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Joseph F. Quinn, Editor

Eric T. Quinn, Researcher

Joseph F. Quinn is legal counsel to more than 40 Fire Departments in the State of Washington.

His office is located at:

10222 Bujacich Rd. NW
Gig Harbor, WA 98332
(Gig Harbor Fire Dept., Stn. 50)

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-858-3226
Cell Phone: 253-576-3232

Email Joe at firelaw@comcast.net

Access this Newsletter at:
firehouselawyer.com

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Happy Holidays from the Firehouse Lawyer

To all of our clients in Washington, be they a fire district, regional fire authority, or 911 dispatch center, we wish you Happy Holidays. We appreciate your service; you keep us safe every day, even on Christmas.

THC in the Workplace: The Concept of "Just Say No" Needs Teeth

The codification of Initiative 502, effectively legalizing the possession and use of marijuana in certain amounts, for those persons ages 21 and above, has created a new issue for fire departments and public agencies: How may this impact the enforcement of policies against drug use in the workplace? Other agencies have addressed this issue, and we at the Firehouse Lawyer believe that a Model Policy may be in order, which balances the privacy rights of individuals against the interest of management in ensuring the safety of its employees and the public. Such a Model Policy should also contain methods for analyzing blood that ensure accuracy prior to making an adverse employment decision, and should include some specific standard to help determine when an employee is "impaired" by marijuana. First and foremost, we stress that in this article we assume that a zero-tolerance policy was bargained to impasse or simply was not agreed upon, in which case labor and management would have to make some other

compromise. We at the Firehouse Lawyer will not voice our support of, or opposition to, zero tolerance policies, for purposes of this article. Instead, we address the alternatives.[1]

Under Washington law, "[T]he possession, by a person twenty-one years of age or older, of useable marijuana or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law." RCW 69.50.4013 (3). This statute permits an individual to possess up to one ounce of "useable marijuana" (this is marijuana in plant-form). We will not discuss here what other types of marijuana-infused products have been legalized. Despite this legalization, a person is guilty of driving under the influence (DUI) if that person, as demonstrated by an analysis of their blood, has, "within two hours after driving, a THC (tetrahydrocannabinol) concentration of 5.00 or higher." RCW 46.61.502 (1)(b). A person's THC concentration "shall be based upon nanograms per milliliter (ng/ml) of whole blood." RCW 46.61.506 (1)(b).

Furthermore, evidence that a person had a THC concentration below 5.00 (but above 0.0) ng/ml within two hours of driving may be considered with "other competent evidence" that the person was DUI. RCW 46.61. 506 (1).

We will not dwell here on the science behind determining this THC concentration (5.00 ng/ml or higher). But to test whether a person is DUI of marijuana, that person's blood must be tested by a person licensed by the state toxicologist to make such a determination. RCW 46.61.506 (3). This gives rise to constitutional privacy concerns. Prior to addressing these concerns, it should be noted that the exclusionary rule, which operates to exclude evidence obtained unlawfully by law enforcement (agents of the state) in criminal cases (hence our reference to DUI laws), has been found to apply in civil actions and disciplinary proceedings as well. Consequently, a detailed Model Policy delineating how and when blood should be drawn from a firefighter suspected of marijuana use (or impairment) while on duty is crucial to ensure that the results of these blood draws may actually be used in disciplinary proceedings. This is so because, in the system of American jurisprudence, constitutions trump statutes.

The extraction of blood from a person suspected of DUI is a search under the Fourth Amendment[2] to the United States Constitution and article I section 7 of the Washington State Constitution.[3] *See State v. Martines*, No. 69663-7-I (Wash.2014). Analyzing that blood sample is a second search. *Id*. Searching an individual generally requires a warrant. *Id*. To raise a constitutional challenge, one must have "standing" to do so. To have standing, one must have an expectation of privacy in the place being searched. *See Katz v. United States*, 389 U.S. 347 (1967). But the Fourth Amendment does not protect a person's every expectation of privacy. *See State v. Dane*, 89 Wn.App. 226, 237 (1997). The Constitution only protects those expectations of privacy that *society* would recognize as reasonable. *See Katz*; *see also O'Connor v. Ortega*, 480 U.S. 709 (1987) (finding that whether a public employee "has a

[1] This article may also be used to establish how a fire department may actually *enforce* a zero tolerance policy.

