PETERSEN V. CITY OF MESA: EXTINGUISHING RANDOM, SUSPICIONLESS DRUG TESTING OF FIREFIGHTERS

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I. BACKGROUND

In 2001, the City of Mesa ("City") introduced a new substance abuse program ("Program") to be followed by the Mesa Fire Department ("Department").[1] The Department implemented the Program, designed to provide employee assistance and education with respect to substance abuse, in an effort to ensure the safety of both the general public and of city firefighters.[2]

Pursuant to the Program's directives, the Department subjects firefighters to drug or alcohol testing in four situations: (1) where the Department has reasonable suspicion to believe a firefighter abuses drugs or alcohol; (2) after a firefighter is involved in an on-the-job accident; (3) after a firefighter returns to work or is found to be in need of assistance; and (4) "on an unannounced and random basis reasonably spread throughout the calendar year."[3] The random testing provision requires a firefighter, chosen arbitrarily by a computer program, to submit to a urine drug test within thirty minutes of being notified by the Department.[4] Twenty percent of those firefighters selected must also undergo an alcohol breath test at that time.[5] A firefighter faces termination by the Department if he refuses to comply with the random testing provision.[6]

A laboratory analyzes the urine sample for the presence of marijuana and cocaine metabolites, codeine, morphine, amphetamine, methamphetamine, phencyclidine, and morphine.[7] Where a sample tests positive, a Medical Review Officer examines the test results and determines whether alternative medical

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1. Petersen v. City of Mesa, 83 P.3d 35, 36 (Ariz. 2004).
2. Petersen v. City of Mesa, 63 P.3d 309, 310 (Ariz. Ct. App. 2003).
3. *Petersen*, 83 P.3d at 36.
4. *Id*. The Department only notifies firefighters of selection immediately before, during, or after work. *Id.*
5. *Id*. at 37 n.1.
6 Petersen v. City of Mesa, 63 P.3d 309, 312 (Ariz. Ct. App. 2003).
7. *Id*. at 312 n.5.

explanations exist.[8] If the Medical Review Officer confirms the test results as positive, he will contact the firefighter individually before submitting the results to the Department.[9] The Department will remove from duty and refer to a substance abuse professional any firefighter who tests positive for a specific drug or whose blood alcohol concentration exceeds 0.04%.[10] A firefighter who tests positive a second time may be disciplined or terminated from employment.[11]

Craig W. Petersen is a firefighter employed by the City of Mesa.[12] After the Department implemented the Program, Petersen challenged the Program's random testing provision in the Maricopa County Superior Court, seeking declaratory and injunctive relief against the City.[13] Specifically, Petersen alleged that the random testing provision violated his rights under both article II, section 8 of the Arizona Constitution and the Fourth Amendment to the U.S. Constitution.[14] The superior court, in granting Petersen's requested relief, ruled that the suspicionless testing procedures violated Petersen's privacy rights under the Arizona Constitution and permanently enjoined the City from enforcing the random testing provision.[15] In so holding, the superior court noted that article II, section 8 offers citizens greater protection than does the Fourth Amendment and declined to analyze the Program's random testing provision directly under the federal Constitution.[16]

On appeal, the Arizona Court of Appeals reversed the decision of the superior court.[17] First, the court of appeals rejected the assertion that article II, section 8 exceeds the scope and reach of the Fourth Amendment in the context of drug and alcohol testing.[18] Instead, "Arizona's Constitutional protection of privacy [is] consistent or coextensive with that of the Fourth Amendment."[19] The court then upheld the random testing provision as reasonable under both the Arizona Constitution and the Fourth Amendment.[20] The City's compelling interests in

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8. *Petersen*, 83 P.3d at 37.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*. at 36.
13. Petersen v. City of Mesa, No. CV2001-090218, slip op. at 1 (Ariz. Super. Ct. Nov. 1, 2001). Petersen did not dispute the three other provisions of the Program. *Petersen*, 83 P.3d at 37 n.2.
14. *Petersen*, No. CV2001-090218, slip op. at 1–2. Article II, section 8 protects a citizen's right to privacy and provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." ARIZ. CONST. art. II, § 8. The Fourth Amendment guarantees, in pertinent part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. CONST. amend. IV.
15. *Petersen*, No. CV2001-090218, slip. op. at 10.
16. *Id*. at 6, 10.
17. Petersen v. City of Mesa, 63 P.3d 309, 317 (Ariz. Ct. App. 2003).
18. *Id*. at 312–13. The court did acknowledge, however, that article II, section 8 may broaden the Fourth Amendment's protections with respect to the "sanctity of the home." *Id.* at 312.
19. *Id*. at 312.
20. *Id*. at 313–17.

