO* case in that it does not target a specific group of positions to be filled for which the government's "special needs" require such testing. In the absence of a showing that county employees' individual expectation of privacy is outweighed by a demonstrated special need of the government, a county's implementation of the drug and alcohol testing required by rule 4123-17-58(E)(4)(a) as a prerequisite to county employment would appear to violate the rights of the individuals tested, under both the United States and Ohio constitutions, to be free from unreasonable searches and seizures. Because an employer that does not comply with, among other things, rule 4123-17-58(E)(4)(a), is not eligible to participate in any level of the BWC's DFWP, it does not appear that a county may become eligible to participate in the DFWP.

I trust that the foregoing discussion of a county's inability to qualify for participation in the Bureau of Workers' Compensation's DFWP addresses the primary concern of the county

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[5] Citing *Blankenship v. Cincinnati Milacron Chem., Inc.*, 69 Ohio St. 2d 608, 614, 433 N.E.2d 572 (1982), the *AFL-CIO* court explained the philosophy behind Ohio's workers' compensation system, as follows:

> "The workers' compensation system is based on the premise that an employer is protected from a suit for negligence in exchange for compliance with the Workers' Compensation Act. The Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability."

97 Ohio St. 3d 504, at ¶ 50. The *AFL-CIO* court also noted that workers in Ohio "have the expectation that Section 34, Article II of the Ohio Constitution would also protect them from baseless searches." *Id.* at ¶ 51. *See generally* Ohio Const. art. II, § 34 (stating, in part, "[l]aws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees").

commissioners, *i.e.*, whether they may participate in the DFWP. Should you have additional concerns, please do not hesitate to contact me.

Respectfully,

Mary Lynne Okano

Mary Lynne Okano
Assistant Attorney General
Opinions Section

cc: Kevin McIver, Chief
Opinions Section

EXHIBIT 2

OHIO ATTORNEY GENERAL'S OFFICE, OPINIONS SECTION LETTER CONCERNING THE INFORMAL OPINION ISSUED TO THE WAYNE COUNTY PROSECUTOR

Thank you for your inquiry.

The Opinions Section of the Attorney General's office provided **informal** advice in May 2007 to the prosecuting attorney of Wayne County in response to a lengthy series of questions he presented on the general subject of pre-employment and post-employment drug testing of county employees. When we contacted the prosecutor for additional information on his questions, however, he told us that county government was primarily concerned about its eligibility for the BWC premium reduction program that is tied to drug-free workplace policies. This is noted on page 2 of our letter to the prosecuting attorney.

As we further explained in our letter, in ***State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers Comp.*** 97 Ohio St. 3d 504 (2002), the Ohio Supreme Court found the drug testing provisions of that BWC program unconstitutional insofar as the pertinent legislation (1999-2000 Ohio Laws, Part I, 749 (Am. Sub. H.B. 122, eff. April 10, 2001) authorized warrantless testing of ***all*** employees without any individualized suspicion of drug or alcohol use. In light of that finding, there was no point in us addressing all the subsidiary questions that the prosecuting attorney had presented.

The informal opinion itself does not prohibit anything, however. How the City of (REDACTED) chooses to proceed, based upon its legal counsel's independent analysis of the issue, is a matter only the city can determine for itself. The same applies to all other Ohio political subdivisions.

From what we have heard so far on this matter since we sent our letter to the prosecuting attorney, this informal advice has not been well understood by many parties. The scope of its advice has been mischaracterized and overstated as well. The letter's analysis is, in fact, limited to a very specific, discrete issue. I urge you to read the letter carefully, and consult with your legal counsel, the city law director, for further guidance.

The informal advisory letter, which was prepared by an attorney within the Opinions Section, is attached here for your reference.

EXHIBIT 3

09-331

Ohio Bureau of Workers' Compensation
30 W. Spring St.
Columbus, OH 43215-2256

Ted Strickland
Governor

Marsha P. Ryan
Administrator/CEO

ohiobwc.com

1-800-OHIOBWC

Public Employers (PECs) and Drug Testing to Meet Drug-Free Workplace Program Requirements June 2007

BWC is aware of an informal opinion of the Ohio Attorney General (OAG) related to public employer taxing districts (PECs) participating or seeking to participate in a BWC drug-free workplace program. One of the program requirements is that participating employers conduct pre-employment and/or new hire drug testing for 100% of job applicants. This requirement does not distinguish between private employers and public employers.

