Georgia State University Law Review

Volume 7
Issue 1 *Fall 1990*

Article 7

9-1-1990

PUBLIC OFFICERS AND EMPLOYEES Personnel Administration: Establish Sanctions for Drug Use and Drug Related Offenses

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PUBLIC OFFICERS AND EMPLOYEES

Personnel Administration: Establish Sanctions For Drug Use And Drug Related Offenses

CODE SECTIONS:	O.C.G.A. §§ 45-20-90 to -93 (new), 45-23-1 to -9 (new)
BILL NUMBERS:	HB 1171, SB 500
ACT NUMBERS:	1445, 1436
SUMMARY:	These two Acts provide for random drug testing of state employees involved in certain high-risk occupations, for the suspension or termination of any state employee convicted of drug related offenses, and for prescribed periods of ineligibility from state employment for applicants who have been convicted of drug-related offenses.
EFFECTIVE DATE:	July 1, 1990

SB 500

The Act amends Title 45 of the Code by adding a new Chapter 23, entitled the "Drug-Free Public Work Force Act of 1990."[1] Under the Act, public employees convicted of certain drug-related criminal offenses must be suspended or terminated.[2] Persons seeking public employment who have been convicted of certain drug-related criminal offenses will be ineligible for state public employment for a prescribed period of time.[3] Circumstances under which a public employee may voluntarily admit to a substance abuse problem and be shielded from termination are also defined in the Act.[4]

New Code section 45-23-2 declares the unlawful "manufacture, distribution, sale or possession of controlled substances, marijuana, and other dangerous drugs," to be a serious threat to Georgia, emphasizing the General Assembly's intolerance towards any member of the public workforce participating in such unlawful activities.[5]

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1. O.C.G.A. § 45-23-1 (Supp. 1990).
2. O.C.G.A. §§ 45-23-2, -4(a), (b), -6 (Supp. 1990).
3. O.C.G.A. §§ 45-23-4(b), -5(a) (Supp. 1990); see *infra* notes 8—11 and accompanying text.
4. O.C.G.A. § 45-23-7 (Supp. 1990); see *infra* notes 18—21 and accompanying text.
5. O.C.G.A. § 45-23-2 (Supp. 1990).

The Act mandates a minimum two-month suspension from public employment for any public employee convicted of a drug-related criminal offense.[6] In addition, the employee, "as a condition of completion of suspension," must "complete a drug abuse treatment and education program."[7] Any public employee convicted of a second drug-related offense will be terminated and rendered ineligible for "any public employment for a period of five years from the most recent date of conviction."[8]

A first-time offender convicted of certain drug-related criminal offenses is ineligible for any public employment for three months from the date of the conviction.[9] Furthermore, any person who has been convicted of a second drug-related criminal offense shall be unable to obtain public employment "for a period of five years from the most recent conviction."[10] All sanctions are "intended as minimum sanctions," and public employers can invoke harsher, more stringent standards to deal with drug related criminal offenses.[11]

As introduced, SB 500 provided for the same penalties for drug "use" as for other drug-related criminal offenses.[12] However, the Senate Judiciary Committee deleted the word "use" from all sections of the bill.[13] One explanation was that drug "use" is technically not an offense for which there exists a "conviction."[14] Also deleted, by a Senate floor amendment, were penalties for "convictions" involving "nolo contendre" or cases in which a court affords first offender treatment.[15]

Surprisingly, the bill did not address "marijuana" use until after the bill passed the Senate and received consideration by the House Committee on State Planning and Community Affairs.[16] The House

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6. O.C.G.A. § 45-23-4 (Supp. 1990). Under the Act, a drug-related criminal offense shall be defined as "any criminal offense involving the manufacture, distribution, sale, or possession of a controlled substance, marijuana, or a dangerous drug." O.C.G.A. § 45-23-4(a) (Supp. 1990).

