LEGAL DEFENSE TRUST TRAINING BULLETIN

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Vol. VII, Issue No. 8 August 2004

ANYWHERE COUNTY SHERIFF'S DEPARTMENT MEETS THE FOURTH AMENDMENT

Notes On The Constitutionality of Seizing Peace Officers' Body Fluids By Administrative Compulsion

by Michael P. Stone, Esq.

The Anywhere County Sheriff's Department wants to investigate claims that some of its custodial officers engaged prisoners in sexual acts that were "consensual" or "forced" upon the inmates under color of authority, or that were "traded" for favors or special treatment.

Anywhere County investigators aided by the Forensic Sciences Division recover "biological evidence" (i.e. body fluids) from inside the custodial facility from which they hope to extract DNA.[1] That accomplished, the investigators propose to order, "for administrative investigation purposes only", each targeted custodial officer to submit to blood testing to determine, through DNA typing of the individual specimens, whether any of the custodial officers' DNA matches with that in the donors' body fluids found in the facility.

The Sheriff of Anywhere County has asked for an opinion on this subject, specifically whether the Constitution's Fourth Amendment would countenance such an extraordinary investigatory procedure.

Before getting into the specific constitutional issues the Sheriff had in mind, we should analyze some foundational assumptions that figure into the constitutional equation.

First, is this Anywhere County investigation appropriate in the first place? Is the conduct alleged, *mis*conduct? For if we cannot say that the conduct alleged is clearly *mis*conduct, then *why* is it being investigated?

This is always a threshold inquiry that must be answered in the affirmative whenever an investigatory procedure collides with employees' constitutional rights.

However, in *this* Anywhere investigation, the question is a "no-brainer". Any reasonable law

[1] Deoxyribonucleic acid–contains the genetic code and transmits the hereditary pattern; the genetic "fingerprint".

enforcement member knows that sexual contact with persons in custody is plainly misconduct regardless of whether it is "consensual", "forced" or "traded". So, at least from the substantive due process standpoint, Anywhere's investigation into whether such activities have occurred, and discipline for those found to be culpable, will pass muster under the Due Process Clause. This is so because the guilty member had "fair warning" that the conduct is prohibited, even in the

absence of a specific departmental rule in the Anywhere Manual forbidding the conduct, not to mention *Penal Code* §289.6 which makes even *consensual* sex acts a crime ("wobbler"), if between an inmate and a custodial officer.

Just like knowingly and willfully lying during an investigation to cover up misconduct as grounds for swift removal from a department, sexual contact with prisoners can be placed under the label "What were you thinking?"

The next factor in the constitutional equation is the question of whether the blood testing will be deemed a "search" within the meaning of the Fourth Amendment? This is also an easy one to answer: *yes*. Any seizure of body fluids by invasion of the body by needle, swab or other medical device, or by digital insertion or manipulation is a "search", as is the compelled extraction of body fluids, for example, by urinalysis.

The third factor in our analysis is the question of whether voluntary submission to such a search carries any constitutional consequences for the volunteering member? This is also not difficult to answer: *yes*.

We all know that if a member voluntarily answers investigators' questions with incriminating statements, it is likely that the statements are admissible against the member in administrative, civil and criminal proceedings. Well, the same rule applies to the seizure of *physical evidence*. That is, if a member voluntarily permits a search of a constitutionally-protected place or thing (i.e. here, the body), the member cannot complain when the evidence is introduced against him or her in any proceeding.

In both of these scenarios, the question is whether the member voluntarily *waived* his rights under the Fourth, Fifth and Fourteenth Amendments. If so, testimonial (admissions) and physical evidence will come in, barring other grounds for exclusion.

Put another way, criminal prosecutors cannot make any beneficial use of physical evidence against a member that was seized under administrative compulsion. *See: Murphy v. Waterfront Commission* 378 U.S.52 (1964). And, just as in the case of statements to investigators, members should always insist on being *compelled* to speak, or *compelled* to submit to search or seizure. The consequence for not doing so is *waiver*.

