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ATTORNEY GENERAL OPINION NO. 2016-16

Dale E. Pike, County Attorney  
Lane County Attorney's Office  
235 East Pearl  
P.O. Box 818  
Dighton, Kansas 67839

Re: Constitution of the United States—Amendment 4; Searches and Seizures—Special Needs Exception—Random Drug Testing of County Elected Officials

Constitution of the State of Kansas—Bill of Rights—Search and Seizure—Special Needs Exception: Random Drug Testing of County Elected Officials

Counties and County Officers—County Clerk—County Clerk; Deputies and Assistants; Budget; Limitation on Personnel Policies and Practices

Counties and County Officers—County Treasurer—County Treasurer; Deputy Treasurers; Budget; Limitation of Personnel Action

Counties and County Officers—Sheriff—Sheriff; Deputies and Undersheriffs; Budget; Limitation of Personnel Action

Counties and County Officers—Register of Deeds—Register of Deeds; Deputy Registers of Deed; Budget; Limitation of Personnel Action

Synopsis: In the absence of a requisite showing that a county has a special need to conduct random drug testing of all county employees, a county's personnel policy and procedure requiring random drug testing would

violate the Fourth Amendment to the United States Constitution and § 15 of the Bill of Rights of the Constitution of the State of Kansas.

A board of county commissioners does not have legal authority to subject a county clerk, county treasurer, county sheriff or county register of deeds to personnel policies and procedures requiring random drug testing. Cited herein: K.S.A. 2016 Supp. 19-101a; K.S.A. 19-302; 19-503; 19-805; 19-1202; Kan. Const., Bill of Rights, § 15; U.S. Const., Amend. 4.

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Dear Mr. Pike:

On behalf of the Lane County Commissioners, you ask for an Attorney General opinion regarding whether a board of county commissioners is “prohibited from requiring elected officials to undergo random drug testing the same as other County employees[.]” In response to your question and as discussed below, we conclude a governmental employer must make a preliminary showing of a special need in order to conduct a search in compliance with the Fourth Amendment to the United States Constitution and § 15 of the Bill of Rights of the Kansas Constitution. Further, we conclude that a board of county commissioners (BOCC) lacks authority to subject a county clerk, county treasurer, county sheriff or county register of deeds to random drug testing pursuant to county personnel policies because they are coequal agents of the county body politic and not subordinate to the BOCC.

#### Search of County Employees

You did not provide us with a copy of the county’s personnel policy regarding random drug testing. Thus, we take this opportunity to review the preliminary requirements for a governmental entity to conduct this type of search of its employees.

The authority for governmental entities to conduct searches is subject to the constraints of the Fourth Amendment to the United States Constitution and § 15 of the Bill of Rights of the Kansas Constitution. The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”<sup>1</sup> Although the verbiage of § 15 of the Bill of Rights of the Constitution of Kansas is not identical to that in the Fourth Amendment, it is well-settled that the scope of the protections afforded by § 15 is identical to that of the Fourth Amendment.<sup>2</sup>

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<sup>1</sup> U.S. Const., Amend. IV.

<sup>2</sup> See *State v. Sprague*, 303 Kan. 418, 434 (2015).

The United States Supreme Court has held that the collection and subsequent drug testing of biological samples imposed by law and enforced by government officials are searches within the meaning of the Fourth Amendment, and therefore must satisfy its reasonableness requirement.<sup>3</sup> Therefore, a search pursuant to a random drug testing policy of a county must be reviewed for “reasonableness.”

To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing and must be conducted pursuant to a warrant issued by a neutral magistrate upon probable cause.<sup>4</sup> However, the United States Supreme Court has recognized that exceptions to this general rule are sometimes warranted when special needs, beyond the normal need for law enforcement,<sup>5</sup> make the warrant and probable-cause requirement impracticable.<sup>6</sup> “When such ‘special needs’—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.”<sup>7</sup>

Thus, in order for a search pursuant to a random drug testing policy to be consistent with the Fourth Amendment, a government employer must make a preliminary showing that drug tests of employees are justified by a “special need,” i.e., the employee performs safety- or security-sensitive duties.<sup>8</sup> If the preliminary showing of special need is made, a government employer must still demonstrate that an important interest advanced by drug tests outweighs the employee privacy interests and would be jeopardized if employees could be tested only upon suspicion of actual drug usage.<sup>9</sup> In *Chandler v. Miller*,<sup>10</sup> the Court made it clear that much more than a desire to show a symbolic commitment to the struggle against drug abuse is required to justify a random drug testing program.<sup>11</sup> A government employer’s ability to make those showings will depend on the facts.

Put simply, if the government shows a special need, courts then must determine whether the privacy interests implicated by the search are minimal and whether an important governmental interest furthered by the search would be placed in jeopardy

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<sup>3</sup> See *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 617 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 678-79 (1989).

<sup>4</sup> See *Chandler v. Miller*, 520 U.S. 305, 314 (1997); *Skinner*, 489 U.S. at 619.

<sup>5</sup> *Skinner*, 489 U.S. at 619.

<sup>6</sup> *Von Raab*, 489 U.S. at 665.

<sup>7</sup> *Chandler*, 520 U.S. at 314 (internal citation omitted).

<sup>8</sup> *Id.*

<sup>9</sup> *Skinner*, 489 U.S. at 624.

<sup>10</sup> 520 U.S. 305 (1997).

