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PUBLIC OFFICERS AND EMPLOYEES

Personnel Administration: Require Applicants for State Employment to Submit to Tests for Illegal Drugs

CODE SECTIONS: O.C.G.A. §§ 45-20-110, -111 (amended)
BILL NUMBER: SB 22
ACT NUMBER: 340
GEORGIA LAWS: 1995 Ga. Laws 667
SUMMARY: The Act provides that an applicant for state employment must submit to an established test for the use of illegal drugs. An applicant who is offered employment and either tests positive for illegal drugs or refuses to submit to such a test shall be disqualified from state employment. This disqualification will not be removed from the applicant's record for a period of two years.
EFFECTIVE DATE: July 1, 1995

History

The 1990 session of the Georgia General Assembly undertook a comprehensive legislative effort to combat the use of illegal drugs in the workplace.¹ Part of this effort was the passage of the Applicant Drug Screening Act, which required that applicants for state employment submit to a test for the presence of illegal drugs.² The constitutionality of the statute was challenged almost immediately. In *Georgia Ass'n of Educators v. Harris*,³ the United States District Court for the Northern District of Georgia, relying on the United States Supreme Court's decisions in *National Treasury Employees Union v. Von Raab*⁴ and

1. See, e.g., 1990 Ga. Laws 2046 (formerly found at O.C.G.A. §§ 45-20-110 to -112 (1990)); 1990 Ga. Laws 2004 (codified at O.C.G.A. §§ 45-23-1 to -9 (1990)).

2. 1990 Ga. Laws 2046 (formerly found at O.C.G.A. §§ 45-20-110 to -112 (1990)).

3. 749 F. Supp. 1110 (N.D. Ga. 1990).

4. 489 U.S. 656 (1989).

Skinner v. Railway Labor Executives' Ass'n,⁵ found the statute unconstitutional as violative of the Fourth and Fourteenth Amendments.⁶

In *Harris*, the Georgia public school teacher's union joined several applicants for state employment in seeking both a declaration that the Applicant Drug Screening Act was unconstitutional and an injunction against its enforcement.⁷ The court noted that in both *Von Raab* and *Skinner*, the Supreme Court applied a balancing test which compared "the individual's privacy expectations against the Government's interests."⁸ The Supreme Court used the test to determine whether employee drug screening, when conducted in the absence of any individualized suspicion, is permissible in a particular employment context in light of the Fourth Amendment's prohibition against unreasonable searches and seizures.⁹ The district court pointed out that for the government's interests to outweigh the individual's privacy expectations, the government must make a "concrete expression of substantial or compelling interests served by drug testing and a fact-specific explanation of how testing the subject employee groups further[s] those interests."¹⁰ The district court also stated that "cases applying *Von Raab* have not accepted boundless invocations of 'workforce integrity' as a ground for testing all government employees."¹¹ Because the only stated justification for the Applicant Drug Screening Act was "a generalized governmental interest in maintaining a drug-free workplace,"¹² the district court found it "difficult to even begin applying [the *Von Raab*] balancing test."¹³ Therefore, the district court found the statute unconstitutional.¹⁴

5. 489 U.S. 602 (1989).

6. *Harris*, 749 F. Supp. at 1112-13.

7. *Id.* at 1110.

8. *Id.* at 1113 (quoting *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989)).

9. *Id.*

10. *Id.*

11. *Id.* at 1115.

12. *Id.* at 1114.

13. *Id.*

14. *Id.* at 1118.

SB 22

SB 22 was introduced to conform the Applicant Drug Screening Act to the court's requirements.¹⁵ In introducing the bill, Senator Johnny Isakson stated in debate that the bill addressed the court's requirement of a clearly stated public purpose.¹⁶ Indeed, section 2 of the Act sets forth the legislative findings regarding the adverse impact of state employment of drug-impaired persons.¹⁷ Another factor prompting passage of both the Applicant Drug Screening Act and SB 22 is the increasing prevalence of drug screening in the private sector, which threatens to make the State the "employer of least resistance" for drug-impaired job-seekers if the State does not also screen its applicants.¹⁸

After its introduction in the Senate, the bill was sent to the Senate Committee on State and Local Governmental Operations.¹⁹ The original bill was changed from requiring testing of those who are "accepted for employment" to those who are "offered employment."²⁰ The purpose of this change was to prevent an application of the Act which would be broader than intended and to ensure that testing is conducted one applicant at a time rather than en masse.²¹

Additionally, the Act amends the definition of "illegal drug" from that found in the Applicant Drug Screening Act and the original version of SB 22 to conform to that found in the Mandatory Guidelines for Federal Workplace Drug Testing

15. Telephone Interview with Sen. Johnny Isakson, Senate District No. 21 (Apr. 7, 1995) [hereinafter Isakson Interview].

16. See *Lawmakers '95* (GPTV broadcast, Feb. 2, 1995) (videotape available in Georgia State University College of Law Library).

17. 1995 Ga. Laws 667. As is common practice, the purpose statement of the Act was not codified. *Id.*

18. *Id.*; Isakson Interview, *supra* note 15.

19. Final Composite Status Sheet, Mar. 17, 1995.

20. Compare SB 22, as introduced, 1995 Ga. Gen. Assem. with O.C.G.A. § 45-20-111(b) (Supp. 1995).

21. Isakson Interview, *supra* note 15.

Programs.²² The Mandatory Guidelines also provide the definition of "established test" used in the bill.²³

The Act provides that a confirmatory test is required if the initial test indicates the presence of illegal drugs.²⁴ If the confirmatory test corroborates the initial positive result, a further provision calls for analysis of the result by a medical review officer to determine if there is an alternative medical explanation for the test result or if a "legitimate usage of the substance" in question caused the positive result.²⁵ If so, the result is reported as negative; if not, it is reported as positive.²⁶ These provisions are intended to conform to the provisions of existing legislation which permit drug testing of certain high-risk public employees.²⁷

The substitute bill was passed by the Senate and sent to the House.²⁸ It then went to the House Committee on Governmental Affairs, which provided its own substitute.²⁹ The House committee substitute provided that positions for which drug testing is required be so designated by "[t]he head of each agency, department, commission, bureau, board, college, university, institution, or authority" involved.³⁰ This provision was introduced to allow the drug testing program to account for unique circumstances and to maintain flexibility.³¹ For instance, if a natural disaster were to occur necessitating the sudden hiring of large numbers of emergency personnel, the head of the agency involved would have the discretion to determine which of the emergency personnel would be required to undergo drug

22. Compare 1990 Ga. Laws 2046 (formerly found at O.C.G.A. § 45-20-110(3) (1990)) and SB 22, as introduced, 1995 Ga. Gen. Assem. with Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,979 (1988).

23. O.C.G.A. § 45-20-110(2) (Supp. 1995).

24. *Id.* § 45-20-111(b).

25. *Id.*

26. *Id.*

27. Isakson Interview, *supra* note 15; see 1990 Ga. Laws 2028 (codified at O.C.G.A. §§ 45-20-90 to -93 (1990)).

28. Final Composite Status Sheet, Mar. 17, 1995.

29. *Id.*; SB 22 (HCS), 1995 Ga. Gen. Assem.

30. O.C.G.A. § 45-20-111 (Supp. 1995).

31. Isakson Interview, *supra* note 15.

screening.³² The House committee substitute was the version ultimately adopted.³³

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32. Isakson Interview, *supra* note 15.

33. Compare SB 22 (HCS), 1995 Ga. Gen. Assem. with O.C.G.A. §§ 45-20-110 to -111 (Supp. 1995).