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GOVERNMENT DRUG TESTING IN MARYLAND: THE IMPLICATIONS OF *CITY OF ANNAPOLIS v. UNITED FOOD & COMMERCIAL WORKERS, LOCAL 400*

Ellen Zelinski Cohill†

Drug abuse has reached epidemic proportions in American society,¹ affecting the workplace in several ways. First, employees who are drug abusers jeopardize the safety of their co-workers and the general public; those using drugs have three to four times as many accidents as other employees.² Second, employees who use drugs have a "higher rate of absenteeism, with estimates ranging from 2.5 to

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1. Michael R. O'Donnell, Comment, *Employee Drug Testing—Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA. L. REV. 969, 970 (1988) (citing Evan Thomas, *America's Crusade: What is Behind the Latest War on Drugs*, TIME, Sept. 15, 1986, at 60 ("opinion polls reveal that drug abuse is now the nation's number one concern")); see also Kaye M. Sunderland & Coni S. Rathbone, Development in the Law, *Jar Wars: Drug Testing in the Workplace*, 23 WILLAMETTE L. REV. 529, 529-35 (1987) (providing a brief sketch of the magnitude of drug abuse and its societal costs).

"More than seventy million Americans have experimented with illegal drugs, and twenty-three million currently use an illegal drug." James M. Sokolowski, *Government Drug Testing: A Question of Reasonableness*, 43 VAND. L. REV. 1343, 1344 (1990) (citing MARK A. ROTHSTEIN, MEDICAL SCREENING AND THE EMPLOYEE HEALTH COST CRISIS 95 (1989)).

2. Craig Zwerling et al., *The Efficacy of Preemployment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome*, 264 JAMA 2639, 2643 (1990). Research indicates that

[d]rug users have been reported to be involved in 200% to 300% more industrial accidents, to sustain 400% more compensable injuries, and to use 1,500% more sick leave [T]hose with marijuana-positive urine samples have 55 percent more industrial accidents, 85 percent more injuries, and a 78 percent increase in absenteeism.

Id.

16 times higher than employees who do not use drugs."³ Third, drug abusers are likely to cause insurance costs to escalate because of increased accident claims. Finally, because of the illegal use of drugs in the workplace, billions of dollars are lost in productivity and absenteeism each year in the United States.⁴

In *City of Annapolis v. United Food & Commercial Workers, Local 400*,⁵ the Court of Appeals of Maryland considered the constitutionality of the City of Annapolis' drug testing program of fire fighters and police personnel during routine physical examinations.⁶ Although some degree of individualized suspicion is normally required for searches conducted in the absence of the Fourth Amendment's warrant and probable cause requirements, the court of appeals held that exceptions do exist.⁷ Earlier the same year, the Supreme Court in *National Treasury Employees Union v. Von Raab*⁸ and *Skinner v. Railway Labor Executives' Association*⁹ recognized that exceptions to the individualized suspicion requirement exist. In *United Food*, the court of appeals recognized standards no more protective of employee rights than had been established by the Supreme Court.¹⁰

This Article examines the current state of government drug testing in Maryland. Part I explores the problem of drugs in the government workplace and discusses the relevant federal law on government drug testing programs. Part II analyzes the *United Food* decision as it applies to mandatory government drug testing and its ramifications on the reasonable suspicion requirement of the Fourth Amendment in light of *Von Raab* and *Skinner*. Part III reviews the current state of Maryland law regarding drug testing. Part IV details the drug testing procedures implemented by the Secretary of Person-

3. Mark A. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI-KENT L. REV. 683, 688 (1987).

4. Sokolowski, *supra* note 1, at 1344 n.6 (citing MARK A. ROTHSTEIN, MEDICAL SCREENING AND THE EMPLOYEE HEALTH COST CRISIS 95, 96 (1989)); see Anne M. Rector, Comment, *Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening*, 35 EMORY L.J. 1011, 1011 (1986); see also Study: \$50 Billion Wasted Annually from Abuse of Drugs and Alcohol, 4 Employee Rel. Weekly (BNA) 1554 (1986) (citing a study by the Comprehensive Care Corporation).

5. 317 Md. 544, 565 A.2d 672 (1989).

6. *Id.* at 545-46, 565 A.2d at 672-73.

7. *Id.* at 552, 565 A.2d at 676.

8. 489 U.S. 656, 665-66 (1989).

9. 489 U.S. 602, 619-20 (1989).

10. *United Food*, 317 Md. at 563, 565 A.2d at 681. While the Supreme Court is the final arbiter regarding protections embodied in the federal constitution, states are free to interpret their own constitutions as being more, but not less, protective of individual liberties than the Federal Constitution.

nel and currently codified at COMAR 06.01.09. Part V examines the impact of various judicial and executive branch decisions on Maryland law. Finally, the Article concludes that the reasonableness balancing test established by the Supreme Court and adopted by the Court of Appeals of Maryland has given government employers wide latitude in implementing drug testing programs.

I. BACKGROUND

In response to the enormous drug abuse problem in the United States,¹¹ in 1986, President Reagan issued an executive order mandating a "drug-free federal workplace."¹² This wide-sweeping order dictated that illegal drug use by federal employees, on-duty or off-duty, is unacceptable, and directed executive agencies to implement a program for random drug testing of employees in "sensitive positions."¹³ Other government employers concerned with the economic reality of drug abuse and safety in the workplace also responded by implementing employee drug testing programs.¹⁴ State and local government workers from groups as diverse as fire fighters and police

11. See *supra* notes 1-4 and accompanying text.

12. Exec. Order No. 12,564, 3 C.F.R. 224 (1987), *reprinted in* 5 U.S.C. § 7301 (1988); see also Edward S. Adams, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U. CHI. L. REV. 1335, 1335 n.3 (1987) (listing early military and administrative agency drug testing policies); Thomas L. McGovern, III, *Employee Drug-Testing Legislation: Redrawing the Battlegrounds in the War on Drugs*, 39 STAN. L. REV. 1453, 1460 (1987) (recognizing that the first challenges to urinalysis testing concerned the Army's Drug and Alcohol Abuse Prevention and Control Program).

13. Exec. Order No. 12,564, *supra* note 12, § 3(a) *reprinted in* 5 U.S.C. § 7301 (1988). Section 7(d) of the Order defines an "employee in a sensitive position" as any of the following:

- (1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Non-Critical-Sensitive . . . ;
- (2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head . . . ;
- (3) Individuals serving under Presidential appointments;
- (4) Law enforcement officers . . . ; and
- (5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

Id. § 7(d)(1)-(5) (emphasis added).