ensuring public safety outweighed the firefighters' substantially diminished expectations of privacy.[21]

The Arizona Supreme Court granted review to address, as a question of first impression, the constitutionality of random, suspicionless drug testing of firefighters.[22] Applying Fourth Amendment principles governing suspicionless drug tests in general, the court deemed the City's random testing provision unreasonable under the Federal Constitution.[23] Thus, the court vacated the opinion of the court of appeals and affirmed the superior court in permanently enjoining enforcement of the Program's random testing provision.[24]

II. THE CONSTITUTIONALITY OF SUSPICIONLESS DRUG TESTING

A. General Principles

The Fourth Amendment to the U.S. Constitution protects individuals from "unreasonable searches and seizures."[25] For a search to be reasonable, and thus constitutional, some individualized suspicion of wrongdoing is usually required.[26] Particularized suspicion is not a necessary condition, however, and may be dispensed with in limited situations where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[27] A search executed without individualized suspicion may still be reasonable "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would [otherwise] be placed in jeopardy . . . ."[28] To determine the reasonableness of a suspicionless search, therefore, courts will balance the individual's legitimate expectations of privacy against the government's interests in intruding upon those expectations.[29]

B. Prior Application in United States Supreme Court Decisions

In two cases decided on the same day, the United States Supreme Court assessed the constitutionality of suspicionless drug and alcohol testing in separate contexts.[30] In the first case, *Skinner v. Railway Labor Executives' Ass'n*, the Court

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21. *Id*. The court reasoned that, due to the highly regulated, "safety sensitive" nature of their employment, the privacy expectations of firefighters are reduced as compared to the general population. *Id*.

22. *Petersen*, 83 P.3d at 38.

23. *Id*. at 37–43. The court did not address the issue of whether article II, section 8 exceeds the protections available under the Fourth Amendment. *Id.* at 37 n.3. Because the court ruled that the random testing provision violated the Fourth Amendment, and the Arizona Constitution cannot provide less protection than what the Federal Constitution offers, the court declined to address the constitutional question. *Id.*

24. *Id*. at 43.

25. U.S. CONST. amend. IV.

26. Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 624 (1989).

27. *Id*. at 619.

28. *Id*. at 624.

29. Nat'l Treasury Employees Union v. Von Rabb, 489 U.S. 656, 665–66 (1989).

30. *See Skinner*, 489 U.S. at 602, 606; *Von Rabb*, 489 U.S. at 656, 659.

reviewed Federal Railroad Administration regulations mandating drug and alcohol testing for covered railroad employees without any particularized suspicion of drug or alcohol abuse.[31] The regulations at issue required employees to undergo breath and urine tests upon the occurrence of a triggering event, such as a railway accident or the violation of certain rules.[32] The Court first held that, like drawing blood to determine alcohol content, subjecting an individual to a breathalyzer or a urine test is a "search" within the meaning of the Fourth Amendment.[33] Such physical intrusions infringe upon those "expectations of privacy that society has long recognized as reasonable," and hence are subject to the Fourth Amendment's constraints.[34] The Court next determined that, despite the lack of individualized suspicion, the regulations complied with the Fourth Amendment's mandate of reasonableness.[35] The governmental interest at issue, ensuring the safety of railroad workers and of the traveling public, outweighed the privacy interests of the covered employees.[36] The Court reasoned that breathalyzer tests, by nature, are minimally intrusive, as they require no piercing of the skin and the results disclose only the alcohol content of the blood.[37] Although the urine test occasioned a fair level of interference with an individual's privacy, the regulations limited the extent of intrusiveness in that the sample was collected in private by a medical professional unrelated to the railroad.[38] Lastly, the Court placed special importance on the diminished privacy expectations of railroad workers, noting their employment in an environment "regulated pervasively to ensure safety, a goal dependent . . . on the health and fitness of covered employees."[39]

