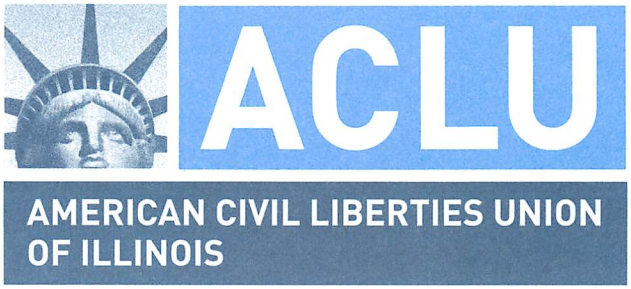

June 16, 2011

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Re: Proposed suspicionless drug test for all Chicago employees and elected officials

Honorable members of the Workforce, Development, and Audit Committee:

I write on behalf of the ACLU of Illinois, including our 10,000 members and supporters in Chicago. The ACLU opposes the proposed program of suspicionless drug testing of all City of

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Chicago employees and elected officials, as set forth in the proposed Order filed by Alderman Burke and Alderman O'Connor. *See* proposed Order 2011-601 (attached). For the following reasons, we urge a "no" vote on this proposed Order.

A. Policy reasons

First, drug testing invades privacy and bodily autonomy. Drug testing by means of urinalysis is humiliating for many people, and embarrassing or unpleasant for many others. Drug testing in the absence of individualized suspicion is stigmatizing: it creates a presumption of guilt that can only be rebutted by a negative test result.

Second, suspicionless drug testing would misallocate scarce City resources. Suspicionless drug testing would cost some $1.75 million per year (assuming a cost of $50 per test, and assuming 35,000 City employees). That money would be better spent on critical City services, like police or schools.

Third, there are more effective and direct alternative methods to advance the City's asserted objectives. Managers can discipline employees who engage in improper absenteeism. Employees in truly safety sensitive positions (such as bus drivers) already are subject to drug testing. On-duty employees who appear to be under the influence of drugs might be subjected to drug testing for cause.

B. Legal reasons

State compelled drug testing is a "search" subject to the demands of the Fourth Amendment to the U.S. Constitution.[1] Ordinarily the Fourth Amendment requires individualized suspicion to perform a search of a person.[2] However when a search advances a "special need, beyond the normal need for law enforcement," the Fourth Amendment does not always require individualized suspicion.[3] Whether government may perform a "special needs" search absent individualized suspicion depends upon a "balance" of the "the individual's privacy expectations against the Government's interests."[4]

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[1] *Skinner v. RLEA*, 489 U.S. 602, 617 (1989); *Chandler v. Miller,* 520 U.S. 305, 313 (1997); *Ferguson v. City of Charleston*, 532 U.S. 67, 76 & n.9 (2001); *Pottawatomie Sc. Dist. v. Earls*, 526 U.S. 822 (2002).

[2] *NTEU v. Von Raab*, 489 U.S. 656, 665 (1989) ("a search must be supported, as a general matter, by a warrant issued upon probable cause").

[3] *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 665.

[4] *Von Raab*, 489 U.S. at 665. In particular, the Court uses four factors in special needs balancing: (1) "the nature of the privacy interest upon which the search at issue intrudes"; (2) "the character of the intrusion that is complained of"; (3) "the nature and immediacy of the governmental concern at issue"; and (4) the "the efficacy of [the challenged government] means for meeting [the government interest]." *Vernonia Sch. Dist.*, 515 U.S. at 654, 658, 660.

As to the privacy side of the scale, suspicionless drug testing by means of urinalysis is a significant intrusion on privacy. *Pottawatomie Sch. Dist. v. Earls*, 536 U.S. 822, 841 (2002) (Breyer, J., concurring) (for some people monitored urination is "seriously embarrass[ing]" and not a "negligible" privacy invasion); *Taylor v. O'Grady*, 888 F.2d 1189, 1197-98 (7th Cir. 1989) ("[a]ll urinalysis programs implicate serious privacy concerns," because monitored urination "is intrusive and often embarrassing and uncomfortable").

Applying this special needs balancing test, courts have struck down suspicionless drug testing of government employees whose possible drug use raises no significant safety concerns. *See, e.g., Taylor,* 888 F.2d 1189 (Cook county jail employees who have no contact with inmates, no reasonable opportunity to smuggle drugs to inmates, and no access to firearms may not be tested); *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (a "library page" whose job was to retrieve books and occasionally staff the youth desk); *AFT v. Kanawha Bd. of Educ.*, 592 F. Supp. 2d 883 (S.D.W.V. 2009) (school teachers); *NTEU v. Watkins*, 722 F. Supp. 766 (D.D.C. 1989) (computer and communications specialists and assistants).