14. Martha I. Finney, *The Right To Be Tested*, 33 PERSONNEL ADM. 74, 74 (1988) ("About a third of U.S. businesses and government agencies have implemented drug testing in the workplace, including nine out of 10 utilities, eight out of 10 transportation operations and half of sports associations and government agencies.").

officers,¹⁵ correction officers,¹⁶ probationary school teachers,¹⁷ nuclear power plant employees,¹⁸ racing commission licensees,¹⁹ and city transit authority conductors²⁰ have been subjected to drug testing.²¹

As a result of these testing programs, many government employees are questioning the constitutionality of drug testing. Unlike private sector programs,²² government drug testing programs constitute state action, enabling opponents to invoke the protection of the Fourth Amendment of the United States Constitution.²³ The Fourth

15. See *McCloskey v. Honolulu Police Dep't*, 799 P.2d 953 (Haw. 1990) (upholding drug testing of a police officer); *Doe v. City of Honolulu*, 816 P.2d 306 (Haw. Ct. App. 1991) (upholding the fire department's suspicionless drug testing of urine specimens collected at the time of the fire fighters' annual physical examination); *O'Connor v. Police Comm'r of Boston*, 557 N.E.2d 1146 (Mass. 1990) (holding that unannounced, warrantless, suspicionless urinalysis testing of profiled police cadets was constitutional).
16. See *Seelig v. Koehler*, 556 N.E.2d 125 (N.Y.), *cert. denied*, 111 S. Ct. 134 (1990) (upholding mandatory, random drug testing of all correction officers).
17. See *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 505 N.Y.S.2d 888 (N.Y. App. Div. 1986) (testing probationary teachers without individualized suspicion held unconstitutional), *aff'd*, 510 N.E.2d 325 (N.Y. 1987).
18. See *Alverado v. Washington Public Power Supply Sys.*, 759 P.2d 427 (Wash. 1988) (upholding mandatory urinalysis drug testing for all prospective employees at a municipally-owned nuclear power plant), *cert. denied*, 490 U.S. 1004 (1989).
19. *Holthus v. Louisiana State Racing Comm'n*, 580 So. 2d 469 (La. Ct. App.) (upholding drug testing of all licensees of commission, except owners who are not trainers), *cert. denied*, 584 So. 2d 1162 (La. 1991).
20. *Dozier v. New York City*, 519 N.Y.S.2d 135 (N.Y. App. Div. 1987) (upholding New York City Transit Authority drug testing of three applicants for the position of conductor).
21. Urinalysis is the most popular method of drug testing for several reasons: (1) The collection of urine is noninvasive; (2) large volumes can be collected easily; (3) drugs and metabolites are generally present in higher concentrations in urine than in other tissues or fluids . . . ; (4) urine is easier to analyze than blood and other tissues . . . ; and (5) drugs and their metabolites are usually very stable in frozen urine, allowing long-term storage of positive samples.
Council on Scientific Affairs, American Medical Association, *Scientific Issues in Drug Testing*, 257 JAMA 3110, 3111 (1987). Although blood tests are more invasive than urinalysis tests, they can be tailored to detect recent drug use. Tia S. Denenberg & Richard V. Denenberg, *Employee Drug Testing and the Arbitrator: What Are the Issues?* 42 ARB. J. 19, 27 (1987); Kurt M. Dubowski, *Drug-Use Testing: Scientific Perspectives*, 11 NOVA L. REV. 415, 427-28, 432-35 (1987).
22. The Fourth Amendment does not apply to private employers in the absence of "state action." See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).
23. The Fourth Amendment to the United States Constitution provides as follows:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

Amendment prohibits the federal government and its agents from engaging in unreasonable searches and seizures.²⁴ State constitutional provisions, such as Maryland's Declaration of Rights, also forbid unreasonable government searches and seizures.²⁵ The ultimate determination of a search's "reasonableness," however, requires the balancing of the intrusiveness of the search against its promotion of a legitimate government interest.²⁶

In the past, federal and state courts have consistently struck down government drug testing programs as unreasonable searches and seizures in violation of the Fourth Amendment.²⁷ In *Capua v.*

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.

U.S. CONST. amend. IV.

24. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985). A search conducted by governmental actors assumes constitutional significance, however, only when it is also unreasonable. *United States v. Sharpe*, 470 U.S. 675, 682 (1985).

25. The Maryland Declaration of Rights provides:

That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous [sic] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

MD. CONST. CODE ANN. art. 26 (1981).

Although this Article focuses on public-sector employees, seven state constitutions contain a protection for the right of privacy which may presumably be violated by the mandatory drug testing of private-sector employees. See ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; HAW. CONST. art. I, § 5; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; WASH. CONST. art. I, § 7.

26. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); see *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (stating that reasonableness is determined in light of "all of the circumstances surrounding the search . . . and the nature of the search . . . itself"); *Chimel v. California*, 395 U.S. 752, 765 (1969) (stating that reasonableness is determined by the facts and circumstances of each case "in the light of established Fourth Amendment principles"); *Cooper v. California*, 386 U.S. 58, 59 (1967) (stating that reasonableness of a search and seizure is determined by the facts and circumstances of each case).
27. See *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110 (N.D. Ga. 1990) (holding drug testing of all job applicants unconstitutional); *Beattie v. City of St. Petersburg Beach*, 733 F. Supp. 1455, 1458 (M.D. Fla. 1990) (holding suspicionless drug testing of firefighters unconstitutional since the city could not demonstrate any evidence of drug use, on- or off-duty, or a history of accidents attributable to drug use); *American Postal Workers Union v. Frank*, 725 F. Supp. 87 (D. Mass. 1989) (ruling drug testing of job applicants without individualized suspicion unconstitutional); *American Fed'n of Gov't Employees v. Thornburgh*, 720 F. Supp. 154 (N.D. Cal. 1989) (holding mandatory, random urinalysis testing of all Federal Bureau of Prisons employees unconstitutional). See generally Phyllis T. Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing*, 11 NOVA L. REV. 307, 337 (1987) (stating that a majority of lower courts have held drug testing procedures unconstitutional).

City of Plainfield,²⁸ a federal district court was confronted with the issue of whether a substance abuse testing program implemented by a New Jersey city's police and fire departments was constitutional. Under the program, all members of the police and fire departments were subject to surprise urinalysis testing.²⁹ The city based implementation of the program upon the belief that its duty to protect the public welfare mandated the employment of drug-free police officers and fire fighters.³⁰ The *Capua* court, however, held that the program constituted an unreasonable search and seizure in violation of the Fourth Amendment.³¹ The court reasoned that the program not only "[swept] up the innocent with the guilty" employees but also "sacrifice[d] each [employee's] Fourth Amendment rights in the name of some larger public interest."³²

In *Lovvorn v. City of Chattanooga*,³³ municipal fire fighters were required to submit to blood and urinalysis tests and "pat downs" at the discretion of the city fire and police commissioners. The Sixth Circuit held that the regulation authorizing a department-wide drug test violated the Fourth Amendment as an unreasonable search and seizure.³⁴ The *Lovvorn* court found no evidence of a widespread drug problem or an individualized suspicion which would have justified the program.³⁵

More recently, however, federal courts have upheld certain drug testing procedures by finding exceptions to the Fourth Amendment warrant and probable cause requirements.³⁶ In *Amalgamated Transit*

28. 643 F. Supp. 1507 (D.N.J. 1986).

29. *Id.* at 1511-12. The program implemented called for testing *en masse*, rather than individual testing. *See id.*

30. *Id.* at 1515.

31. *Id.* at 1517.

32. *Id.*

33. 846 F.2d 1539 (6th Cir. 1988).

34. *Id.* at 1547.