7. O.C.G.A. § 45-23-4(a) (Supp. 1990). A drug abuse treatment and education program is defined under the Code as: "any system of treatment or therapeutic advice or counsel provided for the rehabilitation of drug-dependent persons and shall include programs offered in the following types of facilities: (A) Residential care centers.... ; and (B) Nonresidential care centers...." O.C.G.A. § 26-5-3 (Supp. 1989).

8. O.C.G.A. § 45-23-5(b) (Supp. 1990).

9. O.C.G.A. § 45-23-5(a) (Supp. 1990). The statute appears to include both federal and state convictions.

10. O.C.G.A. § 45-23-5(b) (Supp. 1990).

11. O.C.G.A. § 45-23-6 (Supp. 1990).

12. SB 500, as introduced, 1990 Ga. Gen. Assem.

13. SB 500 (SCS), 1990 Ga. Gen. Assem.

14. Telephone interview with Rusty Sewell, Executive Counsel to the Governor (March. 23, 1990) [hereinafter Sewell Interview].

15. SB 500 (CSFA), 1990 Ga. Gen. Assem.

16. *Compare* SB 500 (CSFA), 1990 Ga. Gen. Assem. *with* O.C.G.A. §§ 45-23-1 to -9 (Supp. 1990).

committee's addition of the term "marijuana" corrected an oversight that resulted because marijuana is not listed as a "controlled substance."[17]

Another important addition by the State Planning and Community Affairs House Committee was Code section 45-23-7. Under certain circumstances, this section allows a public employee who "[i]llegally uses a controlled substance, marijuana, or a dangerous drug," the opportunity to come forward and admit to having a problem without the threat of being discharged.[18] The public employer may, however, restructure the duties of the employee "if practicable to protect persons or property."[19] This section also places a veil of confidentiality around the employee's confession of substance abuse, making such statements inadmissible in "any civil, administrative, or criminal proceeding as evidence against the public employee."[20] The exemption outlined in section seven of the Act can be exercised only "once during a five year period," and it does not cover "any public employee who has refused to be tested or has tested positive for a controlled substance, marijuana, or a dangerous drug."[21]

HB 1171

HB 1171 amends Chapter 20 of the Code by adding Article 5, which allows random drug testing of public employees in high-risk jobs.[22] The Act was targeted toward those employees working in dangerous situations involving firearms and weapons, whose use of drugs and

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17. Sewell Interview, *supra* note 14. A controlled substance is defined as "a drug, substance, or immediate precursor included in Schedules I through V of [O.C.G.A.] Code Sections 16-31-25 through 16-13-29 and Schedules I through V of 21 C.F.R. Part 1308." O.C.G.A. § 16-13-21 (1988). " 'Controlled substance' means any drug, substance, or immediate precursor included in the definition of the term 'controlled substance' in paragraph (4) of [O.C.G.A.] Code Section 16-13-21." O.C.G.A.§ 45-23-3(1) (Supp. 1990). On the other hand, marijuana is defined separately as

> all parts of the plant genus Cannabis, whether growing or not, the seeds thereof, the resin extracted from any part of such plant, and every compound manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include samples as described in subparagraph (P) of paragraph (3) of Code Section 16-13-25 and shall not include the completely defoliated mature stalks of such plant, fiber produced from such stalks, oil, or cake, or the completely sterilized samples of seeds of the plant which are incapable of germination.

O.C.G.A. § 16-13-21(16) (1988).

18. O.C.G.A. § 45-23-7 (Supp. 1990).

19. *Id.*

20. *Id.*

21. *Id.*

22. O.C.G.A. §§ 45-20-90 to -93 (Supp. 1990).

resultant inattention could pose serious danger to themselves and others.[23]

"Employee" is defined narrowly to reach only those persons "required to be certified under the provisions of Chapter 8 of Title 35,"[24] i.e., state law enforcement officers who are paid a salary or hourly wage by a state institution.[25] All certified employees are covered by the Act, whether or not they are subject to the State Personnel Board's rules and regulations.[26] The Act also governs "any certified employee working under a personnel contract to provide personnel services."[27] The Act defines "established drug test,"[28] "high-risk"[29] work, and "illegal drug."[30]