Based on the AG opinion, the county that requested the opinion believed that it could not participate in a BWC drug-free workplace program because the opinion indicates that county agencies cannot legally drug test 100% of applicants for employment (pre-employment testing) or test employees within an established period of time (90 days) from time of hire (new-hire testing). The AG opinion appears to permit, however, drug testing for safety-sensitive positions, and it is possible that counties could justify other positions for testing based on such issues as driving county vehicles or fiduciary responsibilities. Thus, public employers may require a candidate for a safety-sensitive job or other positions for which justification can be produced to submit to a drug test as a condition of employment or for retention of employment if new-hire testing were involved.

At issue is whether any public employer could meet the program's 100% testing requirement. **Until further notice, public employers that participate in a BWC drug-free workplace program (DFWP or Drug-Free EZ) will not be required to perform 100% pre-employment drug testing for other than employees whom the employer determines to be safety sensitive.** Public employers should consult with their legal counsel before testing other than safety-sensitive employees, but BWC will not consider a public employer to be non-compliant with program requirements for failure to require 100% pre-employment drug testing.

BWC defines safety sensitive position or function in rule 4123-17-58 (the DFWP Rule) and rule 4123-17-58.1 (the Drug-Free EZ Program Rule) as applying to "any job position or work-related function or job task designated as such by the employer, which through the nature of the activity could be detrimental or dangerous to the physical well-being of the employee, co-workers, customers or the general public through a lapse in attention or judgment. The safety-sensitive position or function may include positions or functions where national security or the security of employees, co-workers, customers, or the general public may be seriously jeopardized or compromised through a lapse in attention or judgment." Thus, the employer - which shoulders the risk - is allowed to use this definition to determine which positions should be considered "safety sensitive."

This same definition, used previously to identity which positions were subject to random drug testing for Level 2 and Level 3, can be applied to which applicants are drug tested to comply with the 100% testing of safety sensitive employees to be considered as being in compliance. A public employer that ensures 100% pre-employment and/or new hire testing of its safety-sensitive employees will be considered in compliance with BWC drug-free requirements.

BWC will keep public employers posted with additional information when it becomes available. Until then, employers participating in DFWP or DF-EZ must continue to do pre-employment and/or new hire testing of safety-sensitive positions to be considered compliant.

EXHIBIT 4 09-331

Ohio Bureau of Workers' Compensation
30 W. Spring St.
Columbus, OH 43215-2256

Ted Strickland
Governor

Marsha P. Ryan
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ohiobwc.com

1-800-OHIOBWC

July 13, 2007

Policy No: 30000623

EHOVE JVS
316 MASON RD W
MILAN OH 44846-9500

Re: Pre-Employment and/or New-Hire Drug Testing to Meet Drug-Free Workplace Program Requirements

Dear Public Employer:

The Ohio Bureau of Workers' Compensation (BWC) is providing all public employers with an important update on its drug-free workplace programs (DFWP and Drug Free-EZ). As you are aware, one aspect of the DFWP is pre-employment or new-hire testing. Previously, BWC required employers participating in the program to test all employees either during the pre-employment or new-hire period in order to successfully fulfill that component.

However, an informal opinion from the Ohio Attorney General's office, dated May 30, 2007, alters those guidelines for public employers. As a result, BWC will no longer require public employers to conduct pre-employment (post offer) and/or new-hire (probationary period) testing for every applicant who is applying for or filling positions. Instead, DFWP only requires public employers to administer pre-employment or new-hire testing for those positions determined to be "safety sensitive." Public employers that meet all other DFWP requirements will be considered compliant if they apply pre-employment and/or new-hire drug testing to, at minimum, 100 percent of applicants for safety-sensitive positions.