[2] The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers , and effects, against unreasonable searches and seizures".

[3] Article I § 7 mandates that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law".

reasonable expectation of privacy must be addressed on a case-by-case basis."). Penetrating beneath the skin (drawing blood) generally infringes upon such a reasonable expectation of privacy. *See Skinner v. Ry. Labor Exec's Ass'n*, 489 U.S. 602 (1989); *See Also Martines, supra.* (finding that "personal information contained in blood is hidden and highly sensitive.").

Despite these constitutional realities, Washington courts have found that "employer-employee relations tend to be heavily regulated, and a history of state regulation provides support for independent state constitutional analysis." *Robinson v. City of Seattle*, 102 Wn.App. 795, 811 (2000). For that reason, general constitutional principles may not be viewed the same way in the workplace, and different rules may apply there, particularly in the domain of public employment. For example, pre-employment drug testing, without individualized suspicion, survives constitutional scrutiny if the employment genuinely implicates public safety. *Id*. at 823. This is because public employees still enjoy a reasonable expectation of privacy, although this expectation may be lessened depending on the type of work they perform. There is little doubt that a firefighter performs a job that genuinely implicates public safety, and therefore should be subject to pre-employment drug testing without reasonable suspicion. But that does not end the inquiry: What level of suspicion would be necessary when a firefighter is engaged in his or her duties? Essentially, reasonable suspicion arises when one has a belief, based on specific and articulable facts, that a person is engaged in criminal wrongdoing. This belief need not be correct, but only objectively reasonable. As already established, being impaired by marijuana while driving is a criminal offense. But where probable cause is necessary to intrude upon a person's privacy, a greater intrusion is necessary, therefore a warrant is generally required. We contend that probable cause is not needed, in the context of a job that genuinely implicates public safety, prior to withdrawing blood from a firefighter actively engaged in performing his or her duties. "Reasonable suspicion" is all that is required in this employment context.

The United States Supreme Court (the High Court) has held that it would be unreasonable to impose a warrant requirement before public employers could conduct work-related searches. *See Ortega, supra.* The High Court in *Ortega* went on to hold that searches designed to uncover work-related misconduct should be judged by a standard of reasonableness, not by the heightened standard of probable cause, in which case a warrant would be required to conduct a work-related search. *Id*. For that reason, warrantless reasonable suspicion drug testing of public employees is a common practice across the country.

Recently, and presumably in light of the codification of Initiative 502, the Washington State Department of Transportation has promulgated a revised Model Drug and Alcohol Testing Policy that incorporates new procedures related to marijuana use. The DOT policy applies to "all safety-sensitive employees (full or part-time) when performing any transportation-related business." Page 3. The DOT policy indicates further that a "reasonable suspicion drug test can be performed any time the covered employee is on duty." Page 12.

Interestingly enough, the word "blood" appears nowhere within the DOT policy. Perhaps the DOT is wary of invading the body by drawing blood. We acknowledge that the model policy adopted by the DOT would apply only to those drivers that require a commercial driver's license (CDL). We acknowledge that this

requirement is entirely irrelevant to the fire service, as firefighters operating "emergency equipment" are not required to possess CDLs. *See* RCW 46.25.050 (b). The relevant inquiry is whether fire departments may enact a similar policy despite not being subject to the CDL requirement. The answer is yes. A fire district may perform "any and all lawful acts required and expedient to carry out the purpose" of RCW 52, the Washington statute governing fire protection districts and regional fire authorities. *See* 52.12.021.

A "lawful act," presumably, is a constitutional act. Admittedly, if an unlawful search occurs, the evidence from that search would be suppressed from consideration because of the exclusionary rule, even in disciplinary proceedings.