35. *Id.*

36. *American Fed'n of Gov't Employees, Local 1533 v. Cheney*, 944 F.2d 503, 509 (9th Cir. 1991) (holding Fourth Amendment does not prohibit the Navy's random drug testing of civilian employees holding security clearances with access to classified information); *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1309 (9th Cir. 1991) (upholding constitutionality of drug testing of commercial drivers subject to Federal Highway Administration (FHWA) regulations); *Willner v. Thornburgh*, 928 F.2d 1185, 1194 (D.C. Cir.) (holding urine tests of applicants for positions as attorneys at the Department of Justice did not constitute "unreasonable searches" under the Fourth Amendment), *cert. denied sub nom.*, *Willner v. Barr*, 112 S. Ct. 669 (1991); *Hartness v. Bush*, 919 F.2d 170, 174 (D.C. Cir. 1990) (holding random urinalysis testing of employees with "secret" security clearances was constitutional), *cert. denied*, 111 S. Ct. 2890 (1991); *Harmon v. Thornburgh*, 878 F.2d 484, 496 (D.C. Cir. 1989) (allowing random drug testing of Justice Department

Union v. Cambria County Transit Authority,³⁷ the court permitted drug testing as part of the employee's regularly scheduled physical examination, even absent evidence of drug abuse among transit employees.³⁸ The *Amalgamated Transit Union* court reasoned that "the Authority need not await the development of a problem[;] it may take preventative measures."³⁹ Similarly, in *Wrightsell v. City of Chicago*,⁴⁰ the court held that mandatory drug testing of police officers returning from leave of thirty days or more, conducted during a routine medical examination, was not an unreasonable search within the meaning of the Fourth Amendment.⁴¹ In *Wrightsell*, the court reasoned that requiring a urine sample as part of a physical examination is a minimal intrusion.⁴² The diversity of opinion in the federal courts drew the attention of the Supreme Court.

On March 21, 1989, the Supreme Court handed down two decisions upholding the constitutionality of certain government-ordered drug testing programs.⁴³ In *Skinner v. Railway Labor Execu-*

personnel holding top secret national security clearances), *cert. denied sub nom.*, *Bell v. Thornburgh*, 493 U.S. 1056 (1990); *Holloman v. Greater Cleveland Regional Transit Auth.*, 741 F. Supp. 677, 686 (N.D. Ohio 1990) (upholding constitutionality of drug testing of transit bus drivers), *aff'd*, 930 F.2d 918 (6th Cir. 1991). *But see* *American Fed'n of Gov't Employees v. Sullivan*, 787 F. Supp. 255 (D.D.C. 1992) (granting "permanent injunction against the testing of motor vehicle operators whose duties do not include the transportation of passengers" or highly classified materials).

The Supreme Court has recognized that requiring the government to procure a warrant for every work-related intrusion "would conflict with 'the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987) (plurality opinion) (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)). A search ordinarily must be based upon probable cause, even where it is reasonable to dispense with the warrant requirement in certain circumstances. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

37. 691 F. Supp. 898 (W.D. Pa. 1988).

38. *Id.* at 907-08.

39. *Id.* at 905.

40. 678 F. Supp. 727 (N.D. Ill. 1988).

41. *Id.* at 733-34; *see also* *Jones v. McKenzie*, 833 F.2d 335, 340 (D.C. Cir. 1987) (stating that mandatory drug testing of bus drivers, mechanics and attendants conducted "during routine, reasonably required annual medical examinations" minimized intrusion on privacy), *vacated sub nom.*, *Jenkins v. Jones*, 490 U.S. 1001, *modified on remand*, 878 F.2d 1476 (D.C. Cir. 1989); *Amalgamated Transit Union, Local 993 v. City of Oklahoma City*, 710 F. Supp. 1321, 1331-32 (W.D. Okla. 1988) (conducting mandatory drug testing of municipal transit employees operationally involved in the transportation service during the course of regularly conducted medical examinations minimized intrusiveness).

42. *Wrightsell*, 678 F. Supp. at 733.

43. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

tives' Ass'n,⁴⁴ the Court, by a 7-2 vote, upheld Federal Railroad Administration regulations that mandated testing of blood and urine samples for drug use by employees following major train accidents or the violation of safety standards.⁴⁵ The *Skinner* Court held that, because the compelling government interest served by the regulations outweighed employees' privacy interests, the drug and alcohol testing mandated by Federal Railroad Administration regulations was reasonable despite the lack of a warrant or reasonable suspicion that a particular employee might be impaired.⁴⁶ The Court reasoned that the governmental interests in preventing railroad accidents "justifie[d] prohibiting covered employees from using alcohol or drugs on duty."⁴⁷

In *National Treasury Employees Union v. Von Raab*,⁴⁸ the Court upheld mandatory urinalysis testing of Custom Service employees who sought promotion into jobs that involved either the interdiction of illegal drugs or the carrying of firearms.⁴⁹ The *Von Raab* Court held that, although the Custom Service's drug testing program was subject to the reasonableness requirement of the Fourth Amendment, a warrant was not necessary because testing employees applying for promotions to positions involving interdiction of illegal drugs or requiring them to carry firearms was reasonable under the Fourth

44. 489 U.S. 602 (1989). Although Justice Stevens concurred with the opinion, he disagreed with the Court's conclusion that the drug testing program served to deter drug and alcohol abuse. *Id.* at 634-35 (Stevens, J., concurring). Justice Marshall, joined by Justice Brennan, dissented:

The majority's concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its cavalier disregard for the text of the Constitution is not. There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest.

Id. at 641 (Marshall, J., dissenting) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971)).

45. *Id.* at 632-33. "These accidents involved a fatality, release of hazardous material, or damage to railroad property above a specified amount." Michael A. Mass, *Public Sector Drug Testing: A Balancing Approach and the Search For a New Equilibrium*, 42 BAYLOR L. REV. 231, 238 n.45 (1990) (citing *Skinner*, 489 U.S. at 608 (citing 49 C.F.R. § 219.20(a)(1)-(3) (1987))).

"Government officials said that from 1972 through 1983, railroad accidents linked to drug or alcohol abuse killed 42 persons, injured 61 and caused \$19 million in property damage." Stephen Kurkjian, *Justices OK Drug Tests in Some Jobs*, BOSTON GLOBE, Mar. 22, 1989, at 1.

In January 1987 a Conrail freight train collided with an Amtrak train near Baltimore, killing 16 persons and injuring 158 persons. *Id.* According to tests conducted, the Conrail engineer and brakeman had smoked marijuana just prior to the accident. *Id.*

46. *Skinner*, 489 U.S. at 634.

47. *Id.* at 621.

48. 489 U.S. 656 (1989).

49. *Id.* at 677.

Amendment.⁵⁰ The Court reasoned that safeguarding the borders of the United States as well as the safety of the public outweighed the Custom Service employees' privacy expectations with respect to the urine testing program.⁵¹

In *Von Raab*, the Court stated that "requiring employees . . . to produce urine samples for chemical testing implicate[s] the Fourth Amendment, as those tests invade reasonable expectations of privacy."⁵² In *Skinner*, however, the Court stated that "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."⁵³ Thus, as a result of these two Supreme Court cases, the following standard has emerged: A government employee may be tested when there is a reasonable suspicion that the employee is impaired by, or under the influence of, drugs while at work or when a compelling government interest served by the regulations outweighs the employee's privacy concerns.

II. CITY OF ANNAPOLIS v. UNITED FOOD & COMMERCIAL WORKERS, LOCAL 400

In 1986, the City of Annapolis proposed a drug testing plan as part of the regularly scheduled physical examinations required for

50. *Id.*

51. *Id.* Justice Scalia, joined by Justice Stevens, dissented: "I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." *Id.* at 687 (Scalia, J., dissenting). Justice Marshall, again joined by Justice Brennan, dissented for the same reasons as in *Skinner*. *Id.* at 679 (Marshall, J., dissenting).