BWC defines a "safety-sensitive position or function" as "any job position or work-related function or job task designated as such by the employer, which through the nature of the activity could be detrimental or dangerous to the physical well-being of the employee, co-workers, customers or the general public through a lapse in attention or judgment. A safety-sensitive position or function may include positions or functions where national security or the security of employees, co-workers, customers, or the general public may be seriously jeopardized or compromised through a lapse in attention or judgment." See Ohio Administrative Code 4123-17-58 (DFWP) and 4123-17-58.1 (Drug-Free EZ). This is the same definition that public employers participating in Levels 2 or 3 of the DFWP used to identify positions subject to random drug testing.

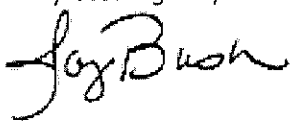
Please note that BWC's program requirements for pre-employment or new-hire testing are only minimum requirements. While BWC no longer requires universal pre-employment and/or new-hire testing, a public employer that chooses to test more expansively on a "special needs" basis would not appear to violate the Attorney General's informal opinion. However, public employers are advised to assess their individual situations and consult with their own legal counsel to help determine any additional "special needs" categories that should be included in pre-employment and/or new-hire drug testing.

To fulfill the intent of DFWP and Drug Free-EZ, please remember all other program requirements must be met in order for the programs to succeed and reduce the chances of your organization having a

(over)

workplace accident resulting from substance use or abuse. If you have additional questions on these changes, please e-mail BWC at dfwp@ohiobwc.com or call (614) 466-6773. BWC appreciates your ongoing commitment to keeping Ohio's workers safe and healthy and looks forward to its continued partnership with you.

My best regards,



Joy Bush
Executive Director, Employer Management Services
The Ohio Bureau of Workers' Compensation

SHERRI BEVAN WALSH

Prosecuting Attorney

County of Summit

09-331

August 12, 2008

Prosecutor Opinion Number 08-036

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Russell M. Pry
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RE: Pre-employment Drug and Alcohol Testing

Syllabus: **Given the dearth of current case law on the subject of blanket pre-employment drug testing, it is unclear that the County of Summit can lawfully require all job applicants to submit to a drug and alcohol test as a condition of employment. However, steps can possibly be taken to minimize the risk associated with such testing as discussed in the opinion below.**

Dear Mr. Pry:

You have requested an opinion regarding the drug testing policies of Summit County. Specifically, you have asked, "May the County of Summit require job applicants to submit to a drug and alcohol test as a condition of employment?"

Your question raises an issue regarding the legality of pre-employment drug testing by county governments. This question was originally addressed to, but not answered by, the Ohio Attorney General in an opinion requested by the Warren County Prosecuting Attorney. Op. Att. Gen. 2007-003 (informal opinion).

The issue of whether governmental entities may conduct drug and alcohol testing of employees is raised due to two factors. First and foremost, because the County is a state actor, the Ohio and U.S. Constitutions apply to limit the County's power. *Adityanjee v. Case W. Res. Univ.* (2004), 156 Ohio

App.3d 432, at ¶ 51. Additionally, the collection and testing of urine are considered searches and in order to be valid, must satisfy the constitutional requirements of the Fourth Amendment.[1] *Skinner v. Railway Labor Executives' Assn.* (1989), 489 U.S. 602, 617.

The Ohio Supreme Court and the U. S. Supreme Court, as well as various federal courts and state courts, have all addressed different aspects of governmental actors conducting drug or alcohol testing in the workplace, and have come to varying conclusions. Most of the cases that have addressed the legality of drug testing of employees by government employers deal with current employees, not applicants. Also, most cases in this area are fact-specific. These cases provide guidance, but leave unresolved the issue of pre-employment drug and alcohol testing in the public sector. Therefore, as opined by the Ohio Attorney General in the informal opinion addressed to the Warren County Prosecuting Attorney, "[I]t is impossible within the scope of an opinion . . . to provide [a] definitive answer[] to [ ] your question[]." Op. Att. Gen. 2007-003, (informal opinion) p. 2. Much like the opinion of the Ohio Attorney General, this opinion is to provide guidance in the requested matter, as each individual situation will vary depending on the circumstances of the potential employment, including, but not limited to, the nature of the position in question.

