FAHRO gram
FLORIDA ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS
November/December 2014

President's Message

Happy Thanksgiving and a Very Merry Christmas!


Maria A. Burger

With the year coming to an end, it is an honor to be a part of the FAHRO family. As president, I want to express how deeply grateful I am for all of the support you have shown me this past year, and I look forward to my next as the FAHRO president.

On behalf of myself and the FAHRO staff, we want to wish you and your family a wonderful Thanksgiving and a very Merry Christmas.

Legal Update

Pre-Employment Drug Testing Policy Held Unconstitutional

by Ricardo L. Gilmore, Esq., and Michael J. Roper, Esq.

As Florida public employers, housing authorities should be aware of a recent case regarding the constitutionality of a governmental body's personnel policy that mandated drug testing for all job applicants. See *Voss v. City of Key West*, 2014 WL 1883588 (S.D. Fla. May 9, 2014). In our experience, many public housing authorities have a similar policy of testing all job applicants across-the-board, and this new decision warrants a careful review of those common employment practices.

Michael J. Roper, Esq., of Bell & Roper PA in Orlando performs quite a bit of insurance defense work for housing authorities we work with here in Florida. He brought this important case to my attention a few months ago, and several of you have asked how to proceed with pre-employment drug testing given this ruling. Much of the analysis that follows was supplied by Mr. Roper, and I want to thank him at the outset for allowing me to use, modify and supplement his expert analysis on this matter.


Ricardo L. Gilmore, Esq.


Michael J. Roper, Esq.

In *Voss*, *supra*, the City of Key West had implemented a drug-free workplace policy that provided for 1) post-offer testing for all applicants for employment; 2) reasonable suspicion testing; and 3) random testing for "safety sensitive" positions. The plaintiff applied for and was offered the newly created position of solid waste coordinator (coordinator) contingent, in part, upon her submission of a urine sample and a successful completion of a standard drug screen. The

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Calendar

March 15-18, 2015
Washington, D.C.
NAHRO Legislative Conference

May 12-14, 2015
Daytona Beach, Fla.
FAHRO Executive Directors' Forum

July 30-August 1, 2015
Austin, Tex.
NAHRO Summer Conference

August 11-13, 2015
Orlando, Fla.
FAHRO Annual Convention & Trade Show
Disney's Yacht Club Resort

October 15-17, 2015
Los Angeles, Calif.
NAHRO National Conference

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Member Feedback

Do you need help with a project or issue and want to see if any of our readers have the answer? Has a colleague done something wonderful that deserves an attaboy or attagirl? Or are you just frustrated and want to vent? Here is your chance to (anonymously if you wish) say thanks, ask for assistance, vent your frustrations, express your opinion or let us know how you feel.

- Congratulations to Pinellas County HA on its receipt of $132,425 in Family Self-Sufficiency (FSS) program funds. This money will continue to fund and develop programs that link residents with local community organizations that provide training and skill workshops for employment.

If you would like to contribute to Sounding Off, please email your comments to Susan Trainor, FAHROgram editor, *editor.trainor@gmail.com*.

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plaintiff signed an employee acknowledgement agreement reflecting her agreement to submit voluntarily to the test and her understanding that her refusal to test would disqualify her from employment. Thereafter, the plaintiff refused to submit to the drug test and instead went directly to the city attorney and objected to undergoing the pre-employment drug screen. Due to her refusal to submit to the drug test, the position was offered to, and accepted by, another candidate.

The plaintiff then filed suit against the city alleging that the requirement for her to undergo a mandatory drug test violated her civil rights. In ruling upon the plaintiff's motion for summary judgment, the U.S. District Court for the Southern District of Florida, Key West Division, first of all noted the well-settled precedent that drug testing that utilizes urinalysis is a "search" that falls within the ambit of the Fourth and Fourteenth amendments. As such, in order to be "reasonable," the search must ordinarily be based upon an individualized suspicion of wrongdoing. However, the U.S. Supreme Court has recognized exceptions to that rule where the government proffers a "special need" or an "important governmental interest" that is furthered by the minimal intrusion.