52. *Von Raab*, 489 U.S. at 665 (citing *Skinner*, 489 U.S. at 616-18). In *Skinner*, the Supreme Court stated:

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom. . . . [T]he Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.

Skinner, 489 U.S. at 617 (citation omitted).

In *City of Annapolis v. United Food & Commercial Workers, Local 400*, 317 Md. 544, 551, 565 A.2d 672, 675 (1989), the Court of Appeals of Maryland noted that "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Id.* at 551 n.2, 565 A.2d at 675 n.2 (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

53. *Skinner*, 489 U.S. at 624.

city uniformed police and fire fighters.⁵⁴ The unions objected to parts of the plan, and when the parties could not reach an agreement, the City filed an unfair labor practices complaint with the State Mediation and Conciliation Service (hereinafter "Service").⁵⁵ The Service found that the City's drug testing program was constitutional and permitted it to be imposed.⁵⁶ The unions appealed to the Circuit Court for Anne Arundel County, which held that the plan was unconstitutional under the Fourth Amendment because it was not based on individualized suspicion of drug use among the employees.⁵⁷ The City appealed, and the Court of Appeals of Maryland granted certiorari prior to consideration by the court of special appeals.⁵⁸ On certiorari, the court of appeals reversed the trial court.⁵⁹

In *United Food*, the court of appeals held that a program of mandatory suspicionless drug testing of uniformed police and fire fighters did not violate the Fourth Amendment when conducted during an employee's regularly scheduled physical examination.⁶⁰ The court noted that employees had a diminished expectation of privacy because they had previously consented to urinalyses during routine physical examinations.⁶¹ With the *Skinner* and *Von Raab* cases as their guide, the court of appeals reasoned that the City's interest in the safety of police and fire fighters, co-workers, and the public was sufficiently compelling to outweigh the privacy interests of police and fire personnel.⁶²

The Court of Appeals of Maryland upheld the constitutionality of the City of Annapolis' drug testing program. Although some degree of individualized suspicion is normally required for searches in the absence of the warrant and probable cause requirements of the Fourth Amendment, there are exceptions, as illustrated in the

54. *United Food*, 317 Md. at 546, 565 A.2d at 672-73.

55. *Id.* at 546, 565 A.2d at 673. See generally MD. CODE ANN., LAB. & EMP. § 4-103 (1991) (The Mediation Service is a unit functioning within the State Division of Labor and Industry.).

56. *United Food*, 317 Md. at 547-48, 565 A.2d at 673-74.

57. *Id.* at 548-49, 565 A.2d at 674.

58. *Id.* at 550, 565 A.2d at 675.

59. *Id.* at 566-67, 565 A.2d at 683.

60. *Id.* at 566, 565 A.2d at 683. The court of appeals held that the City's drug testing program did not violate the Fourth Amendment. Further, the court reasoned that while the Fourth Amendment and the Maryland Declaration of Rights are independent of each other, the two constitutional provisions should be read *in pari materia*. *Id.* at 566 n.4, 565 A.2d at 683 n.4 (citing *Widgeon v. Eastern Shore Hosp. Ctr.*, 300 Md. 520, 532, 479 92A.2d 921, 927 (1984); *Gahan v. State*, 290 Md. 310, 319-20, 430 A.2d 49, 54 (1981); *Attorney Gen. v. Waldron*, 289 Md. 683, 714, 426 A.2d 929, 946 (1981)).

61. *United Food*, 317 Md. at 553, 565 A.2d at 676.

62. *Id.* at 561-63, 565 A.2d at 680-81.

Supreme Court cases of *Von Raab* and *Skinner*.⁶³ The court of appeals balanced the governmental interests in conducting the search against the employee's expectation of privacy in deciding whether the search was reasonable.⁶⁴

A. Privacy Interests

In evaluating the privacy interests of the employees, the court of appeals focused on the actual drug analysis of the urine sample, not on the mandatory taking of the sample.⁶⁵ The reason for this focus was that the employees "had participated for several years, without objection, in providing urine specimens for analysis as part of their required periodic physical examinations."⁶⁶ Although the court acknowledged that the actual assaying of samples for drug use constituted a search, the court found that "the intrusion on [the employee's] reasonable expectations of privacy was not only 'minimal' under *Skinner* and *Von Raab*, but negligible for several reasons."⁶⁷

First, the court of appeals observed that the employees received three distinct notices of testing: (1) the physical would be during their "birthday" month; (2) within thirty days, they knew the week of the examination; and (3) within forty-eight hours, they knew the

63. *Id.* at 552, 565 A.2d at 676 (citations omitted). Compare *National Treasury Union v. Von Raab*, 489 U.S. 656 (1989) (upholding suspicionless drug testing for Custom Service employees applying for promotion to positions involving interdiction of illegal drugs or requiring them to carry firearms) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (upholding suspicionless drug testing for railroad employees involved in certain train accidents or violations of safety standards) with *City of Annapolis v. United Food & Commercial Workers, Local 400*, 317 Md. 544, 565 A.2d 672 (1989) (upholding suspicionless drug testing for police and fire fighter personnel when conducted during the employee's annual physical examination).

64. *United Food*, 317 Md. at 553-63, 565 A.2d at 676-81. Whether a search is reasonable depends upon a balancing test set forth by Justice O'Connor in *O'Connor v. Ortega*, 480 U.S. 709 (1987), as follows:

A determination of the standard of reasonableness applicable to a particular class of searches requires "[balancing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace.

Id. at 719-20 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)) (citations omitted).

65. See *United Food*, 317 Md. at 553, 565 A.2d at 676.

66. *Id.* For several years, police and fire fighters participated in periodic physical examinations where a urine specimen was used to analyze for physiological explanations other than drug use. *Id.*

67. *Id.*

time of the examination.⁶⁸ The court compared the case before it with *Von Raab* and found that, in the latter case, the employees also received advance notice of the test date.⁶⁹ The court explained that receiving three notices prior to testing helped minimize the intrusion on the employees' privacy interests and allayed any anxieties about drug testing.⁷⁰

Second, the court found that disclosure of "private facts," including signs of physical infirmities or latent diseases, was already part of the employees' periodic physical examination.⁷¹ The court stated that physicians skilled in urinalysis would examine the urine sample for such latent diseases or infirmities.⁷² The court emphasized that the *United Food* case involved a lesser degree of intrusion than *Skinner*, because the tests in *Skinner* were not part of a regularly scheduled physical examination. Furthermore, *Skinner* required only "that the urine tests . . . not be used to inquire into private facts unrelated to alcohol or drug use."⁷³ Therefore, the possible disclosure of private facts in *United Food* was deemed not to be a significant invasion of privacy.

Third, the court of appeals noted that the employees were required to complete a medication form to insure that the test results were accurate.⁷⁴ Similarly, in *Skinner*, railroad employees were required to fill out a form listing any medication taken within thirty days before the test.⁷⁵ The court in *United Food* explained that, like *Skinner*, the purpose of the medication form was "to discover whether a positive test result may be explained by the employee's lawful use of drugs."⁷⁶ The court of appeals addressed the concern that the completion of a medication form by the employee permitted the government to learn private facts about an individual that the individual did not want disclosed, such as epilepsy, pregnancy or diabetes.⁷⁷ The court, however, found that there was no indication that the government would disclose such information or use it for other purposes.⁷⁸ In addition, the court was confident that, even

68. *Id.* at 554, 565 A.2d at 676-77.