Employees working in high-risk jobs are subjected to random drug testing.[31] The determination of "those positions and groups of positions whose occupants regularly perform high-risk work" is left up to "the head of each state agency, department, commission, board, bureau, or authority."[32] Employees in the same classification with other employees who perform high-risk work but who do not, themselves, regularly perform such high-risk jobs, are exempt from random drug testing.[33]

An employee engaged in high-risk work who is discovered to have used an "illegal drug" must be terminated.[34] An employee who refuses

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23. Telephone interview with Representative Bob Holmes, Governmental Affairs Committee Chairman, House District No. 28 (Mar. 22, 1990) [hereinafter Holmes Interview].

24. Chapter 8 refers only to the employment and training of peace officers, thereby aiming this Act directly towards the State's law enforcement personnel. *See* O.C.G.A. §§ 35-8-1 to -21 (1987, Supp. 1990).

25. O.C.G.A. § 45-20-90(1) (Supp. 1990).

26. *Id.*

27. *Id.* The personnel services of those working under a personnel contract include, but are not limited to, "medical, security, or transportation services to a state or other public agency." *Id.*

28. O.C.G.A. § 45-20-90(2) (Supp. 1990). Established drug test is defined as "the collection and testing of bodily fluids administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Testing Programs (HHS Regulations 53 Fed. Reg. 11979, et seq., as amended) or other professionally valid procedures approved by the commissioner of human resources." *Id.*

29. O.C.G.A. § 45-20-90(3) (Supp. 1990). High-risk work is defined as "those duties where inattention to duty or errors in judgment while on duty will have the potential for significant risk of harm to the employee, or other employees, or the general public." *Id.*

30. O.C.G.A. § 45-20-90(4) (Supp. 1990). " 'Illegal drug' means marijuana ... ; a controlled substance ... ; a dangerous drug ... ; or any other controlled substance or dangerous drug that persons are prohibited from using.... [I]t shall not include any drug when used pursuant to a valid medical prescription or when used as otherwise authorized by state or federal law." *Id.*

31. O.C.G.A. § 45-20-91(a) (Supp. 1990).

32. O.C.G.A. § 45-20-91(b) (Supp. 1990).

33. *Id.*

34. O.C.G.A. § 45-20-93(a) (Supp. 1990). An employee who has tested positive for

to submit to a random drug test upon request will also be terminated.[35] HB 1171 underwent several changes before its passage. The original version exempted "any person working under terms of a contract."[36] This language was replaced in the House committee substitute which expanded the definition of employee to cover not only individuals working under personnel contracts, but also "employees of the Board of Regents of the University System of Georgia."[37] The Senate Committee on Judiciary substitute deleted this language.[38] Curiously, HB 1171, as it passed the House, referred only to salaried employees;[39] however, the Senate substitute included hourly wage earners to clarify the broad reach of this prohibition.[40]

The definition of "illegal drug" underwent several alterations; apparently, the intent of these changes was to refrain from defining "controlled substances" by reference to the Schedules listed in Code Sections 16-13-29 through 16-13-35. Instead, the Act relies upon the broader definitions in Code sections 16-13-21 and 16-13-71.[41]

The Senate deleted a provision allowing department or agency heads to certify to the commissioner of Personnel Administration that their organization did not have positions whose occupants regularly performed high-risk work.[42] Also, language that would have allowed the regulations of the Administrative Procedures Act to determine which positions and groups of positions should be designated as high-risk was deleted in its entirety from the Act.[43] The Senate removed language which would have required the state agency administering a drug testing program to select a laboratory by accepting qualified bids.[44]

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illegal drug use cannot thereafter seek refuge under § 45-23-7 by confessing to his substance abuse problem. O.C.G.A. § 45-23-7 (Supp. 1990). The protections provided under that section are applicable only to employees who step forward prior to having tested positive under a random drug testing program. *See supra* notes 20—24 and accompanying text.