The presence of marijuana may be detected in the urine for up to 7 days (this number is for a single use; regular users may have marijuana in their system for up to 100 days). However, urine testing does not detect amounts of active THC, the naturally occurring chemical which causes impairment. In other words, testing urine for marijuana may not demonstrate *impairment*. The analysis of breath may not detect marijuana. For that reason, our legislature has insisted that the presence of THC in an individual's system should be determined by analyzing the individual's blood. *See* RCW 46.61.506 (1)(b). Remember, our courts have found that personal information contained in blood is "hidden and highly sensitive." But the High Court, in *Ortega*, ruled that in measuring the reasonableness of a search—in the context of public employment—the Court "must balance the invasions of the employees' legitimate expectations of privacy against government's need for supervision, control, and the efficient operation of the workplace."

Therefore, we must consider the intrusion necessary for a blood draw balanced against a fire department's concern for ensuring an efficient and safe workplace. In doing so, we might reasonably conclude—reading *Robinson* and *Ortega*, cited above, together—that although something like reasonable suspicion may be required to draw blood from a firefighter suspected of using marijuana in the workplace, the heightened standard of probable cause should not control. Because some suspicion is surely necessary, a marijuana-use policy should include a two-tiered inquiry into whether a firefighter might be impaired by marijuana in the workplace: First, establishing reasonable suspicion that the firefighter is impaired; and second, establishing a procedure for substantiating that suspicion by performing a blood draw and analyzing that blood (as indicated above, the analysis of the blood is a second search). If such a Model Policy contains this two-tiered inquiry, a fire department will not (in our opinion) run afoul of constitutional mandates when drawing blood from a firefighter suspected of marijuana use in the workplace, or impairment while on duty. What is crucial is that management enact blood-draw procedures that are reasonably related to the objectives of the blood draw: discovering evidence of marijuana use in the workplace.

We submit that it would not be difficult for a fire department to prove that firefighting is a dangerous occupation, in which concerns for safety outweigh privacy concerns. We further submit that a fire department should not engage in random drug screening without individualized suspicion, unless the department is prepared to demonstrate, based on factual evidence, that it has a compelling governmental interest in doing so.[4] Such a "compelling

governmental interest" would be evidence of repeated drug use within a fire department that may greatly impact public safety as a result. We only contend that, given the implications of RCW 69.50.4013, a fire department has a legitimate need to ensure that marijuana use—which is now legal—is strongly forbidden in the realm of providing fire protection and emergency medical services. Adopting a zero-tolerance policy may achieve this objective, but may go too far, if it means persons who are no longer impaired still violate the policy.

But establishing a Model Policy that comports with the DUI laws and safety regulations of Washington State, and requires a reasonable suspicion of marijuana use or impairment in the workplace prior to seeking a blood withdrawal, is far less likely to be successfully challenged in our courts. And such a Model Policy could be more easily enforced than a "just say no" zero-tolerance policy. Fire departments should address the practical realities of enacting a Model Policy. A comprehensive approach is necessary, and may be broken down into subcategories:

Reasonable Suspicion: Management should train a supervisor on each shift to recognize the symptoms of marijuana impairment, in order to establish reasonable suspicion, and file a report prior to seeking a blood draw. This report would include an examination of various symptoms: Dizziness, shallow breathing, red eyes and dilated pupils, dry mouth, increased appetite ("the munchies"), slowed reaction time, increased heart rate, and the strong odor of intoxicants, to name a few examples. Generally, THC may only be detected within the blood for a few hours, depending on the amount of marijuana consumed. Consequently, time is of the essence. The supervisor should have, at his or her disposal, and within an hour, access to a neutral and detached person properly qualified to draw and analyze blood.