<sup>11</sup> *Chandler*, 520 U.S. at 321-2. The United States Supreme Court was asked to decide the constitutionality of a Georgia statute requiring *candidates* for state office to pass a drug test. The Court found that candidates for public office are not “safety sensitive” and cannot constitutionally be subjected to drug testing.

by a requirement of individualized suspicion of illegal drug use.<sup>12</sup> If, however, the government fails to show a requisite special need, there is no need for a court to balance public and private interests because the Fourth Amendment bars such searches as unreasonable.<sup>13</sup>

In the absence of a requisite showing that a county has a special need to conduct random drug testing of all county employees, a county's personnel policy and procedure requiring random drug testing would violate the Fourth Amendment to the United States Constitution and § 15 of the Bill of Rights of the Constitution of the State of Kansas.

### Search of County Elected Officials

Assuming that the above constitutional requirements are met, we now turn to your question regarding the inclusion of elected officials in the county's personnel policy for drug testing. As we did in Attorney General Opinion No. 2013-3, we review the relationship between a BOCC and county elected officials. Under the Kansas home rule statute for counties,<sup>14</sup> a BOCC in each county has the authority to "transact all county business and perform all powers of local legislation and administration it deems appropriate," subject to certain enumerated restrictions.<sup>15</sup> The applicable exceptions that address your question are found in K.S.A. 2016 Supp. 19-101a(a)(6) and (14) which provide:

(6) Counties shall be subject to all acts of the legislature concerning elections, election commissioners and officers and their duties as such officers and the election of county officers.

....

(14) Counties may not exempt from or effect changes in K.S.A. 19-302, 19-502b, 19-503, 19-805 or 19-1202, and amendments thereto.

Kansas statutes uniformly create several elected offices within each county, including the offices of county clerk, county treasurer, sheriff, and register of deeds. Although different statutes apply to the various officials, each of these statutes provides:

Any personnel action taken by [the elected official] shall be subject to the following: (1) Personnel policies and procedures established by the board of county commissioners for all county employees *other than elected officials*; (2) any pay plan established by the board of

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> K.S.A. 2016 Supp. 19-101a(a).

<sup>15</sup> *Id.*

county commissioners for all county employees other than elected officials; (3) any applicable collective bargaining agreements or civil service system; and (4) the budget for the financing of the operation of the [official's] office as approved by the board of county commissioners.<sup>16</sup>

This statutory language requires the county clerk, county treasurer, sheriff, and register of deeds to abide by the county's personnel policy *when taking personnel action*.<sup>17</sup> This language clearly refers to actions taken by the elected official with respect to his or her personnel and specifically excludes elected county officials from the county's personnel policies and procedures.

Additionally, case law supports the proposition that the BOCC and county elected officials are coequal agents of the county body politic and not subordinate to one another. For example, the Kansas Supreme Court in *Bd. of Cty. Comm'rs of Cty. of Lincoln v. Nielander*<sup>18</sup> adopted the following characterization of the relationship between a sheriff and the BOCC:

The sheriff is an independently elected officer whose office, duties, and authorities are established and delegated by the legislature. The sheriff is not a subordinate of the board of county commissioners and neither are the undersheriff or the sheriff's deputies and assistants. Rather, the sheriff is a state officer whose duties, powers, and obligations derive directly from the legislature and are coextensive with the county board.<sup>19</sup>

In *Blume v. Meneley*,<sup>20</sup> a case decided shortly after *Nielander*, the United States Federal District Court of Kansas decided that the sheriff's position, as well as other elected positions in county government, were not subordinate to one another, but are equal positions, each empowered with the task of running one of the departments of county government.<sup>21</sup>

We recognize, therefore, that personnel action taken by a county elected official is subject to BOCC personnel policies and procedures, but this does not give a BOCC the ability to supersede a county elected official's statutory duties.<sup>22</sup> We also recognize that a BOCC is prohibited by these same statutes and case law from including a county elected official within the purview of established personnel policies and procedures.

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<sup>16</sup> K.S.A. 19-302(c); K.S.A. 19-503(c); K.S.A. 19-805(d); K.S.A. 19-1202(c) (emphasis added).

<sup>17</sup> *Emphasis added*.

<sup>18</sup> 275 Kan. 257 (2003).

<sup>19</sup> *Id* at 262.

<sup>20</sup> 283 F.Supp.2d 1171 (2003).

<sup>21</sup> *Id* at 1174-75.

<sup>22</sup> *Nielander*, 275 Kan. at 267.

Thus, we conclude that, because county elected officials are excluded from the personnel policies and procedures established by a BOCC for all county employees, and it is well-settled that a BOCC and county elected officials are coequal agents of the county body politic and not subordinate to one another, a BOCC does not have legal authority to subject a county clerk, county treasurer, county sheriff or county register of deeds to personnel policies and procedures requiring random drug testing.

Even assuming, *arguendo*, a county's random drug testing policy is constitutional and could be imposed on a county elected official, if a county's policy for failure of the random drug testing results in a sanction of termination of any "other County employee," the same sanction cannot be imposed upon a duly elected official. The only methods available to involuntarily remove an elected official before the end of the term are recall<sup>23</sup> and ouster.<sup>24</sup>

Sincerely,

/s/Derek Schmidt

Derek Schmidt  
Kansas Attorney General

/s/Athena E. Andaya

Athena E. Andaya  
Deputy Attorney General

DS:AA:sb

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<sup>23</sup> K.S.A. 25-4301 *et seq.*

<sup>24</sup> K.S.A. 60-1201 *et seq.*