On the heels of *Skinner*, the Supreme Court decided *National Treasury Employees Union v. Von Rabb*, and upheld suspicionless drug testing of certain United States Customs Service employees.[40] In that case, the government required drug tests as a condition precedent to employment where the position entailed illegal drug interdiction or the use of firearms.[41] As in *Skinner*, the Court assessed the constitutionality of the drug testing requirement and held that the personal privacy interests must give way to the interests of the government.[42] With respect to interdiction personnel, the Court identified as a compelling government interest the assurance that such employees are "physically fit, and have unimpeachable integrity and judgment," necessary qualities considering the nature of their employment.[43] Similarly, in the name of public safety, the government may legitimately ensure that employees carrying deadly firearms will not be impaired

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31. 489 U.S. at 606–34.
32. *Id*. at 609–11.
33. *Id*. at 616–17.
34. *Id*. at 617.
35. *Id*. at 606–34.
36. *Id*. at 624–33.
37. *Id*. at 625–26.
38. *Id*. at 626–27.
39. *Id*. at 627.
40. 489 U.S. 656, 659–79 (1989).
41. *Id*. at 660–61.
42. *Id*. at 667–77.
43. *Id*. at 670.

in perception or judgment.[44] As for the employees' interests in privacy, the Court recognized that certain intrusions, although generally unreasonable, may become reasonable in the employment context.[45] Moreover, in light of the extraordinary demands on Customs Service personnel, employees possess a lesser expectation of privacy and should "reasonably expect effective inquiry into their fitness and probity."[46] The Court ruled the suspicionless drug testing scheme reasonable and, therefore, constitutional under the Fourth Amendment.[47]

The Supreme Court also affirmed the constitutionality of suspicionless drug testing in the public school context in *Vernonia School District 47J v. Acton*[48] and *Board of Education of Independent School District v. Earls*.[49] In *Acton*, the school district responded to an identified drug problem in its schools by implementing a new drug policy, which authorized weekly random drug testing of student athletes.[50] In concluding that the testing policy met the reasonableness requirement of the Fourth Amendment, the Court began by assessing the student athletes' privacy interests.[51] The Court reiterated that the Fourth Amendment recognizes only those expectations of privacy that are "legitimate," a characterization that is influenced by a student's legal relationship to the state.[52] Notably, a school possesses a custodial responsibility toward its students and, consequently, a student's privacy interests are decreased as compared to nonstudents.[53] Next, the Court observed that the level of intrusion on students' privacy interests is minimal; the urine collection procedures do not implicate privacy interests any more than use of a public restroom, the urine sample is only tested for drugs, and the test results are only made known to those with "a need to know."[54] Lastly, the Court discussed the nature of the governmental interest and clarified the appropriate standard to be followed.[55] In order to satisfy reasonableness in a suspicionless search, the interests of the government need not be "compelling."[56] Instead, the concern must be "important enough to justify that

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44. *Id*. at 670–71.
45. *Id*. at 671.
46. *Id*. at 672.
47. *Id*. at 677.
48. 515 U.S. 646 (1995).
49. 536 U.S. 822 (2002). This case is significant in that it extends the Court's reasoning in *Vernonia* to all competitive extracurricular activities in public schools. *Id.* at 826. Because the analysis of the Court in *Earls* is similar to that in *Vernonia*, extended discussion of the *Earls* decision is omitted.
50. 515 U.S. at 648–51.
51. *Id*. at 654–57.
52. *Id*. at 654–56.
53. *Id.* at 654–57. With respect to student athletes, privacy expectations are further reduced as school sports are voluntary activities subject to increased regulation. *Id.* at 657 (noting that schools may require a student athlete to purchase insurance, submit to a physical examination, achieve at least a minimum grade point average, and comply with other guidelines established by the athletic director).
54. *Id*. at 654–58.
55. *Id*. at 660–64.
56. *Id*. at 661. Although the Court in *Skinner* and *Von Raab* described the applicable governmental interest as "compelling," that high standard was not intended to be the proper inquiry. *Id.*

particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."[57] In evaluating the district's proffered interest in deterring student use of drugs, the Court placed special significance on the extensive documentation of drug use by student athletes.[58] While not establishing a new requirement for a finding of reasonableness, proof of an immediate drug problem further supports the constitutionality of random drug testing policies.[59]