Accordingly, the city proffered two alternative "important governmental interests" in an effort to justify the suspicionless testing of job applicants. First, the city argued that it had an important interest in the "… safe, effective and efficient delivery of public services." Second, the city argued that the position was "safety sensitive" because the coordinator must occasionally supervise the transfer station and give presentations to school-aged children.

The district court, relying primarily upon the Supreme Court's decision in *Chandler v. Miller*, 520 U.S. 305 (1997), rejected the city's argument regarding the safe and effective delivery of services as being merely a "symbolic" interest and therefore insufficient to justify the search. The court indicated that there was no record evidence of a serious problem with drug abuse amongst job applicants or city employees, which might serve to justify the suspicionless testing regimen.

The court also rejected the city's argument that the coordinator position was "safety sensitive," so as to justify the testing. The court analyzed the essential requirements of the job and concluded that the coordinator was really not actively engaged in safety-related duties. The court also distinguished this case from *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), which found that certain "surpassing safety interests" would justify suspicionless drug testing. In *Skinner*, the court was presented with evidence that on-the-job intoxication resulted in multiple fatalities and other injuries over a 10-year period. In *Voss*, the city was unable to produce any such similar history of accidents or injuries in the solid waste department resulting from intoxication.

Finally, the court rejected the city's argument seeking to draw a distinction between current employees and applicants for employment. The city, relying primarily upon the prior decision in *Willner v. Thornburgh*, 928 F. 2nd 1185 (D.C. Cir. 1991), argued that suspicionless

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testing of job applicants was reasonable under the Fourth Amendment because applicants can refrain from applying for positions that require pre-employment drug testing. In reaching this conclusion, the district court judge stated in pertinent part as follows:

> … there is no precedent in this Circuit which holds that the government can violate a person's rights under the Fourth Amendment so long as prior notice of the impending violation is given. Accordingly, the Court finds no reasons to adopt the distinction between applicants and employees that the City has suggested.

Accordingly, the court granted summary judgment in favor of the plaintiff as to liability, finding that her Fourth Amendment rights had been violated by the city's requirement for a pre-employment drug test for her non-safety-sensitive position. The court noted that while suspicionless drug testing of applicants for employment may have become routine for private employers, public employers are more constrained by the Fourth Amendment.

This decision seems to be consistent with the recent trend by the federal courts to increasingly restrict the ability of Florida's public employers to drug test their employees. See, e.g., *AFSCME v. Scott*, 717 F. 3d 851 (11th Cir. 2013) cert. den. 134 S. Ct. 1877 (2014) (holding that a suspicionless random drug testing policy for all state employees violated the Fourth Amendment). It appears that, under current law, a Florida public employer can only lawfully drug test its applicants or employees under the following circumstances: 1) reasonable suspicion; 2) random testing for a true safety-sensitive position; 3) routine fitness for duty; and 4) follow-up testing. Furthermore, it appears that in order to justify the random drug testing of safety-sensitive employees, an employer may be required not only to demonstrate that the position is truly "safety sensitive," but may also be required to demonstrate a history of accidents or injuries constituting "surpassing safety interests," either within the organization or within the industry as a whole, in order to justify suspicionless testing of even safety-sensitive positions.

The *Voss* decision did not reference either § 112.0455, Florida Statutes (Drug-Free Workplace Act), which applies to the state and its agencies, or § 440.1025, which establishes a framework by which employers may secure workers' compensation discounts. However, it is worthwhile to note that the definition of "job applicant" for a public employer in § 440.102(1)(j) is limited to "… a person who has applied for a special-risk or mandatory-testing position." Accordingly, the language of that statute appears to be consistent with the rationale and holding in *Voss*.