69. *Id.* at 553-54, 565 A.2d at 676-77.

70. *Id.*

71. *Id.* at 554, 565 A.2d at 677.

72. *Id.*

73. *Id.*

74. *Id.* at 555, 565 A.2d at 677.

75. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626 n.7 (1989). The Court did not find it a significant invasion of privacy that employees giving blood or urine samples must disclose all medications taken within 30 days. *Id.*

76. *United Food*, 317 Md. at 555, 565 A.2d at 677; see *Skinner*, 489 U.S. at 626 n.7.

77. *United Food*, 317 Md. at 555, 565 A.2d at 677 (citing *Skinner*, 489 U.S. at 626 n.7).

78. *Id.*

without drug testing, such disclosure of facts would be the subject of an inquiry during the course of the employee's regularly scheduled physical examination.⁷⁹ The purpose of the annual physical examination was to uncover all medical facts having a bearing on the employee's health and fitness in performing his duties. Consequently, urinalysis was not likely to reveal any personal information, other than the use of drugs, that had not already been uncovered in the annual physical examination.

Finally, the regular physical examinations were used to inquire into the employees' fitness and probity.⁸⁰ The court observed that the program's objective was to provide secure and proficient working conditions for its employees and to protect the public by regulating and treating the illegal use of drugs.⁸¹ In *Von Raab*, the Supreme Court held that employees involved in drug interdiction, or those who carry a firearm, should expect their employer to inquire into their physical fitness and integrity: "Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the [Custom] Service personal information that bears directly on their fitness."⁸²

Similarly, the *United Food* court recognized the City of Annapolis' police and fire personnel were also "required to meet a minimum level of fitness to sustain the demands of physical and mental stress that may arise spontaneously and in a manner not experienced by other public employees."⁸³ The court, however, failed to recognize that the City's program goes beyond the guidelines of *Skinner*. In *Skinner*, suspicionless drug testing was allowed because the railroad industry is a highly regulated industry notorious for its alcohol and drug abuse problem.⁸⁴ Based upon such clear evidence of a serious crisis in public safety, the Supreme Court upheld suspicionless testing, but only after a serious train accident occurred. Although there was no evidence of a significant drug or alcohol

79. *Id.*

80. *Id.* at 555-56, 565 A.2d at 677-78.

81. *Id.* at 556, 565 A.2d at 677.

82. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989).

83. *United Food*, 317 Md. at 556, 565 A.2d at 677-78; see, e.g., MD. CODE ANN., LAB. & EMP. § 9-503 (1991 & Supp. 1992).

84. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 607 (1989). In *Skinner*, the FRA testing regulations resulted from a study which determined that "an estimated one out of every eight railroad workers drank at least once while on duty during the study year." *Id.* at 607 n.1 (citations omitted). In addition, "5% of workers reported to work 'very drunk' or 'got very drunk' on duty at least once in the study year," and "13% of workers reported to work at least 'a little drunk' one or more times during that period." *Id.* The study also found that 23% of the operating personnel were "problem drinkers," but that only 4% of these employees "were receiving help through an employee assistance program" *Id.*

abuse problem in the City's police and fire departments, the *United Food* court concluded that the purpose for the City's drug testing was "reasonably and objectively related to the accepted purpose of medically investigating the employee's fitness for duty."⁸⁵

To strengthen their decision, the *United Food* court equated the case before it with *Amalgamated Transit Union v. Cambria County Transit Authority*,⁸⁶ and distinguished *Lovvorn v. City of Chattanooga*.⁸⁷ *Amalgamated Transit Union* involved a requested preliminary injunction against mandatory drug and alcohol testing of municipal bus drivers and mechanics during regularly scheduled physical examinations.⁸⁸ The court in *Amalgamated Transit Union* held that the intrusion on the employees' privacy rights was minimal because the drug testing of employees had been a routine part of their annual physical examination.⁸⁹ Moreover, the *Amalgamated Transit Union* court believed it was important for the transit authority to take preventive measures to insure the safety of its employees and the general public.⁹⁰

In both *Amalgamated Transit Union* and *United Food*, there was little or no evidence that a drug or alcohol problem existed in the work force.⁹¹ Moreover, both cases involved tests performed only during regularly scheduled physical examinations that already included the taking of urine or blood samples.⁹² Finally, *Amalgamated Transit Union* and *United Food* involved unobserved specimen taking, a confirmatory test in the event that the initial test results were positive, and procedures that protected the confidentiality of the employees.⁹³

Conversely, in *Lovvorn*, employees were not only subjected to a drug test, but also "pat downs" at the discretion of the city fire and police commissioners.⁹⁴ Unlike the program at issue in *United Food*, some fire fighters were even required to provide urine samples under the "direct observation" of their superiors.⁹⁵ In *Lovvorn*, there

85. *United Food*, 317 Md. at 556, 565 A.2d at 678.

86. 691 F. Supp. 898 (W.D. Pa. 1988).

87. 647 F. Supp. 875 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1539 (6th Cir. 1988), *vacated en banc sub nom.*, Penny v. Kennedy, 915 F.2d 1065 (6th Cir. 1990).

88. 691 F. Supp. 898 (W.D. Pa. 1988).

89. *Id.* at 904.

90. *See id.* at 908.

91. *See id.* at 904-05; *United Food*, 317 Md. at 564-65, 565 A.2d at 682.

92. *See Amalgamated Transit Union*, 691 F. Supp. at 904; *United Food*, 317 Md. at 553, 565 A.2d at 676.

93. *Amalgamated Transit Union*, 691 F. Supp. at 900-01; *United Food*, 317 Md. at 554, 565 A.2d at 677.

94. *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1540 (6th Cir. 1988).

95. *Id.*

was no written directive or policy statement delineating the methods for testing, managing, or analyzing the urine samples.⁹⁶ Therefore, the court of appeals recognized that the “unstructured and discretionary” nature of the drug testing program in *Lovvorn* was significantly more intrusive than the drug screening program in *United Food*.⁹⁷

B. Governmental Interests

The *United Food* court identified two compelling governmental interests advanced by the drug tests: (1) ensuring that front-line interdiction employees are physically competent, and (2) ensuring that they have impeccable character and judgment.⁹⁸ To justify its reasoning, the court noted with approval the statement in *Von Raab* that “the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force.”⁹⁹ The *United Food* court concluded that police officers encounter similar risks, in that they also are involved in front-line drug interdiction and are permitted to carry firearms whether on-duty or off-duty.¹⁰⁰ Furthermore, police may be placed in a life threatening situation in which they must exercise split second judgment in the use of their firearms.¹⁰¹

With respect to the City’s fire fighters, the court observed that although fire fighters do not interdict drugs, carry firearms, or handle state secrets, fire fighters are “charged with duties to respond quickly and effectively at a moment’s notice,” and their actions have serious implications with regard to the life and property of others.¹⁰² Thus, the court of appeals in *United Food* held that the City’s interest in the safety of personnel, co-workers, and the public outweighed the privacy interests of the police and fire fighters.¹⁰³

C. Suspicionless Drug Testing

The Union’s argument that a search warrant is required before drug testing is permitted also did not sway the court. Noting that

96. *Id.* at 1541.

97. *United Food*, 317 Md. at 558-59, 565 A.2d at 679.

98. *Id.* at 561-62, 565 A.2d at 680 (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1988)).

