



VIA FAX: 586-3433

Agency: Board of Education, State of Hawai'i
Hearing Date/Time: June 19, 2008
Place: Queen Lili'uokalani Building, Room 404

Re: *ACLU Testimony on Random Drug Testing of Bargaining Unit 1 Employees*

Dear Chair Ikeda and Members of the Board of Education:

Thank you once again for the opportunity to provide comments on the Board of Education's agenda item relating to random drug testing of Bargaining Unit ("BU") 1 employees. As we have previously testified, we respectfully suggest that the Board of Education ("Board") use its limited resources to improve the quality of education for Hawaii's children, rather than on the Governor's unconstitutional and overbroad drug testing scheme for BU 1 workers. Should the Board decide to go ahead with a drug testing program, however, we strongly urge the Board to limit such testing to those employees who are in "safety-sensitive" positions. If the Board fails to act, Board Members will be subject to lawsuits from BU 1 employees.

1. The Board Should Spend Its Limited Resources in the Classroom

We respectfully believe that the Board should continue to keep precious educational dollars in the classroom. Given that the Department of Education has already had to absorb a

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522-5900
F: 808.522-5909
E: office@acluhawaii.org
www.acluhawaii.org

\$10 million budget cut, the Board should decline to take even more money away from school programs to pay for the Governor's pet projects.

Section 63A of the BU 1 agreement for 2007-2009 provides that "the Employer *may* conduct random and reasonable suspicion alcohol and controlled substance tests" on BU 1 employees.¹ In other words, the Board is *not required* to conduct drug tests of BU 1 employees (other than commercial motor vehicle operators).² By the terms of the labor agreement, the Board *may* conduct these tests if it chooses to do so, but if the Board decides that it can find a better use for the tens (or hundreds) of thousands of dollars it would otherwise spend on drug testing – such as additional funding for small schools under the weighted student formula or much-needed capital improvements – the Board has full authority to make that decision.

2. The Board Will Be Opening the Door to Litigation Unless it Prohibits the Department of Education From Engaging in Widespread Random Drug Testing

The BU 1 Tentative Agreement provides that *any* BU 1 worker may be subjected to random drug testing. If the Board proceeds with random drug testing of *all* BU 1 workers, the Board will be opening the door to litigation: the State may not randomly drug test workers unless those workers are in "safety-sensitive" positions.

¹ Commercial Motor Vehicle operators are excluded from this provision, insofar as they are already required to undergo drug testing.

² All government employees with a Commercial Driver's License ("CDL") are required to be drug tested under U.S. D.O.T Rules, 49 C.F.R. Part 40. CDL positions subject to drug testing include bookmobile drivers, bus drivers, truck drivers and any other employees performing CDL functions.

As we have previously testified, the Ninth Circuit Court of Appeals (whose decisions are binding on Hawaii's federal courts) explained the types of positions that are considered "safety-sensitive":

Jobs are considered safety-sensitive if they involve work that may pose a great danger to the public, such as the operation of railway cars; the armed interdiction of illegal drugs; work in a nuclear power facility; work involving matters of national security; work involving the operation of natural gas and liquefied natural gas pipelines; work in the aviation industry; and work involving the operation of dangerous instrumentalities, such as trucks that weigh more than 26,000 pounds, that are used to transport hazardous materials, or that carry more than fourteen passengers at a time[.]

Lanier v. City of Woodburn, 518 F.3d 1147, 1151-52 (citations omitted) (9th Cir. 2008). In *Lanier*, the court ruled that public library pages (employees who return books to their shelves and who, on occasion, staff the desk at the library) were *not* "safety-sensitive." The court explained that, when compared with aviation employees, nuclear power plant technicians, and the like, "[t]he work of a page . . . entails nothing of this order of magnitude." *Id.* at 1152. Because there was no evidence to suggest that library pages were, in fact, "safety-sensitive," the drug testing program was held to be unconstitutional.

Similarly, a number of jobs in BU 1 – such as cafeteria workers and audio-visual technicians – simply are not "safety-sensitive." If the State subjects these employees to random drug testing, the State will be violating these employees' constitutional rights. Again, the ruling from the Ninth Circuit in *Lanier* is binding law in Hawaii: if any UPW worker in BU 1 challenges the random drug testing program, the Ninth Circuit's ruling will control the court's

interpretation of the program's constitutionality. By allowing the Department of Education to proceed with random drug testing of all BU 1 employees, the Board is inviting a lawsuit.

Although the ACLU believes that the State should not conduct random drug tests of its workers (because there are more effective ways of dealing with on-the-job performance issues relating to drug and alcohol abuse), we acknowledge that the State *may* lawfully conduct random drug tests of "safety-sensitive" workers. Thus, because the Board has discretion as to whether to implement a random drug testing program at all, the Board need not choose an "all-or-nothing" approach; instead, the Board may wish to consider a compromise position: proceeding with random drug testing, but only for those individuals who are determined to be in "safety-sensitive" positions. The ACLU still believes that money spent on drug testing would be better spent on other school services, but we acknowledge that a program limited to "safety-sensitive" employees would meet constitutional guidelines.³ Similarly, we recognize that a drug testing program based on individualized suspicion is constitutional – and significantly less costly than a random testing program (and there is no evidence to suggest that random testing is more effective at deterring or detecting drug abuse than a program based on individualized suspicion).

A year has passed since the Governor demanded that UPW agree to random drug testing. In the meantime, the Ninth Circuit Court of Appeals has made *very* clear that the State is prohibited from subjecting its non-safety-sensitive employees to suspicionless drug testing. If

³ This would, of course, depend on the way in which the program was implemented (and would depend, in large part, on the State's findings as to which employees were determined to be "safety-sensitive"). The Board should insist on a careful review of job classifications and a clear justification that a particular job is safety-sensitive before approving random drug-testing.

Board of Education
June 19, 2008
Page 5 of 5

the Board decides to spend tens (or hundreds) of thousands of dollars to test BU 1 employees, the Board will be opening the door to lawsuits by BU 1 members. The Board can avoid these lawsuits by implementing a policy allowing random drug testing of only those employees who are “safety-sensitive” – or, better yet, by declining to implement any random drug testing program at all (and spending the money on educational services that are proven to benefit Hawaii’s children).

Thank you for this opportunity to testify.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Graham Boyd". The signature is written in a cursive, flowing style.

Graham Boyd
ACLU Foundation