This ruling, if not reversed or otherwise contradicted, represents a significant EPL (employment practices liability) exposure for housing authorities and other governmental bodies in the state of Florida. There is a four-year statute of limitations applicable to 42 U.S.C. § 1983 suits in the state of Florida. Accordingly, job applicants who have been denied employment by a public entity within the past four years for either refusing to take

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or failing a pre-employment drug test potentially will have a claim for damages against said entity for the violation of their Fourth Amendment rights. Further, there is significant incentive for plaintiff's counsel to pursue such claims due to the availability of a separate attorney's fee award pursuant to 42 U.S.C. § 1988.

Although there is not much that can be done now to remedy past practices, until there is further direction from the courts on this issue, we recommend that each housing authority carefully review the *future* application of its drug testing policy and, if necessary, amend it to comply with the above case law. Although pre-employment drug testing for true safety-sensitive positions is still acceptable, an across-the-board policy of testing *all* job applicants would not be lawful, based upon the analysis contained in the *Voss* decision. Additionally, without specific authority, we also caution against a blanket policy of testing all employees post-accident, absent reasonable suspicion that drug or alcohol use caused or contributed to the occurrence of the accident. While post-accident testing may be authorized by certain licensure (commercial driver license) or by contract (collective bargaining agreement), absent such authority, suspicionless testing of public employees just because they were involved in an accident will likely run afoul of the constitutional protections described in *Voss*.

Finally, we advise that you contact your housing authority's attorney for individualized advice about your specific personnel policies and practices.

HA Spotlight

Tampa's ENCORE! Shines at Congressional Black Caucus

The Congressional Black Caucus culminated its 44th Annual Leadership Conference in Washington, D.C., with more than 8,000 attendees representing business and industry leaders, elected officials, community leaders, media, emerging leaders and everyday Americans during the scheduled policy forums, panels and general sessions of this three-day conference. An integral part of the conference included Congresswoman Frederica Wilson's introduction of U.S. Department of Housing and Urban Development Secretary Julian Castro. During his welcoming remarks, Secretary Castro mentioned ENCORE! as a successful model of public-private partnership that is worthy of emulation.

Various members of the Tampa Bay community participated in a panel presentation: The New Urban Agenda - Building Successful Public-Private Partnerships for Stronger Communities. Panelists from Tampa included President/CEO Jerome Ryans and SVP/COO Leroy Moore from Tampa Housing Authority, Frank DeBose from Pinnacle

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Group Holdings, Nancy Crown from Bank of America, Bob Rohrlack from Greater Tampa Chamber of Commerce, Santiago Corrada from Visit Tampa Bay and Christine Burdick from Tampa Downtown Partnership. George Burgess from Becker and Poliakoff and attorney Stephanie Mickle also participated on this panel that drew the crowd in with the members' combined expertise in building successful public-private partnerships for development projects like ENCORE. Video presentations featuring the City of Tampa's Downtown Partnership, elements of Visit Tampa Bay, the Greater Tampa Chamber of Commerce as well as ENCORE were all well received.

ENCORE!, Tampa Housing Authority's $430 million project at build-out, will provide more than 1,000 jobs on site, 1,100 residential units that will include 794 mixed-income housing for families, a hotel, retail shops, offices and more, thereby contributing millions of dollars to Tampa's economy.

President/CEO Jerome Ryans (left) and SVP/COO Leroy Moore of Tampa HA with Congresswoman Frederica Wilson (Miami) at the Leadership Conference in D.C.