99. *Id.* at 562, 565 A.2d at 680-81 (quoting *Von Raab*, 489 U.S. at 671). The *Von Raab* Court likened such risks to those identified in *Skinner*, where a brief lapse of concentration by employees of the railroad “can have disastrous consequences.” *Von Raab*, 489 U.S. at 670 (quoting *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 628 (1989)).

100. *United Food*, 317 Md. at 562, 565 A.2d at 681.

101. *Id.*

102. *See id.* at 562, 565 A.2d at 680.

103. *Id.* at 562, 565 A.2d at 681.

"there is not a great privacy expectation in the drug analysis of an employee's urine produced in this regular examination procedure," the court concluded that "[a] warrant requirement would add little protection to that privacy."¹⁰⁴ While acknowledging that the primary purpose of a warrant is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are neither random nor arbitrary, the court further stated that the City's program was structured to deter illegal drug use, which would be hampered by a warrant requirement.¹⁰⁵ Quoting from *Von Raab*, the court asserted that where drug testing is not premised on "a discretionary determination to search based on a judgment that certain conditions are present, there are simply 'no special facts for a neutral magistrate to evaluate.'"¹⁰⁶ Therefore, the court was logically correct in concluding that (1) a reasonable suspicion requirement was unwarranted, given the government's superior interest in detecting illegal drug use; and (2) the warrant justifications were not jeopardized because the City's program required suspicionless drug testing in the context of an employee's nondiscretionary physical examination.¹⁰⁷

D. Random Drug Testing

Although random drug testing was not an issue in *United Food*, the court indicated in dictum that a random physical examination would require the court to apply a more rigid review.¹⁰⁸ Moreover, the court of appeals noted that jurisdictions are split as to the constitutionality of suspicionless random drug testing in the public sector.¹⁰⁹ For example, some jurisdictions have upheld random drug testing,¹¹⁰ while others have required some degree of suspicion.¹¹¹ The

104. *Id.* at 563-64, 565 A.2d at 681.

105. *Id.* at 563-64, 565 A.2d at 681-82.

106. *Id.* at 564, 565 A.2d 681-82.

107. *Id.*

108. *Id.* at 561, 565 A.2d at 680.

109. *Id.* at 559-61, 565 A.2d at 679-80.

110. See *American Fed'n of Gov't Employees, Local 1533 v. Cheney*, 944 F.2d 503 (9th Cir. 1991) (upholding random drug testing by the Navy of civilian employees having security clearances and access to classified information); *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292 (9th Cir. 1991) (upholding "random, biennial, preemployment and post accident testing of urine samples of truck drivers without [a] warrant or without individualized suspicion"); *American Fed'n of Gov't Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (holding suspicionless random drug testing of federal transportation workers constitutional), *cert. denied*, 495 U.S. 923 (1990); *Thomson v. Marsh*, 884 F.2d 113 (4th Cir. 1989) (upholding random drug testing for civilian employees at a chemical weapons plant); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir.) (holding suspicionless random drug testing of city police constitutional), *cert. denied*, 493 U.S. 963 (1989); *Policemen's Benevolent*

legality of purely random drug testing of government workers has not yet been decided by the United States Supreme Court. To date, the Court has consistently declined to review cases such as *Harmon v. Thornburgh*¹¹² and *Hartness v. Bush*,¹¹³ both of which address this issue.

III. DRUG TESTING OF MARYLAND STATE EMPLOYEES

On April 7, 1989, Governor William Donald Schaefer outlined the State's commitment to a drug-free workplace in an executive order entitled "State of Maryland Substance Abuse Policy,"¹¹⁴ which made it a condition of employment that all state employees refrain from using illegal drugs.¹¹⁵ Although subsequently rescinded by a

Ass'n v. Township of Washington, 850 F.2d 133 (3d Cir. 1988) (holding suspicionless random urinalysis of police officers constitutional), *cert. denied*, 490 U.S. 1004 (1989).

111. See *National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) (department of agriculture employees who do not hold safety or security-sensitive jobs); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (prison employees having daily contact with prisoners); *Beattie v. City of St. Petersburg Beach*, 733 F. Supp. 1455 (M.D. Fla. 1990) (fire fighters); *Wrightsell v. City of Chicago*, 678 F. Supp. 727 (N.D. Ill. 1988) (police officers not tested as part of routine, reasonably-required medical examination); *Smith v. White*, 666 F. Supp. 1085 (E.D. Tenn. 1987) (nuclear plant employees), *aff'd*, 857 F.2d 1475 (6th Cir. 1988); *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986) (department of defense civilian police officers holding "critical" jobs); *McKenzie v. Jackson*, 556 N.E.2d 1072 (N.Y. 1990) (probationary correction officers).
112. 878 F.2d 484 (D.C. Cir. 1989), *cert. denied sub nom.*, *Bell v. Thornburgh*, 493 U.S. 1056 (1990) (holding random drug testing by urinalysis of personnel holding "top secret" security clearances was permissible).
113. 919 F.2d 170 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2890 (1991) (holding random drug testing by urinalysis of employees who held "secret" security clearances was permissible).
114. 16:8 Md. Reg. 900 (1989) (codified at Exec. Order (COMAR) 01.01.1989.05 (*rescinded by* Exec. Order (COMAR) 01.01.1991.16)); see COMAR 06.01.09 (delineating current drug testing regulations). The 1989 Executive Order amended the January 9, 1989 drug testing regulations under COMAR 06.01.01 which previously allowed the Secretary of Personnel to test employees for drug abuse only upon "reasonable suspicion." See COMAR 06.01.09.04(A) (Supp. 10, 1988). As of November 20, 1990, the Secretary of Personnel is authorized to test state employees in "sensitive positions" or in "sensitive classifications" on a random basis. See COMAR 06.01.09.04(B). As indicated, the Governor's original order, Exec. Order (COMAR) 01.01.1989.05, was rescinded by a subsequent order in 1991, Exec. Order (COMAR) 01.01.1991.16.
115. At the time of its implementation, the Substance Abuse Policy was expected to affect approximately 13,000 state workers. Maryland: Drug Testing, Individual Emp. Rights Newsletter (BNA) (Nov. 20, 1990) in WL 5 IER 21d 4, at *1.

more comprehensive order,¹¹⁶ both the original order and its successor emphasize the commitment "to making good faith efforts to insure a safe, secure, and drug-free workplace for its employees consistent with the Drug-Free Workplace Act as enacted by Congress."¹¹⁷ Thus, the Governor's orders focus not upon the use of drug testing or screening as a specific means of identifying drug users, but upon the broader goal of removing from the workplace those employees whose drug or alcohol use jeopardizes the safety or security of themselves or others. In this regard, both the original order and its successor explicitly recognize the distinct status of employees in "sensitive" classifications,¹¹⁸ a theme also echoed by the COMAR regulations that implement the testing of state employees for illegal drug use.¹¹⁹

Maryland's drug testing statute, section 17-214.1 of the Health-General Code, specifically grants private employers the right to test for drug or alcohol use by employees or applicants.¹²⁰ Currently, there is no Maryland statute directly requiring state agencies to implement drug testing programs for their employees.¹²¹ Pursuant to Article 64A of the Annotated Code of Maryland, however, the Secretary of Personnel for the State of Maryland has the authority to adopt by regulation a drug testing program.¹²² After consulting with the Attorney General of Maryland,¹²³ regulations establishing a procedure for testing for illegal drug use by state employees and applicants for state employment were proposed by the Secretary in June 1988¹²⁴ and adopted in December of that year.¹²⁵ As originally adopted, the regulations required the testing of all applicants¹²⁶ and

116. See Exec. Order (COMAR) 01.01.1991.06 (codifying 18:8 Md. Reg. 848 (1991)).

117. *Id.* 01.01.1991.06(B)(1); accord Exec. Order (COMAR) 01.01.1989.05(C).