35. O.C.G.A. § 45-20-93(b) (Supp. 1990).

36. HB 1171, as introduced, 1990 Ga. Gen. Assem.

37. HB 1171 (CSFA), 1990 Ga. Gen. Assem.

38. HB 1171 (SCS), 1990 Ga. Gen. Assem.

39. HB 1171 (CSFA), 1990 Ga. Gen. Assem.

40. *See* HB 1171 (SCS), 1990 Ga. Gen. Assem.

41. O.C.G.A. § 45-20-90(4) (Supp. 1990). The definition of "controlled substance" in O.C.G.A. § 16-13-21 incorporates all of the substances listed in Schedules I through V of § 21 C.F.R. Part 1308. O.C.G.A. § 16-13-21 (1988). Also covered by the Act are the "dangerous drugs" listed under O.C.G.A. § 16-13-71, thereby significantly expanding the scope of the statute. O.C.G.A. § 45-20-90(4) (Supp. 1990).

42. *Compare* HB 1171, as introduced, 1990 Ga. Gen. Assem. (proposed § 45-20-91(c)) *with* O.C.G.A. § 45-20-91 (Supp. 1990).

43. *Compare* HB 1171 (CFSA), 1990 Ga. Gen. Assem. (proposed § 45-20-91(b)) *with* O.C.G.A. § 45-20-91(b) (Supp. 1990).

44. *Compare* HB 1171 (CFSA), 1990 Ga. Gen. Assem. (proposed § 45-20-92(c)) *with* O.C.G.A. § 45-20-92(c) (Supp. 1990).

Sanctions for violations of the Act, found in section 45-20-93, underwent the most changes during the legislative process.[45] As originally introduced, the bill provided that a public employee found to have used illegal drugs, at worst, "may be subject to adverse personnel action," but such employee could have been referred to treatment based on an examination of other criteria.[46] In addition, any employee refusing to submit to a random drug test would have been subject to "appropriate adverse personnel action after consideration" of several factors.[47]

The House committee substitute provided that any employee testing positive or refusing to take a random drug test "may be subject to such adverse personnel action as required or authorized by law, ordinance, rule or regulation of the board, or other appropriate rules."[48] The Senate Judiciary Committee substitute provided that a positive test result, or a refusal to submit to testing, would result in termination.[49] This language was not altered in the final version that passed both chambers.[50]

Conclusion

The General Assembly's deluge of drug legislation targeted at drug users will undoubtedly have to pass constitutional muster to be effectively enforced.[51] The United States Supreme Court addressed the issue of random drug testing in *National Treasury Employees Union v. Von Raab*.[52]

In *Von Raab*, the Court upheld the testing of employees "directly involved in drug interdiction or *required to carry firearms*," but stated that "[government] drug testing programs must meet the reasonableness

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45. O.C.G.A. § 45-20-93 (Supp. 1990).

46. HB 1171, as introduced, 1990 Ga. Gen. Assem. Section 45-20-93(a) originally read to allow for "consideration of the particular nature of the employee's duties; the status of the employee as a working test employee, a permanent employee, or an employee of the classified or unclassified service." *Id.*

47. HB 1171, as introduced, 1990 Ga. Gen. Assem.

48. HB 1171 (CSFA), 1990 Ga. Gen. Assem.

49. HB 1171 (SCS), 1990 Ga. Gen. Assem.

50. O.C.G.A. § 45-20-93(a) (Supp. 1990).

51. In particular, with respect to random drug testing of state employees, the fourth amendment poses a significant roadblock.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV

52. 109 S. Ct. 1384 (1989). The Court evaluated the constitutionality of the U.S. Customs Service's drug testing program, applicable to those employees seeking promotions to positions involving the interdiction of drugs, the carrying of firearms, or the handling of classified materials. *Id.*

requirement of the fourth amendment."[53] However, the Court qualified the latter statement by declaring that *Skinner v. National Railway Labor Executives Association*[54] represented a reaffirmation of "the longstanding principle that neither a warrant nor probable cause, nor indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."[55]

The implications for Georgia's random drug testing legislation are clear. The State will have to demonstrate that its drug testing program comports with the fourth amendment reasonableness standard and evinces a compelling state interest in safeguarding the public and its own employees from drug-impaired workers in high-risk positions. Thus, if HB 1171 is challenged, *Von Raab* indicates that the court will balance Georgia's public interest against the privacy interests of the tested employees.[56]

Nevertheless, given the Supreme Court's majority decision in *Von Rabb*, as long as the State can adequately proffer the required showing,[57]

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53. National Treasury Employees Union v. Von Raab, 109 S. Ct. at 1390 (emphasis added).