Blood Analysis: Reference to the DUI laws in our state provides guidance for drafting the procedure for analyzing blood draws. First, the person drawing the blood should be licensed by the state toxicologist. *See* RCW 46.61.506 (3). Second, the law states that a person is conclusively DUI if, within two hours after driving, he or she has a THC concentration of 5.0 ng/ml or higher. Recall that the DUI laws permit the consideration of levels of THC lower than 5.0 ng/ml, along with other competent evidence, in criminal proceedings (DUI trials). Logically, this may be extended to disciplinary proceedings, especially when the imposition of discipline—not criminal penalties such as jail time—is the ultimate consequence of such proceedings. Another consideration remains: Whether the employer may set an arbitrary number that measures what level of THC within the blood causes "impairment" in the context of driving a fire engine or ambulance. Again, reference to the DUI laws may give us guidance. Certainly, the number falls somewhere between 0.01 and 5.0 ng/ml of whole blood. We might look to how other agencies have addressed this issue, including those agencies with policies applicable to employees that must possess CDLs. Recall that marijuana is still a Schedule I Controlled Substance under federal law.

The City of Shoreline has enacted a Drug and Alcohol Testing Policy for Employees who Operate Commercial Vehicles. http://www.mrsc.org/policyprocedures/s55drugtestpol.pdf. This policy contains a provision for reasonable suspicion drug and alcohol testing.

[4] Please refer to the May 2005 *Firehouse Lawyer* newsletter for further analysis of random drug screening: http://www.firehouselawyer.com/archives/v05n05may2005.pdf

Page 5. The policy goes further to state that if an employee is removed from duty for reasonable suspicion of alcohol use, that employee may not return to duty "until an alcohol test is administered and the driver's breath alcohol concentration (BAC) measures less than 0.02." Page 6. Unfortunately, the policy does not reference the testing of blood to measure THC impairment. But we should not give up there. Let us consider the math: .02 is ¼ of .08, the BAC required to convict a person of DUI. Perhaps the number a fire department could use, in the context of establishing a threshold for THC impairment, is ¼ of 5.0 ng/ml of whole blood: 1.25. This number could be the measure by which a lab technician determines an employee is impaired by THC, thus comporting with the second tier of this Model Policy, and other applicable laws and constitutional principles.

Additionally, the Shoreline policy states that "[I]f an employee tests positive for drugs or has an alcohol test that indicates a breath alcohol level of .04 or greater from a random, reasonable suspicion or post-accident test," that the employee will be disciplined and may not return to work requiring a CDL until specific requirements are met. Pages 8-9. This gives the employer some idea of how it may enforce a Model Policy in disciplinary proceedings. Again, the Shoreline policy, like many others, does not address blood testing, which, as already established, requires a greater intrusion than urine or breath testing. But we remind the reader that this article is written as though a zero-tolerance policy was incapable of being enacted, and labor and management are forced to reach some compromise. Accordingly, we return to the enforcement of our hypothetical Model Policy.

Most importantly, your supervisor should be prepared to insist that the employee suspected of impairment subject themselves to a blood draw, to measure whether the employee has a THC concentration of 1.25 ng/ml or higher. Your policy should also include a provision dealing with an employee's admission of drug use when informed of any suspicions of impairment. In such a case, a blood analysis may not be necessary, but the supervisor should obtain a written admission for purposes of establishing a record for disciplinary proceedings.

In all other areas, this Model Policy should be drawn broadly to ensure that employees have knowledge of when it applies. The goal is simple: keep our employees and citizens safe. Taken as a whole, we believe that this Model Policy would balance the privacy of employees against the achievement of this goal.

Of course, your fire department could always engage in bargaining to enact a procedure for random drug testing without individualized suspicion. We at the Firehouse Lawyer are drawing up our own Model Policy for THC in the workplace.

Put Benefit Charges on Your Meeting Agenda

"Benefit charges" are allowed by RCW 52.18. Only a handful of fire districts and regional fire authorities use the benefit charge legislation. This financial weapon is the healthiest alternative to property taxes. In fact, our courts have found that benefit charges are neither taxes nor special assessments. *Fire Protection Districts v. Housing Authority of King County*, 123 Wn.2d 819 (1994). Consequently, benefit charges are not subject to the statutory limitations on lifting a property tax levy over the 1% of assessed valuation (AV). And these benefit charges are unlike EMS levies, which are also property taxes. Taxes are directly related to AV; special assessments are only valid if the assessment amount does not

substantially exceed the "special benefit" conferred on the property by the improvement (such as sewers or water lines or roads).