118. Exec. Order (COMAR) 01.01.1991.16(A)(7); Exec. Order (COMAR) 01.01.1989.05(A)(6).

119. See COMAR 06.01.09.01(B)(8).

120. See MD. CODE ANN., HEALTH-GEN. § 17-214.1 (1990 & Supp. 1992).

121. See 75 Op. Att'y Gen. Md. 91 (1990). On January 17, 1990 Delegate Ryan introduced H.D. 370, which would have authorized the Secretary of Personnel to establish and implement a drug testing program for all State applicants and employees in "sensitive positions" or upon individualized suspicion. H.D. 370, Reg. Sess. (1990). However, on April 9, 1990 the bill was withdrawn from the House Appropriations Committee. Telephone Interview with Esther Bishop, Department of Legislative Reference, General Assembly of Maryland, Library and Information Services Division (Dec. 28, 1990).

122. 75 Op. Att'y Gen. Md. 91, 98 (1990); see COMAR 06.01.09 (delineating current drug testing regulations).

123. See 71 Op. Att'y Gen. Md. 58 (1986).

124. See 15:13 Md. Reg. 1559 (1988) (codified as adopted and amended at COMAR 06.01.09).

125. See 15:27 Md. Reg. 3126 (1988) (codified as amended at COMAR 06.01.09).

126. As defined in COMAR, "applicant" "means a person who is seeking an employer-employee relationship in a position in a sensitive classification or in a sensitive position." COMAR 06.01.09.01(B)(2).

applicant-employees¹²⁷ for positions in "sensitive classifications"¹²⁸ who had "not been eliminated from consideration at an earlier stage of the recruitment process."¹²⁹ Incumbent employees performing in sensitive classifications, however, were subject to drug testing only "if the condition of reasonable suspicion exist[ed]."¹³⁰

In March 1990, following the issuance of the *Skinner* and *Von Raab* opinions by the Supreme Court, the Secretary of Personnel proposed that the scope of the State's employee drug testing program be expanded.¹³¹ The most significant changes were (1) the broadening of circumstances under which incumbent "sensitive" employees could be required to submit to drug testing; and (2) the implementation of random testing of employees. The new regulations, adopted in August 1990,¹³² permitted an "appointing authority"¹³³ to require that an employee be tested if the following conditions were present:

- (1) The appointing authority had reasonable suspicion that a test would produce evidence of illegal drug use; or

127. As defined in COMAR, "applicant-employee" "means an employee of the State who is an applicant for a position that is: (a) In a sensitive classification or is a sensitive position; and (b) Different from or in addition to the position currently held by the applicant-employee." COMAR 06.01.09.01(B)(3).

128. Under the regulations, a "sensitive classification" means
a classification in the classified service in which the Secretary [of Personnel] has determined that all of the following conditions exist:
(a) A substantially significant degree of responsibility for the safety of others;
(b) A potential that impaired performance of the employee could result in death of or injury to the employee or others; and
(c) Lack of close monitoring of the employee's behavior, which reduces the possibility of intervention or assistance by another when necessary.

15:13 Md. Reg. 1559, 1560 (1988) (codified as amended at COMAR 06.01.09.01(B)(8)).

129. *Id.* (codified as amended at COMAR 06.01.09.03(B)).

130. *Id.* at 1561 (codified as amended at COMAR 06.01.09.04(A)); 15:27 Md. Reg. 3126, 3127 (1988) (codified as amended at COMAR 06.01.09.04(A)). At the time the regulations were originally adopted, the Attorney General believed that "[m]andatory testing of most categories of State employees would violate the Fourth Amendment prohibition against 'unreasonable searches and seizures.'" 71 Op. Att'y Gen. Md. 58, 59 (1986).

131. See 17:5 Md. Reg. 649 (1990) (codified as adopted and amended at COMAR 06.01.09). The COMAR drug testing provisions were again amended in 1991 in order to offer more protection to employees who tested positive; to require the use of only those laboratories whose services have been contracted by the Department of Personnel; and to clarify the confidentiality protections of test results. 18:9 Md. Reg. 1007 (1991); 18:5 Md. Reg. 598 (1991); see 17:26 Md. Reg. 2972 (1990).

132. See 17:15 Md. Reg. 1854 (1990).

133. An "appointing authority" is defined as "a person who has the power to make appointments and to terminate employment." COMAR 06.01.09.01(B)(4).

- (2) The employee was directly involved in an incident that resulted in injury to person(s) or property; or
- (3) The employee notified his or her appointing authority that the employee was voluntarily participating in a drug abuse rehabilitation program.¹³⁴

In addition, the 1990 regulations require that "[e]ach appointing authority, with the approval of the Secretary [of Personnel], shall assure that employees in positions in sensitive classifications or in sensitive positions within the appointing authority are subject to random testing for illegal use of drugs."¹³⁵

The drug testing program examined by the *United Food* court was clearly of more limited scope and applicability than the program promulgated by the Secretary of Personnel for state employees. In particular, the regulations require random drug testing of state employees in "sensitive" positions and classifications.¹³⁶ Although *United Food* dealt with employees in sensitive positions, the court of appeals stated in dictum that it had "no occasion to consider whether random drug testing, not based on reasonable suspicion, unconstitutionally invades reasonable expectations of privacy."¹³⁷ The court did, however, suggest that there might be a constitutionally significant difference between random¹³⁸ and mandatory drug testing;¹³⁹ "a purely random physical examination program for the purpose of drug testing would likely necessitate more stringent review."¹⁴⁰

The dictum in *United Food*, however, has not disabused the Attorney General of Maryland of the view that random drug testing of state employees in "sensitive" jobs is constitutional.¹⁴¹ In an opinion dated March 2, 1990, Maryland's Attorney General, J. Joseph Curran, Jr., stated that the principles of *Skinner* and *Von*

134. 17:5 Md. Reg. 649, 652 (1990) (codified as adopted and amended at COMAR 06.01.09.04(A)).

135. 17:5 Md. Reg. 649, 652 (1990) (codified as adopted and amended at COMAR 06.01.09.04(B)(1)). The new § .04(B) also outlined the nature of the random testing. *See id.* (codified as adopted and amended at COMAR 06.01.09.04(B)(2)-(3)).

136. *See supra* notes 118-19 and accompanying text.

137. *City of Annapolis v. United Food & Commercial Workers, Local 400*, 317 Md. 544, 561, 565 A.2d 672, 680 (1989).

138. *See* 17:5 Md. Reg. 649, 652 (1990). "Random testing requires that statistically significant samples of employees in sensitive classifications or in sensitive positions be tested on a periodic basis." COMAR 06.01.09.04(B)(2).

139. Mandatory testing requires employees to submit to an urinalysis test for laboratory study. 71 Op. Att'y Gen. Md. 58 (1986).

140. *United Food*, 317 Md. at 561, 565 A.2d at 680.

141. *See* 75 Op. Att'y Gen. Md. 94 (1990).