III. THE ARIZONA SUPREME COURT HOLDS RANDOM, SUSPICIONLESS DRUG TESTING OF FIREFIGHTERS UNCONSTITUTIONAL

Applying the principles of the Fourth Amendment as outlined by the U.S. Supreme Court, a unanimous Arizona Supreme Court deemed the City's random testing provision unconstitutional in *Petersen v. City of Mesa*.[60] The court, following the established Fourth Amendment inquiry into the provision's reasonableness, began its analysis by identifying the City's interest in requiring random, suspicionless drug tests, then weighed those interests against Petersen's privacy expectations under the United States Constitution.[61]

As justification for its testing procedures, the City emphasized the "safety sensitive" nature of firefighting and the need to deter and detect drug and alcohol abuse.[62] The court, while recognizing the validity of the City's interest, probed further into the "nature and immediacy of the City's concern" and the "efficacy of the Program in meeting [that] concern."[63] Here, the court focused on the lack of evidence in the record reflecting an actual need to implement randomized drug tests.[64] There existed no documented incidents of substance abuse among the City's firefighters, and the record contained no proof that drug or alcohol use by firefighters contributed to any accidents, injuries, or property damage.[65] Because drug or alcohol abuse by City firefighters did not constitute a "real and substantial risk," the court concluded that the random testing provision could only respond to a "generalized, unsubstantiated interest in deterring and detecting a hypothetical drug abuse problem among the City's firefighters."[66]

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57. *Id*.

58. *Id*. at 662–63.

59. *Id*. at 663–65; *see also* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 824 (2002) ("[T]his Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing.").

60. 83 P.3d at 37–43.

61. *Id*. at 39–43.

62. *Id*. at 39 ("The City alleges that random testing furthers this interest by deterring 'prohibited alcohol and controlled substance use' and detecting 'prohibited use for the purpose of removing identified users from the safety-sensitive work force.'").

63. *Id*.

64. *Id*.

65. *Id*. The court also noted that the firefighters did not request or approve the implementation of the testing policy. *Id*.

66. *Id*.

In its emphasis on the meager evidentiary record with respect to a tangible substance abuse problem among firefighters, the court discounted the City's argument that the U.S. Supreme Court has not required proof of a documented drug problem before approving suspicionless drug testing in other contexts.[67] Even though pervasive drug and alcohol abuse was not dispositive in approving the drug testing schemes in *Von Rabb*, *Vernonia*, and *Earls*, the court distinguished those cases as implicating other concerns not present in the instant situation.[68] The employees in *Von Rabb*, for instance, worked directly in drug interdiction, in the "Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population."[69] In addition, the *Vernonia* and *Earls* decisions placed special importance on the school districts' custodial responsibility over their students, a factor not present in the City's relationship with its firefighters.[70] Moreover, the random testing policies in the school cases were devised in response to an identified substance abuse problem in the school districts.[71] The *Petersen* court acknowledged that "the lack of empirical data, by itself, is not fatal to a suspicionless testing program," but nevertheless considered it an important factor in assessing the strength of the City's interest.[72]

The court next evaluated Petersen's Fourth Amendment privacy interests by determining, first, his reasonable expectation of privacy as a firefighter and second, the nature of the intrusion caused by the random drug test.[73] Comparing firefighters to the railroad employees in *Skinner*, the court similarly characterized the privacy interests at issue as diminished and noted that firefighters should anticipate at least "some intrusion into matters involving their health and fitness."[74] The job of a firefighter requires not only living in a communal setting while on duty, but it also entails a great emphasis on the safety and protection of the general public.[75] In examining the level of intrusiveness occasioned by the drug test, the court initially recognized the City's attempt at limiting interference with the firefighters' privacy.[76] The urine samples are collected in private stalls and are tested by reliable, proven methods.[77] Additionally, test results are kept strictly

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67. *Id*. at 39–41. The City relied on *Von Rabb*, *Vernonia*, and *Earls* for its assertion that a documented drug problem is not a necessary condition for a testing policy's reasonableness. *Id*. at 39.