Next, we look at the *consequences* for Department officials who compel the search of a member by the seizure of body fluids, if the order is determined by a court to have been unconstitutional (i.e. unlawful) at its inception. We also look at the *consequences* for the member who *refuses* to comply with an order to submit to testing that *is constitutional* (lawful).

All alleged violations of federal constitutional rights are addressed in an action at law or in equity under 42 *U.S.C.* §1983 (the so-called

Civil Rights Acts, which were originally passed as part of the Reconstruction-era *Ku Klux Klan Act of 1871*). Criminal violations of civil rights are prosecuted under 18 *U.S.C.* §242 and related sections.

The plaintiff can obtain the full range of compensatory and punitive damages as well as injunctive relief in an action under §1983. §1983 liability is very broad. The section has only three (3) elements: (1) a person acting under color of law; (2) who deprives a person within the jurisdiction of any State, Territory or the District of Columbia; (3) of the benefit of constitutional rights or of federal laws, is liable to that person (for the harm caused by the violation).

Notice no particular mental state or "intent" is required to be shown. Hence, even an innocent mistake as to the lawfulness of an order can lead to personal liability for the supervisor or investigator, subject to the qualified immunity defense.

Each month I teach police civil rights in a POST-certified seminar for internal affairs investigators. I tell my students that these orders to submit to various kinds of searches are always "a bit of a gamble". Investigators are gambling the order is constitutional, and there will be no liability for them regardless of whether the order is obeyed or not. The member is gambling that the order is unconstitutional if he refuses the order (insubordination). If he obeys an unconstitutional order, then there is an unconstitutional search (and seizure, if body fluids *are* recovered).

But, can a member be disciplined for insubordination, for *refusing* an unconstitutional order? Does the "obey now–grieve later" workplace rule bar the defense of "unlawful order" to insubordination charges? Where a member refuses a search order, and is punished for insubordination, can there be a Fourth Amendment violation even though there was *no search and no seizure*?

These issues were all examined in a U.S. District Court jury trial, a Ninth Circuit Court of Appeal decision, and a Petition for Writ of Certiorari to the United States Supreme Court, in a case we litigated well over ten years ago: *Jackson v. Gates,* CV 87-1085 RSWL (C.D. Cal. 1990); 975 F.2d 648 (9th Cir. 1992); *sub. nom. City of Los Angeles v. Jackson*, 509 U.S. 905, 113 S. Ct. 2996, cert. den. (1993). In that case, Jackson, a discharged Los Angeles police officer won reinstatement, back-pay, compensatory damages and attorney's fees. Jackson was fired by Chief Daryl F. Gates based upon Jackson's refusal to submit to an order to provide a urine sample to be tested for drugs. Because Jackson violated the insubordination rule of the LAPD (known as the "obey now-grieve later" policy), Chief Gates believed that Jackson should be fired, regardless of whether the order was arguably unconstitutional.

At that time (1986), there was no case in any of the federal circuits or in the U.S. Supreme Court that established the test for determining when such an order can be constitutionally given. But another case in the Ninth Circuit held that an order to an officer to submit to a strip search and body cavity inspection required that there be a "reasonable suspicion" that the search would uncover the evidence sought (in that case, money allegedly taken from an arrestee).[2]

[2] See: *Kirkpatrick v. City of Los Angeles*, 803 F. 2d. 485 (9th Cir. 1986).

While compelled urinalysis involved, in my opinion at the time, an equal degree of personal invasion, as the strip search and body cavity inspection, in one sense it was, I thought, more invasive–and that is because if the order is obeyed, there is always a *seizure* of body fluids, which can be analyzed for all of the physiological secrets they hold; not just for drug screening purposes. But on balance, it seemed logical to me that the "reasonable suspicion" requirement should also be complied with in the case of compelled extraction of body fluids by urinalysis or blood- testing. So, we proposed the following jury instruction regarding what is required before a law enforcement employer can lawfully order a member to provide a sample:

> (The order must be based on) *...a reasonable, individualized and articulated suspicion* (based on objective facts) *that the test* (search) *will yield evidence of drug use, impairment or ingestion."*