54. 109 S. Ct. 1402 (1989). Justice Kennedy authored both the opinion in this case and the opinion in *Von Raab*. Both cases were handed down on the same day, March 21, 1989.

55. *Von Raab*, 109 S. Ct. at 1390.

56. In *Von Raab*, the Supreme Court noted that a balancing of privacy interests against the Government's interests is necessary in cases "[w]here a Fourth Amendment intrusion serves special government needs, beyond the normal need for law enforcement." *Id.*

57. The Supreme Court's analysis in *Von Raab* should allow the state to dispense with the fourth amendment warrant requirement by establishing that "a warrant would provide little or nothing in the way of additional protection of personal privacy." 109 S. Ct. at 1391. However, the permissible limits of the random drug testing program would have to be "defined narrowly and specifically" and be made "well known to covered employees." *Id.*

The Court's opinion in *Von Raab* also nullified the necessity of making a probable cause showing by associating the probable cause standard with criminal investigations. *Id.* The court described drug tests as "routine administrative functions" to which the traditional probable cause analysis could prove to be "unhelpful." *Id.* Given that HB 1171 seeks to take preventive measures in ensuring the safe performance of high-risk jobs by state employees, the State could posit that "the traditional probable cause standard would be unhelpful in analyzing the reasonableness of [the random drug testing program]." *Id. See also* O'Connor v. Ortega, 480 U.S. 709, 722 (1987) (plurality decision) (quoting Connick v. Myers, 461 U.S. 138, 143 (1983)).

The *Von Raab* Court also determined that the need for individualized suspicion was unnecessary in certain limited instances of privacy invasions due to the government's compelling interest in "discover[ing] such latent or hidden conditions, or to prevent their development." *Von Raab*, 109 S. Ct. at 1392.

Therefore, the individualized suspicions criterion should not present a problem for the state's random drug testing program. Moreover, because the *Von Raab* Court stated that "public interest likewise demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm," the State should

and make assurances that the testing program "is not designed to serve the ordinary needs of law enforcement,"[58] the Act should pass constitutional muster.[59]

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have little difficulty establishing that "its need to conduct the suspicionless searches [i.e., random drug tests] outweigh the privacy interests of employees engaged directly in [high-risk jobs,] and of those [employees] who otherwise are required to carry firearms." *Id.* at 1392–93.

58. *Id.* at 1390.

59. As an epilogue to this discussion of HB 1171, it is interesting to note that both the House and Senate were working similar bills regarding random drug testing of state employees. *Compare* HB 1171, as introduced, 1990 Ga. Gen. Assem. *with* SB 502, as introduced, 1990 Ga Gen. Assem. SB 502 was introduced as part of the Governor's drug package, and passed in the Senate one week after HB 1171 passed in the House. Final Composite Status Sheet, March 9, 1990. Given the volume of drug bills that had been introduced during the session, it had become a matter of general procedure to take whichever version of a drug bill passed first and merge it with a similar bill of the other chamber. Johnson Interview, *supra* note 23. In this case, however, there was some concern that HB 1171 was too broad in scope; therefore, the Senate substituted verbatim the as passed version of SB 502 for the House's as passed version of HB 1171. Sewell Interview, *supra* note 14. *Compare* SB 502 (SCS), 1990 Ga. Gen. Assem. *with* HB 1171 (SCS), 1990 Ga. Gen. Assem. The two bills are identical. The House then acquiesced in this senatorial sleight of hand, but did include one minor addition to the bill prior to its passage. *See* O.C.G.A. §§ 45-20-90 to -93 (Supp. 1990).