In order to answer your question, "May the County of Summit require job applicants to submit to a drug and alcohol test as a condition of employment," an analysis of the constitutionality of the individual search is required. The measure of the constitutionality of a governmental search is reasonableness, which ultimately depends on the context within which the search takes place.[2] *Vernonia School Dist. 47J v. Acton* (1995), 515 U.S. 646, 652-53; *O'Connor v. Ortega* (1987), 480 U.S. 709, 719. In order to determine the reasonableness of a search, the Supreme Court has recognized that a warrantless, suspicionless search may be justified "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Wilson v. Collins* (6th Cir. 2008), 517 F.3d 421, 426. First, the "special need" for the search must be identified. Then the "reasonableness" of the search must be weighed by balancing the gravity of the public interests, the degree to which the search advances the public interests, and the severity of the interference with individual liberty. *Id.* at 426.

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[1] The Fourth Amendment provides: 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.

[2] Searches that are undertaken by law enforcement personnel to discover evidence of criminal wrong doing are subject to the probable cause requirement. Searches conducted for means other than discovering criminal wrong doing are not necessarily subject to probable cause and warrant requirement. *International Union v. Winters* (6th Cir. 2004), 385 F.3d 1003, 1007.

In *State, ex rel. AFL-CIO v. Ohio Bureau of Workers' Compensation* (2002), 97 Ohio St.3d 504, the Ohio Supreme Court addressed the issue of government-conducted suspicionless drug testing of employees. The *AFL-CIO* court held that an individual's expectation of privacy outweighs any special needs asserted by the state, and that without individualized suspicion, drug and alcohol testing violates the protections against unreasonable searches and seizures as embodied in both the United States and Ohio Constitutions. Citing several U. S. Supreme Court decisions, the Ohio Supreme Court outlined three categories of "constitutionally permissible suspicionless searches" of employees: 1) the targeted individuals have a demonstrated history of drug or alcohol abuse; 2) they hold unique positions in which safety is critical; and, 3) the use of drugs or alcohol in the position would cause serious danger to workers or co-workers or to the general public.[3] *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.* (2002), 97 Ohio St.3d 504, at ¶ 42-43. (citing *Skinner v. Ry. LaborExecutives' Assoc.*, 489 U.S. 602 (1989), *Veronia School Dist. 47J v. Acton*, 51 U.S. 646 (1995), *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) and *Chandler v. Miller*, 520 U.S. 305 (1997)).

The Ohio Attorney General noted in an informal opinion that the *AFL-CIO* decision did not directly address pre-employment drug testing, but only dealt with drug testing while already employed. Op. Atty. Gen. 2007-003 (informal opinion) p. 8. The Attorney General still concluded that pre-employment testing fell within the analysis of the *AFL-CIO* court decision. *Id.*

It can certainly be argued that there is a difference between an applicant and a current employee. As noted by at least one court, an "individual has a large measure of control over whether he or she will be subject to drug testing. No one is compelled to seek a job. They need only refrain from applying." However, even this court noted that employment applicants have some expectation of privacy under the Fourth Amendment. *Willner v. Thornburgh* (C.A.D.C. 1991), 928 F.2d 1185, 1190 (finding the Department of Justice's policy of testing all applicants for the position of attorney is valid). Our research indicates that there is no statute or case law that gives blanket approval to public sector employers to conduct pre-employment drug and alcohol testing for all applicants. Therefore, the County's drug and alcohol testing policy would still have to be "constitutionally permissible suspicionless searches" in order to be valid. *AFL-CIO, supra.*

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[3] Summit County has a wide range of positions and employs over 4,000 individuals. The County employs individuals in positions of receptionists, clerks, secretaries, as well as social workers, deputy sheriffs, lawyers, engineers, nurses, medical doctors and a myriad of other positions. Some positions require that the individuals hold a certain license, such as a Commercial Drivers License (CDL). At any given time, the County can have applicants seeking a wide range of jobs.

Also, a person may consent to a search, which completely eliminates any need for the County to show individualized suspicion, probable cause, or special needs. However, the government may not simply inform the applicant that he or she must pass a drug-test before being hired to defeat the applicant's expectation of privacy. *Willner*, supra. Consent is usually discussed in the criminal context, but if consent is obtained first, then a warrantless search does not violate the Constitution. Consent must be voluntary, freely given, unequivocal, intelligent, specific, and uncontaminated by any duress or coercion. The burden of proving consent by clear and positive testimony is on the government. *U.S. v. Moon* (2008), 513 F.3d 527, 537.