Benefit charges are essentially charges for services rendered. These charges need only "relate to a direct benefit or service." *Housing Authority* at 833. A fire district may, by resolution (but see below, it also requires voter approval), impose a benefit charge on personal property or improvements to real property. RCW 52.18.010. The statute further delineates the method by which a fire district may determine a fire benefit charge. A fire district may utilize:

> Any other method that reasonably apportions the benefit charges to the actual benefits resulting from the degree of protection, which may include but is not limited to the distance from regularly maintained fire protection equipment, the level of fire prevention services provided to the properties, or the need of the properties for specialized services

RCW 52.18.030 is mostly a procedural statute. It provides that the resolution establishing the benefit charges shall specify the charge to be applied to each property. We assume that it would be adequate to attach the entire roll of the property descriptions as an exhibit to the annual resolution. The benefit charge is not ordinarily assessed against raw land or vacant acreage. That is because there must be protected property in which the assessor may measure the benefit. RCW 52.18.040 authorizes, and recognizes the need for, a contract with the county for administration of the charge, including imposition and collection.

RCW 52.18.050 is a key provision. It is the voter-approval statute. The benefit charge is "ineffective" until 60% voter approval is obtained, at an election not more than 12 months before the charge is to be imposed. RCW 52.18.060 provides for a public hearing on the proposed charges, not less than 10 days nor more than six months before the election. A report of that hearing is to be filed with the county treasurer. A strength of the benefit charge is that it need only be approved every six years, rather than on a yearly basis, like property taxes.

We are convinced that benefit charges are used sparingly because of a resistance to change. Probably one reason for the lack of use is just that the reliance on property taxes has been an effective source of revenue until recently. Unfortunately, if a fire district enacts a benefit charge, it will lose the "third fifty cents" which may be collected—subject to constitutional and statutory limitations—under RCW 52.16.160. Without much difficulty, a fire district or RFA can establish a formula for creating benefit charges that, when collected, in their entirety would exceed that 50 cents. Admittedly, the legislature, under RCW 52.18.030, has not provided detailed guidance to formulate a resolution that would demonstrate the measurable "benefit" to each individual property.

Perhaps one strategy for implementing a benefit charge would be to adopt a "town hall meeting" model, in which fire districts, during their regular meetings, begin discussing the pros and cons of the benefit charge. An effective way of shedding our fear of this financing method—and our reliance on the property tax—would be to engage in a dialogue with citizens. We understand that regular meetings of a board of fire commissioners are often sparsely attended.

But perhaps if we throw a stone in the water, we can watch the ripples spread. The benefit charge may be spread by word-of-mouth, rather than resorting first to the ballot box.

Case Note: Information on Private Devices

This last September, the Firehouse Lawyer published an article in which we opined that a fire district need not waste its money issuing personal electronic devices, such as tablets and cell phones, to avoid the broad disclosure requirements of the Washington Public Records Act.[5] This is because the message, not the medium in which the message is contained, is relevant to the court's determination of whether a record is a public one or not. Our opinion was recently confirmed by the Washington Court of Appeals, Division One, in *Nissen v. Pierce County*. No. 44852 -1 – II.

Nissen involved Pierce County Prosecutor Mark Lindquist, who, according to the court, admitted during the litigation that he used his personal cell phone to conduct government business. Initially, the requestor sought those records related to government business, from whatever source, but included the qualifier that those records be work-related. But after the County provided heavily redacted call logs and text messages, the requestor made another request, this time removing that qualifier, and asking that Lindquist essentially produce all of the text messages he had sent from his phone. Division Two held that text messages sent or received by Lindquist on his or her personal device are "public records" insofar as those text messages relate to the conduct of government. We find that this affirms our opinion: The Court is worried about the message contained within a device. It does not matter where the message comes from.

[5] You can view this article on the Firehouse Lawyer website: http://www.firehouselawyer.com/archives/v12n03sep2014.pdf.