Raab apply equally to random drug testing.¹⁴² Indeed, as pointed out by the Attorney General, "the only decision of the Fourth Circuit on this issue stated flatly that 'the Supreme Court upheld the constitutionality of random drug tests in *Skinner* . . . and . . . *Von Raab* . . .'"¹⁴³ The Attorney General's position is also reinforced by the holding of *American Federation of Government Employees v. Skinner*,¹⁴⁴ in which the United States Court of Appeals for the District of Columbia rejected the union's argument that random testing is more intrusive than the mandatory drug testing condoned by the Supreme Court:

We find [the] analysis [in *Skinner*] fully applicable in the present case. While it is true that the regulations sustained in *Skinner* required testing only after a triggering event and in a medical environment, we do not find that either of these facts compels a "fundamentally different analysis from that pursued by the Supreme Court." . . . While it is true that random testing may increase employee anxiety and the invasion of subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence.¹⁴⁵

Thus, Maryland has determined from the Supreme Court decisions in *Skinner* and *Von Raab* that the distinction between random and mandatory testing is not fundamental, but merely an additional factor to be evaluated and weighed. Maryland seems to have decided that a significant intrusion upon privacy is outweighed by a presumed nexus between drug use and the disclosure of sensitive material.

IV. TESTING PROCEDURES

Drug testing in Maryland takes the form of analysis of urine specimens subject to a screening test called an immunoassay.¹⁴⁶ Positive test results from the immunoassay are then confirmed by a Gas

142. *Id.* at 93. The Attorney General's Office reiterated the position that they "discern no constitutionally significant difference between categorical testing and random testing. The determinative point is that testing without individualized suspicion is constitutionally permissible under some circumstances. That the methodology of a testing program is random rather than categorical makes no difference, in our view." *Id.*

143. *Id.* at 94 (quoting *Thomson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989)).

144. 885 F.2d 884 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 923 (1990).

145. 75 Op. Att'y Gen. Md. 95 (1990) (quoting *American Fed'n of Gov't Employees v. Skinner*, 885 F.2d 884, 891 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 923 (1990)).

146. COMAR 06.01.09.07(A).

Chromatography - Mass Spectroscopy (GC-MS) test.¹⁴⁷ Employers are required to confirm an initial positive result, as well as provide the employee with a copy of the following:

- (i) the laboratory test indicating the test results;
- (ii) the employer's written policy;
- (iii) written notice of the employer's intent to take disciplinary action; and
- (iv) the provisions of the law regarding the employee's right to secure independent verification.¹⁴⁸

Such information must be delivered in person or by certified mail to the employee within thirty days of the date of the test.¹⁴⁹ In addition, an employer who requires any person to be tested for illegal drug use because of job related reasons shall do the following:

- (1) Have the specimen tested by a laboratory that
 - (i) holds a permit under this subtitle; or
 - (ii) is located outside of the State and is certified or otherwise approved under [the Department of Health and Mental Hygiene regulations]; and
- (2) At the time of testing, at the person's request, inform the person of the name and address of the laboratory that will test the specimen.¹⁵⁰

Except for job-related alcohol or controlled dangerous substance testing, no laboratory, physician, or any other person, may report positive test results to an employer if the substance detected is a legal nonprescription drug or a prescription drug that an employee can show was legitimately prescribed.¹⁵¹

These procedures do not apply to:

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147. COMAR 06.01.09.07(B). As noted by the Attorney General, Maryland law does not require that the screening [of positive test results] be done by a "medical review officer" which is a term in the guidelines of the federal drug testing program referring to a physician specially trained in substance abuse disorders who evaluates positive test results in light of an employee's medical background. 75 Op. Att'y Gen. Md. 17 (1990); see MD. CODE ANN., HEALTH-GEN. § 17-214.1 (1990 & Supp. 1992).
148. MD. CODE ANN., HEALTH-GEN. § 17-214.1(c)(1)(i)-(iv) (Supp. 1992).
149. *Id.* § 17-214.1(c)(2)(i)-(ii).
150. *Id.* § 17-214.1(b)(1)-(2). A laboratory may analyze a specimen only upon order of a physician except drug tests conducted for job-related reasons may be ordered directly by an employer with a laboratory. *Id.* § 17-214.1; see 75 Op. Att'y Gen. Md. 19, 21 (1990).
151. MD. CODE ANN., HEALTH-GEN. § 17-214.1(h) (1990 & Supp. 1992). Nondisclosure of information under this section does not apply to a person complying with the Federal Commercial Motor Vehicle Safety Act of 1986 and the Federal Motor Carrier Safety Regulations. *Id.* § 17-214.1(h)(2) (Supp. 1992).

- (1) Alcohol or controlled dangerous substance testing of a person under arrest or held by a law enforcement or correctional agency;
- (2) Alcohol testing procedures conducted by a law enforcement or correctional agency on breath testing equipment certified by the State Toxicologist; or
- (3) Controlled dangerous substance testing by a laboratory facility of a law enforcement or correctional agency that maintains laboratory testing standards comparable to the standards in this section.¹⁵²

All of these procedures should be viewed in light of the expressed policy of balancing the employee's right to privacy against the government's objective of a safe and productive work environment.

V. IMPACT ON MARYLAND LAW

The initial consequence of the court of appeals decision in *United Food* has been the establishment of a prototype for Maryland police and fire departments that want to implement drug testing. Another consequence will be the reevaluation of existing government drug testing programs and the introduction of new programs for other fields of work affecting the safety of the public.

Also, with the recent implementation of random drug testing by Maryland's State Department of Personnel for applicants and employees in sensitive and classified positions, the court of appeals will most likely be asked to rule on random drug testing in the near future. The full import of the *United Food* decision will not be known, however, until there is further litigation in this area.¹⁵³ Of course, widespread drug testing by itself will not cure the drug epidemic. Drug testing, combined with strict criminal law enforcement, public relations campaigns, and rehabilitation measures, should be implemented to reach a large percentage of government employees in the work force.¹⁵⁴

152. *Id.* § 17.214.1(f)(1)-(3) (1990 & Supp. 1992).

153. As of the expected publication date of this Article, only one case challenging the dismissal of a state employee resulting from drug testing had reached the state's appellate courts. In *Singletary v. Maryland State Department of Public Safety & Correctional Services*, 87 Md. App. 405, 589 A.2d 1311 (1991), however, the dismissed employee did not raise a constitutional challenge. Instead, the Court of Special Appeals of Maryland concluded the employee's dismissal was invalid because the employee's appointing authority failed to adequately advise him of the consequences of refusing to be tested. *Id.* at 418, 589 A.2d at 1318.

154. B. Fein & W.B. Reynolds, *Drug Tests: No Harm to the Innocent*, MANHATTAN LAW., 1989, at 13.

VI. CONCLUSION

In its decision in *United Food*, the Court of Appeals of Maryland decided against imposing stricter limitations on drug testing than those set out by the Supreme Court in its decisions of *Skinner* and *Von Raab*. The court of appeals created a special exception to the reasonable suspicion requirement for drug testing of police and fire fighters when conducted during the employee's regularly scheduled physical examination. Citing strong public policy and the government's interest in protecting employees and the public, the Court of Appeals of Maryland has determined that the right to privacy is reduced when it seriously interferes with the safe management of job-related duties. Thus, it appears that Maryland courts will have little trouble upholding the constitutionality of most government drug testing programs.