It is noted that Summit County provides notice on its job postings and employment applications that if tentatively selected for employment, all applicants will be required to submit to drug testing. The County is well-advised to consider placing the notice at the top of the application in bold print. The County is also well-advised to consider the use of a consent form prior to extending an offer of employment. This form should additionally offer an appeal procedure in the event of a positive test, to allow for some type of due process. This could minimize, although not completely eliminate, the risk to the County in requiring pre-employment drug and alcohol testing.

For example, in *Fontaine v. Clermont County Bd. of Com'rs*, 2007 WL 2627338 (S.D.OH. 2007), a court found that the employee knew about drug test as a condition for employment and consented to it. The court upheld the pre-employment testing. However, the court also said that since the employee was applying for a position that required a CDL, that it was a safety sensitive position and a drug test was permissible. In *Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth.*, 263 F.3d 61 (3rd Cir. 2001), a court found that the employee knew about the drug test as a condition for employment and consented to it. The court upheld the Board's policy of pre-employment testing based on notice and consent. Also, the California Supreme Court found that a city's pre-employment drug testing policy for all applicants was constitutional. *Loder v. City of Glendale* (Cal. 1997), 927 P.2d 1200, 1222 (noting that city gave notice and obtained written consent of testing for job applicants, but could not test current employees absent suspicion or special needs). However, also see *Robinson v. City of Seattle* (Wash. Ct. App. 2000), 102 Wash.App. 795 (distinguishing *Loder* and finding the city's pre-employment testing of all applicants unconstitutional and that applying for a government position does not amount to voluntary consent to drug testing) and *Lanier v. City of Woodburn* (9th Cir. 2008), 518 F.3d 1147 (invalidating city's pre-employment testing for all applicants).

In summary, there may be compelling and legitimate reasons for the County of Summit to have a pre-employment drug testing policy. However, there does exist significant federal and state case law which indicates that the government may not adopt a pre-employment policy applicable to all applicants absent a showing of 1) individualized suspicion or 2) special needs where the applicant applies for a safety sensitive position. Also, obtaining informed consent,

with an appeal procedure that allows for due process may minimize, although not completely eliminate, the risks associated with pre-employment drug and alcohol testing of all applicants.

Therefore, it is our opinion and you are so advised that given the dearth of current case law on the subject of blanket pre-employment drug testing, it is unclear that the County of Summit can require all job applicants to submit to a drug and alcohol test as a condition of employment without incurring risk. However, as discussed above, steps can be taken to minimize the risk associated with such testing.

We trust that this answers your inquiry, and should you have any further questions or concerns, please do not hesitate to contact our office.

Very truly yours,

SHERRI BEVAN WALSH
Prosecuting Attorney

ANITA DAVIS
Assistant Prosecuting Attorney

APPROVED:

JOHN F. MANLEY
Chief Counsel, Civil Division

COUNTY OF SUMMIT, OHIO
Russell M. Pry, Executive

09-331

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Sent Via Email

September 3, 2008

Mr. John Manley
Chief Counsel, Civil Division
County of Summit Prosecuting Attorney's Office
175 South Main Street, First Floor
Akron, Ohio 44308

Subject: **Pre-Employment Drug and Alcohol Testing**
Prosecutor's Opinion 08-036

Dear Mr. Manley:

Thank you for the recent prosecutor's opinion regarding pre-employment drug and alcohol testing. We have had discussions with various officeholders regarding the impact of the opinion on current and future County drug policies.

It is my formal request that you clarify the opinion with language advising me of your opinion whether pre-employment drug and alcohol testing can be implemented with informed consent and an appeal process as part of the pre-employment process.

Thank you in advance for your cooperation in providing this clarification.