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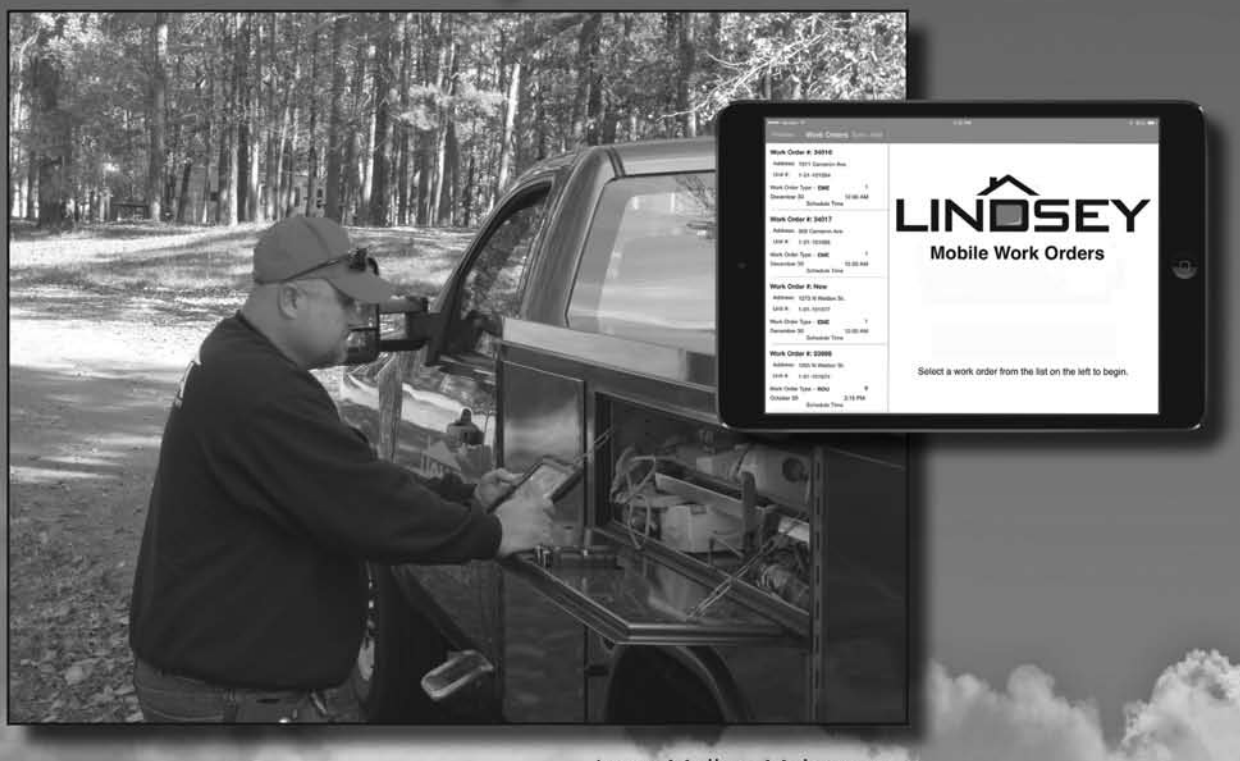

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ROSS Residents Get New Computer Lab in Pinellas County

Thanks to the Pinellas County Housing Authority (PCHA), participants of the Resident Opportunity Self-Sufficiency (ROSS) program at Lakeside Terrace now have access to a brand new community computer lab, located in the shared community center between Lakeside Terrace and Crystal Lakes Manor.

The lab features six computer stations with high-speed internet access and free printing. Each computer will take advantage of Microsoft OneDrive, a cloud-storage based service that allows residents to edit, share and save Microsoft Office files on a personal account, without the need for a USB thumb-drive or disc. Using OneDrive makes saved files accessible on any device with an internet connection. Three floor-to-ceiling bookcases will host a rotating variety of books made available through partnership with the Clearwater Public Library System. For those visually impaired and wishing to enlarge books or photos, a state-of-the-art video magnifier has been generously donated to the community by the Lakeside Terrace and Crystal Lakes Manor resident associations.

Books from the Clearwater Library and a video magnifier make leisurely reading convenient for ROSS residents.

Send Your News to FAHRO!

Tell us about your accomplishments, milestones and other interesting member news. Your fellow members want to know!
Submit your news to FAHRO via email: *editor.trainor@gmail.com* (attach in MS Word format)
Photographs are welcome!