68. *Id*. at 39–41.

69. *Id*. at 40 (citing Nat'l Treasury Employees Union v. Von Rabb, 489 U.S. 656, 668 (1989)). Furthermore, the drug testing policy in *Von Rabb*, although suspicionless, was not random; Customs Service employees were given advance notice of their impending drug tests. *Von Rabb*, 489 U.S. at 671 n.2.

70. *Petersen*, 83 P.3d at 40; Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 654–57 (1995); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829–31 (2002).

71. *Petersen*, 83 P.3d at 41; *Acton*, 515 U.S. at 663; *Earls*, 536 U.S. at 834–36.

72. *Petersen*, 83 P.3d at 41.

73. *Id*. at 41–43.

74. *Id*. at 41.

75. *Id*. ("A firefighter's ability to do this job in a safe and effective manner depends, in substantial part, on his or her health and fitness.").

76. *Id*. at 41–42.

77. *Id*. at 41.

confidential and are only released with the firefighter's consent.[78] Despite these protective measures, however, the fact that the tests are conducted randomly creates an intrusion into the firefighters' privacy that the court felt could not be characterized as minimal.[79] To support this conclusion, the court acknowledged *Von Rabb*'s observation that "notification in advance of a scheduled search minimizes the intrusiveness of the search."[80] The court also considered as persuasive the reasoning of the Alaska Supreme Court in *Anchorage Police Department Employees Ass'n v. Municipality of Anchorage*,[81] a case involving random, suspicionless drug testing of firefighters and police.[82] The *Anchorage* court distinguished between the privacy intrusions occasioned by random tests and those tests that are scheduled in advance, stating that even where an employee may expect some investigation into his health and fitness, he "might nevertheless expect not to be subjected to a continuous and unrelenting government scrutiny that exposes the employee to unannounced testing at virtually any time."[83]

After deliberating upon the aforementioned factors, the court ruled that the privacy interests of the firefighters outweighed the City's "generalized and unsubstantiated" interests in conducting random, suspicionless drug tests.[84] Thus, the Program's random testing provision failed the Fourth Amendment's requirement of reasonableness and was held unconstitutional.[85]

IV. CONCLUSION

The Arizona Supreme Court, in holding unconstitutional the random drug testing of city firefighters, placed great weight on two main factors. First, the court emphasized the lack of evidence concerning a real, identified substance abuse problem amongst members of Mesa's Fire Department.[86] Second, the random nature of the mandatory tests elevated the level of interference on the firefighters' reasonable expectations of privacy.[87] These factors, in balancing the City's interests in conducting randomized drug and alcohol testing against the firefighters' privacy expectations, tipped the scale towards the firefighters, and the random testing provision was struck down.[88] Notwithstanding the court's decision, however, Mesa firefighters may still be subject to drug and alcohol testing pursuant to the Department's substance abuse program; the first three provisions in

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78. *Id*. at 42.

79. *Id*.

80. *Id*. *See also* Nat'l Treasury Employees Union v. Von Rabb, 489 U.S. 656, 672 n.2 (1989).

81. 24 P.3d 547 (Alaska 2001) (invalidating the random component of Anchorage's drug testing policy).

82. *Petersen*, 83 P.3d at 42–43.

83. *Anchorage*, 24 P.3d at 558.

84. *Petersen*, 83 P.3d at 43.

85. *Id*. ("[T]he increased intrusion occasioned by the Program's random, suspicionless testing component represents the very type of 'arbitrary and invasive acts by officers of the Government or those acting at their direction' against which the Fourth Amendment is meant to guard.").

86. *Id*. at 39–41.

87. *Id*. at 42–43.

88. *Id*. at 38–43.

the drug testing policy remain unchallenged after *Petersen*.[89] Therefore, the City of Mesa will not be completely hindered from its goals of deterring drug and alcohol abuse by its firefighters and ensuring the public's safety.

89. *Id.* at 37 n.2; *see supra* note 13.