Sincerely,

Russell M. Pry, Executive
RMP:rr
cc: R. Dobbins
J. Dodson
B. McDowall
D. Nott
K. Jones
M. Rowlands
S. Vavruska Dodson
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09-331

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(330) 643-8540 Fax

January 16, 2009

Prosecutor Opinion Number 08-036
REVISED

Russell M. Pry
Summit County Executive
175 South Main Street
Akron, Ohio 44308

RE: Pre-employment Drug and Alcohol Testing

Syllabus: **It is our opinion that because there exists no constitutional right to a job offer, that pre-employment drug and alcohol testing for all applicants does not pose a fourth amendment concern provided valid consent is obtained, as applicants who do not consent to be tested may simply seek alternative employment.**

Dear Mr. Pry:

As you will recall you had previously requested an opinion as to whether the County of Summit may require job applicants to submit to a drug and alcohol test as a condition of employment. Thereafter we received a request for clarification of our original opinion with regard to obtaining informed consent and the provision of an appeal process. This revised opinion is in response.

Your question raises an issue regarding the legality of pre-employment drug testing by county governments. This question was originally addressed to, but not answered by, the Ohio Attorney General in an opinion requested by the Warren County Prosecuting Attorney. Op. Att. Gen. 2007-003 (informal opinion).

The issue of whether governmental entities may conduct drug and alcohol testing of employees is raised due to two factors. First and foremost, because the County is a state actor, the Ohio and U.S. Constitutions apply to limit the County's power. *Adityanjee v. Case W. Res. Univ.* (2004), 156 Ohio App.3d 432, at ¶ 51. Additionally, the collection and testing of urine are considered searches and in order to be valid, must satisfy the constitutional

requirements of the Fourth Amendment.[1] *Skinner v. Railway Labor Executives' Assn.* (1989), 489 U.S. 602, 617.

The Ohio Supreme Court and the U. S. Supreme Court, as well as various federal courts and state courts, have all addressed different aspects of governmental actors conducting drug or alcohol testing in the workplace, and have come to varying conclusions. Most of the cases that have addressed the legality of drug testing by government employers deal with ***employees***, not applicants. Also, most cases in this area are fact-specific. These cases provide guidance, but leave unresolved the issue of pre-employment drug and alcohol testing in the public sector.

In order to answer your question, "May the County of Summit require job applicants to submit to a drug and alcohol test as a condition of employment," an analysis of the constitutionality of the traditional individual search is helpful, acknowledging from the outset that a valid consent to search does constitute a waiver of ones fourth amendment rights. The measure of the constitutionality of a governmental search is reasonableness, which ultimately depends on the context within which the search takes place.[2] *Vernonia School Dist. 47J v. Acton* (1995), 515 U.S. 646, 652-53; *O'Connor v. Ortega* (1987), 480 U.S. 709, 719. In order to determine the reasonableness of a search, the Supreme Court has recognized that a warrantless, suspicionless search may be justified "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Wilson v. Collins* (6th Cir. 2008), 517 F.3d 421, 426. First, the "special need" for the search must be identified. Then the "reasonableness" of the search must be weighed by balancing the gravity of the public interests, the degree to which the search advances the public interests, and the severity of the interference with individual liberty. *Id.* at 426.

In *State, ex rel. AFL-CIO v. Ohio Bureau of Workers' Compensation* (2002), 97 Ohio St.3d 504, the Ohio Supreme Court addressed the issue of government-conducted suspicionless drug testing of ***employees***. The *AFL-CIO* court held that an individual's expectation of privacy outweighs any special needs asserted by the state, and that without individualized suspicion, drug and alcohol testing violates the protections against unreasonable searches and seizures as

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[1] The Fourth Amendment provides: 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.

[2] Searches that are undertaken by law enforcement personnel to discover evidence of criminal wrong doing are subject to the probable cause requirement. Searches conducted for means other than discovering criminal wrong doing are not necessarily subject to probable cause and warrant requirement. *International Union v. Winters* (6th Cir. 2004), 385 F.3d 1003, 1007.

embodied in both the United States and Ohio Constitutions. Citing several U. S. Supreme Court decisions, the Ohio Supreme Court outlined three categories of "constitutionally permissible suspicionless searches" ***of employees***: 1) the targeted individuals have a demonstrated history of drug or alcohol abuse; 2) they hold unique positions in which safety is critical; and, 3) the use of drugs or alcohol in the position would cause serious danger to workers or co-workers or to the general public.[3] *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.* (2002), 97 Ohio St.3d 504, at ¶ 42-43. (citing *Skinner v. Ry. LaborExecutives' Assoc.*, 489 U.S. 602 (1989), *Veronia School Dist. 47J v. Acton*, 51 U.S. 646 (1995), *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) and *Chandler v. Miller*, 520 U.S. 305 (1997)).