When courts have upheld suspicionless drug testing of government workers, there were serious safety concerns. *See, e.g., Krieg v. Seybold*, 481 F.2d 512 (7th Cir. 2007) (municipal employees who drive dump trucks and back hoes near people).

Thus, a blanket suspicionless drug testing program of all City employees would not withstand a constitutional challenge. While the proposed Order asserts a general interest in a drug free workforce ("whereas" #8), a general governmental interest in the integrity of its work force is insufficient to overcome the privacy interest of its employees. *See Taylor*, 888 F.2d at 1195. Like the blanket suspicionless drug testing program of all Cook County Jail employees that the appellate court held overbroad in *Taylor*, 888 F.2d at 1193, the proposed Order requiring suspicionless drug testing of all City of Chicago employees is too sweeping to pass the test of reasonableness under the Fourth Amendment.

The proposed Order further imposes a suspicionless drug testing program upon all elected officials of the city of Chicago "as a sign of solidarity with City employees." This is not a "special governmental interest," as that term is used by courts, that overrides the individual's privacy interest and justifies suppression of the Fourth Amendment's normal requirement of individualized suspicion. For this reason, suspicionless drug testing of candidates for elected office was found to be unconstitutional. *Chandler v. Miller*, 520 U.S. 305, 318 (1997). Similarly, the testing of elected City officials as required in the proposed Order is unconstitutional.

Finally, suspicionless drug testing of all City of Chicago employees and elected officials would also violate the Privacy Clause of the Illinois Constitution. *See* Ill. Const. Art. I, sec. 6. That liberty guaranty "goes beyond" the protections of the U.S. Constitution. *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 391 (1992) (requiring probable cause for a grand jury to seize head or pubic hair, and individualized suspicion for it to seize thumb prints).

* * *

In conclusion, blanket drug testing of all City employees and elected officials is contrary to public policy and constitutionally impermissible. We therefore urge you to oppose the proposed Order 2011-601. If you have any questions, please do not hesitate to contact me at (815) 483-1980, or at mdixon@aclu-il.org

Very truly yours,

Mary Dixon
Legislative Director
ACLU of Illinois

cc: Mayor Rahm Emanuel
Corporation Counsel Stephen Patton

Office of Chicago City Clerk

Or2011-601

Office of the City Clerk

City Council Document Tracking Sheet

Meeting Date:	**6/8/2011**
Sponsor(s):	Burke, Edward **(14)** O'Connor, Patrick **(40)**
Type:	Order
Title:	Call for implementation of random drug screening program for City employees and elected officials
Committee(s) Assignment:	Committee on Workforce Development and Audit

Workforce Development and Audit

ORDER

WHEREAS, the City of Chicago is a home rule unit of goverunuent pursuant to the 1970 Illinois Constitution, Article VII, Section 6 (a); and

WHEREAS, pursuant to its home rule power, the City of Chicago may exercise any power and perform any function relating to its goverument and affairs including the power to regulate for the protection of the public health, safety, morals, and welfare; and

WHEREAS, the Chicago Housing Authority has proposed a policy to drug test Chicago Housing Authority (CHA) residents and applicants for housing; and

WHEREAS, this drug testing would apply to all individuals over 18 years of age including senior citizens; and

WHEREAS, the State of Florida recently enacted new rules wherein welfare recipients and new state goverument hires are required to submit to drug tests; and

WHEREAS, there has been a national movement to require all welfare recipients to participate in drug screenings in order to obtain their benefits; and

WHEREAS, typically, drug testing identifies the presence of alcohol and illegal drugs including cannabis (marijuana and hashish), cocaine, opiates (codeine, morphine and heroin) phencyclidine and amphetamines; and

WHEREAS, according to a National Institute on Drug Abuse study, drug and alcohol abusers are five times more likely to file a Workers' Compensation Claim; and

WHEREAS, a similar study from the American Council for Drug Education shows that drug and alcohol abusers are 10 times more likely to miss work; and

WHEREAS, the City of Chicago seeks to promote the hiring of a drug free workforce; and

WHEREAS, random drug testing helps to protect City residents from unnecessary risks of personal harm and inefficient use of their tax payer dollars; **NOW THEREFORE**

BE IT ORDERED, that the City Council of the City of Chicago hereby directs the Commissioner of the Department of Human Resources to develop and implement a random drug screening program for all City employees; and

BE IT FURTHER ORDERED, that the elected officials of the City of Chicago subject themselves to a similar random drug screening program as a sign of solidarity with City employees.

Alderman Edward M. Burke, 14th Ward

40th