FAHRO Peer Assistance Network Stands Ready to Help

FAHRO offers many great resources to members, including education, advocacy and communications relevant to your agency. One of the greatest benefits of membership, however, is being a part of the FAHRO family. Many agencies have relied on the members and staff of FAHRO to help them out of a tough situation when they had many questions and very few, if any, answers.

One way to receive support is by contacting the FAHRO Peer Assistance Network. This committee, chaired by Becky-Sue Mercer of the Arcadia Housing Authority, provides members with solutions to their toughest problems. The committee consists of 12 members of variously sized housing authorities eager to assist you with whatever your issue might be. If you would like help from the committee, please email Becky-Sue at *arcadiahousing@embarqmail.com*.

Attention Members! Keep FAHRO Up-to-Date!

Help us serve you better by keeping our record of your mailing address, telephone, fax, email address and website address up-to-date.

Whenever you make a change, please send your new information via email to Cherie Pinsky, *Cherie@FAHRO.org*, call 850/222-6000 or fax 850/222-6002.

Thank you!

FPHASIF FACTS

Turkey Frying Safety
Brought to you by FPHASIF!

The use of turkey fryers can lead to devastating burns, other injuries and the destruction of property. The problem has gotten so bad that Underwriters Laboratories (UL) has refused to certify turkey fryers. For safety reasons, the use of outdoor gas-fueled turkey fryers that cook the turkey in hot oil are discouraged. Consider purchasing an outdoor turkey cooking appliance that does not use oil. But if you "must" fry a turkey, please follow these important safety rules:

Basic Safety Rules for Frying a Turkey

- Do not use your turkey fryer on a wooden deck, in your garage, near a wooden structure, under the eaves of any building or anywhere near flammable materials. Use a turkey fryer outdoors on a solid and level surface in a safe location—only and always.
- Always make sure your turkey is completely thawed before placing in a fryer and NEVER overfill your fryer.
- Never leave your turkey fryer unattended. This really is a two-person job. You need a good volunteer to do the running while you watch the turkey fryer. Even a few minutes could cost you thousands.
- If your oil begins to smoke, check the temperature and lower the heat immediately. When turkey fryers get too hot, they don't just catch fire—they can explode.
- Practice safe frying by always having an all-purpose fire extinguisher handy. Use well-insulated potholders or oven mitts and wear long sleeves and safety goggles to protect from splatter.

Again, the use of turkey fryers that cook with oil are discouraged. Here's why:

The Dangers of Turkey Fryers

- In deep frying, oil is heated to temperatures of 350° Fahrenheit or more. Cooking oil is combustible, and at temperatures over 300° F, the oil becomes about as flammable as gasoline. If oil is heated above its cooking temperature, its vapors can ignite.
- Turkeys must be completely thawed before placing in the fryer because a partially thawed turkey will cause the oil to splatter, causing serious burns.
- Hot oil may splash or spill during cooking. Contact between hot oil and skin can result in serious injury. An oil spill can happen with fryers designed for outdoor use using a stand. The fryer might tip over or collapse, causing the hot oil to spill. Newer electric countertop units that use a solid base appear to reduce this risk.
- Propane-fired turkey fryers must be used outdoors. They are very popular for holiday meals. Many parts of the country may have rain or snow at this time of year. If rain or snow hits the hot cooking oil, the oil may splatter or turn to steam, leading to burns.
- The fryers use a lot of oil, about five gallons. Considering the size and weight of the turkey, extreme caution must be taken when transferring the turkey to and from the fryer to be sure it's not dropped back into the fryer, splattering oil on the cook or other people.

TIP: Purchase an already cooked deep-fried turkey, or consider a new type of turkey fryer that does not use oil.

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Mission Statement

FAHRO *is committed to the professional development of the people who provide public and assisted housing in Florida by offering a network for increased communication and education. We will continue to support legislation for the improvement and development of affordable housing and economic opportunities.*