The Ohio Attorney General noted in an informal opinion that the *AFL-CIO* decision did not directly address pre-employment drug testing, but only dealt with drug testing while already employed. Op. Atty. Gen. 2007-003 (informal opinion) p. 8. The Attorney General still informally concluded that a BWC program requiring 100% pre-employment testing would not pass the special needs test articulated in *AFL-CIO*, yet offered no explanation as to why the test should apply to the pre-employment situation.

It can certainly be argued that there is a difference between an applicant and a current employee. As noted by at least one court, an "individual has a large measure of control over whether he or she will be subject to drug testing. No one is compelled to seek a job. They need only refrain from applying." However, the court noted that employment applicants do retain some expectation of privacy under the Fourth Amendment in the absence of consent. *Willner v. Thornburgh* (C.A.D.C. 1991), 928 F.2d 1185, 1190 (finding the Department of Justice's policy of testing all applicants for the position of attorney is ***valid***).

It is well established that a person may consent to a search, which completely eliminates any need for the County of Summit to demonstrate individualized suspicion, probable cause, or special needs. However, the government may not simply inform the applicant that he or she must pass a drug-test before being hired to defeat the applicant's expectation of privacy. *Willner*, supra. Consent is usually discussed in the criminal context, but if consent is obtained first, then a warrantless search does not violate the Constitution. Consent must be voluntary, freely given, unequivocal, intelligent, specific, and uncontaminated by any duress or coercion. The burden of proving consent by clear and positive testimony is on the government. *U.S. v. Moon* (2008), 513 F.3d 527, 537.

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[3] Summit County has a wide range of positions and employs over 4,000 individuals. The County employs individuals in positions of receptionists, clerks, secretaries, as well as social workers, deputy sheriffs, lawyers, engineers, nurses, medical doctors and a myriad of other positions. Some positions require that the individuals hold a certain license, such as a Commercial Drivers License (CDL). At any given time, the County can have applicants seeking a wide range of jobs.

It is noted that the County of Summit provides notice on its job postings and employment applications that if tentatively selected for employment, all applicants will be required to submit to drug testing. The County is well-advised to consider placing the notice at the top of the application in bold print. The County is also well-advised to consider the use of a consent form prior to extending an offer of employment. This form should additionally offer an appeal procedure in the event of a positive test, to allow for some type of due process. This could further minimize, if not eliminate, the nominal risk to the County in instituting pre-employment drug and alcohol testing.

It is interesting to note that in *Fontaine v. Clermont County Bd. of Com'rs*, 2007 WL 2627338 (S.D.OH. 2007), the court found that the employee knew about drug test as a condition for employment and consented to it. The court upheld the pre-employment testing. However, the court also said that since the employee was applying for a position that required a CDL, that additionally there was a safety sensitive position issue and a drug test was permissible. In *Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth.*, 263 F.3d 61 (3rd Cir. 2001), a court found that the employee knew about the drug test as a condition for employment and consented to it. The court upheld the Board's policy of pre-employment testing based on notice and consent. Also, the California Supreme Court found that a city's pre-employment drug testing policy for all applicants was constitutional. *Loder v. City of Glendale* (Cal. 1997), 927 P.2d 1200, 1222 (noting that city gave notice and obtained written consent of testing for job applicants, but could not test current employees absent suspicion or special needs).

Therefore, it is our opinion and you are so advised that there certainly exists compelling and legitimate reasons for the County of Summit to institute pre-employment drug and alcohol testing for job applicants.

We trust that this answers your inquiry, and should you have any further questions or concerns, please do not hesitate to contact our office.

Very truly yours,

SHERRI BEVAN WALSH
Prosecuting Attorney

John F. Manley

JOHN F. MANLEY
Chief Counsel, Civil Division