U.S. District Judge Ronald S.W. Lew gave this instruction to the jury, despite the City of Los Angeles' objection, and the jury applied it to the facts of Jackson's case to find that the order was unconstitutional, and returned a damages verdict in favor of Jackson. On appeal, the City and Gates argued many objections and points of law, but the Ninth Circuit resolved all in favor of Jackson. In addition to upholding the jury instruction above as a correct statement of the law and U.S. Supreme Court precedents, the Circuit judges also set forth new precedent on the following issues:

1. A suspicion-based order like that to Jackson is fundamentally different from random, periodic or event-triggered drug testing that the Supreme Court had already approved in *N.T.E.U. v. Von Raab*, 489 U.S. 656(1989)[3] and *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989).[4] Therefore, suspicion-based testing, being a "search" for Fourth Amendment purposes, must be *reasonable*.
2. Even though, as in *Jackson,* the order is not obeyed, the lawfulness of the order is still at issue if the Department decides to discipline or remove the officer for refusing the order (insubordination).
3. If an officer exercises his *right* to refuse an unconstitutional order, the Fourth Amendment is violated if the officer is punished for the refusal, *even though there is no search and/or seizure.*
4. The "obey now—grieve later" policy caused the constitutional violation when it was applied to Jackson by Gates (the policymaker) in determining to fire Jackson. In the Ninth Circuit, such a "policy" need not be unconstitutional on its face–it need only cause a constitutional deprivation *(see: McKinley v. City of Eloy*, 705 F.2d 1110, 1117 (9th Cir. 1983). Municipal liability follows, despite the immunity of individual defendants.

The City of Los Angeles petitioned the U.S. Supreme Court to grant *certiorari* (to hear the issues raised by the City in its petition) but the

[3] *Von Raab* involved the National Treasury Employees Union challenge to mandatory drug testing for agents who sought positions in drug interdiction;

[4] *Skinner* involved a challenge by trainmen to the requirement that they submit to testing if they are involved in a train wreck or railroad mishap.

Court denied the petition. So, *Jackson* is now firmly-set and well-settled law in this Circuit.

Now, if we look at the issues raised by the Anywhere Sheriff, and by analogizing the *Jackson* urinalysis order with the Anywhere County blood test order, we can make some very good predictions about the likely outcomes. First, the proposed Anywhere County order to the custodial officers is a *suspicion-based order* because it is neither random, periodic nor event-triggered. Rather, it is based upon a *suspicion* that the targeted officers were involved in some form of on-duty sexual misconduct. Second, accordingly, the compelled blood tests are a "search" within the meaning of the Fourth Amendment. Third, therefore, the order must be *reasonable* under the Fourth Amendment. Fourth, the order must be predicated upon a reasonable suspicion that the search (blood test) will produce DNA that will match that recovered from the facility or from someone or something inside. Fifth, "reasonable suspicion" is a highly (objective) fact-oriented analysis, and usually consists of a combination of observations, statements, physical evidence and so forth, that together would cause the reasonable person to suspect that indeed, *this* search, if done *now*, will *yield the evidence* investigators are looking for. Sixth, a member cannot be punished or discharged for insubordination for refusing the test, if "reasonable suspicion" as defined above *does not exist*. Seventh, remember that the "reasonable suspicion" analysis must be *individualized* to each member targeted for the order and blood test (search)--"...it was somebody who works here..." doesn't get it; and Eighth, the "reasonable suspicion" must be articulated or articulable; that is, the objective facts that constitute the reasonable suspicion must be carefully documented.

So, these are the constitutional requirements for the proposed compelled blood tests of Anywhere County Sheriffs' Department custodial officers. And, the same analysis would probably also apply to any other method to obtain "evidence" from within the officers' bodies by *minimally invasive* means.[5]

-Stay Safe!

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[5] *More invasive* means, for example, those that would require the officer to submit to medical intrusions into the body are beyond the scope of this article, and would probably require a search warrant, *if they are to be done at all.*