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Vet. Aff. Op. Gen. Couns. Prec. 46-91

TEXT:

SUBJECT: Taking of Patients' Urine, Blood and Breath Specimens for Drug and Alcohol Analysis for Admittance to and While in A Domiciliary Care

(This opinion, previously issued as Opinion of the General Counsel 7-86, dated March 10, 1986 is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: District Counsel, Washington

QUESTION PRESENTED

Under what circumstances domiciliary patients may be required to submit to blood, breath or urine testing for the detection of drug or alcohol use. The issue arises as a result of the intention to require domiciliary patients participating in drug abuse treatment programs to execute a written contract prior to entering the domiciliary program to permit such testing at the request of a staff member. The intention to require domiciliary patients not in abuse programs to submit to testing, irrespective of any contract, is also at issue.

COMMENTS:

THE TAKING OF BLOOD, BREATH OR URINE SPECIMENS IN THE CONTEXT OF MEDICAL TREATMENT

In general, domiciliary care is provided to veterans able to take care of themselves who suffer from a chronic disability, disease or defect which prevents them from earning a living. 38 C.F.R. § 17.47. Part of the domiciliary program includes a "coordinated professional treatment program organized to attain preventive and restorative goals." VA Manual M-2, Part XIX, para. 5.02. Admission to a domiciliary program requires an admission history and physical examination, including a urinalysis. VA Manuals M-1, Part I, para. 4.01; M-2, Part XIX, paragraph 5.04a. Inasmuch as medical treatment is part of the domiciliary program, the need for which is determined by a preliminary admission physical examination, the requirement that a patient submit a urine specimen taken as part of such an examination certainly does not violate the Fourth

Amendment. Additionally, we see no legal objection to including an analysis of blood, breath or urine as part of routine periodic physical examinations of domiciliary patients in view of the chronic medical problems suffered by domiciliary patients. The progressively improving health of patients participating in such programs is paramount to their success, and periodic testing may be medically indicated to monitor such progress. In the context of medical care and treatment where the taking of blood, breath, or urine specimens is dictated by the exercise of medical judgement, the question is one not of search and seizure, but of informed consent to the taking. Section 17.34 of title 38, Code of Federal Regulations, requires that to the maximum extent practicable, VA's furnishing of patient care shall be carried out only with the full and informed consent of the patient. Thus, as long as a patient freely gives his informed consent to required medical procedures, including the taking of blood, breath or urine specimens, the taking is not a search or seizure in the context of the Fourth Amendment. However, a patient's unreasonable withholding of consent to a medical procedure may provide a sufficient basis for discharge from the facility under 38 C.F.R. § 17.66.

A drug or alcohol abuse program is a medical treatment program likewise permitting the taking of blood, breath or urine specimens in the exercise of medical judgment. In thesecircumstances then, execution of the "Domiciliary Abstainers Contract," which specifically requires domiciliary patients to submit to blood, breath or urine testing upon request, affords no greater authority to request a specimen than that already extant in the exercise of medical judgment in a medical treatment program. The contract may evidence, however, a notification and an understanding of the patient that the testing is being performed in the context of medical treatment, and that the patient's "breach" of the agreement may result in discharge from the program. Health care providers should be aware, however, that demands for blood, breath or urine specimens which are made in order to obtain the specimens for security or criminal investigation concerning drug abuse, smuggling or the like, rather than for purposes of medical care and treatment do raise Fourth Amendment issues. Officials conducting an unreasonable search violative of patients' rights could be subject to risk of patient lawsuits for damages based on constitutional torts or batter.

THE TAKING OF BLOOD, BREATH OR URINE SPECIMENS AS PART OF ADMINISTRATIVE SEARCHES IN THE CONTEXT OF SECURITY, DRUG ABUSE, DRUG SMUGGLING OR SIMILAR ACTIVITIES

A. THE LAW OF SEARCH AND SEIZURE--GENERAL PRINCIPLES

The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It specifically protects persons, not places (Katz v. United States, 389 U.S. 347, 351 (1967)), from unreasonable searches

and seizures (Carroll v. United States, 267U.S. 132, 147 (1925)), and from invasion of the person and those places and things wherein the individual has a reasonable expectation of privacy (Terry v. Ohio, 392 U.S. 1, 9 (1968)). The courts have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities. (Camara v. Municipal Court, 387 U.S. 523, 530 (1967); Marshall v. Barlow's Inc., 436 U.S. 307, 312 (1978); New Jersey v. T.L.O., --- U.S. ----, 105 S.Ct. 733 (1985)). Whether the "seizure" of blood, breath or urine specimens by VA personnel from domiciliary residents is lawful depends upon its reasonableness, under all the circumstances. "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search or seizure against the invitation of personal rights that the search or seizure entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979). In weighing the reasonableness of any search, the courts have examined the intrusion associated with the Government's actions in relation to the individual's legitimate expectation of privacy, See Katz v. United States, 389 U.S. 347, 361 (1967). This concept has been described as requiring that the person have an actual expectation of privacy, and that the expectation is one that society is prepared to recognize as reasonable. Id. Thus, determining the lawfulness of a warrantless search or seizure under the Fourth Amendment requires the application of a two-pronged test. The first prong requires a balancing between the needs of the Government in conducting the search or seizure and an individual's expectation of privacy. The second prong requires a determination that the search or seizure is reasonable under all the circumstances. As you have stated, prior voluntary express consent for VA personnel to obtain a patient's blood, breath or urine specimen would obviate Fourth Amendment concerns. Failure to consent to a search and seizure permissible under the Fourth Amendment could result in termination of the patient's treatment and residence in the VA domiciliary, Unpub.Op.G.C., June 15, 1981, para. 5; 38 C.F.R. § 17.66.

As discussed below, the courts have applied these principles in cases closely related to this question. With regard to the proposal for taking patient urine specimens for drug and alcohol analysis, the discharge of urine from the body is a normal human physiological function, so that no intrusion into the body would be necessary in order to collect it. However, as discussed in cases cited below, the discharge and disposal of urine is normally accomplished under circumstances where an individual has a reasonable and legitimate expectation of privacy. In that event, a patient would not expect the discharged urine to be available to others to collect and analyze, except as part of a bona fide medical examination. Courts have concluded that a Government entity's requiring an individual to provide a urine specimen constitutes either a search or seizure within the meaning of the Fourth Amendment. Allen v. city of Marietta, 601 F.Supp. 482 (N.D.Ga.1985); McDonell v. Hunter, 612 F.Supp.

1122 (S.D.Iowa, 1985); Shoemaker v. Handel, 619 F.Supp. 1089 (D.N.J.1985); Anable v. Ford, No. 84-6033, slip op. (W.D.Arkansas, July 15, 1985). Similarly, taking blood from the body is a search and seizure within the meaning of the Fourth Amendment, Schmerber v. California, 384 U.S. 757, 767 (1966), as is the detaining and testing of an individual for use of alcohol by means of a breathalyzer, Shoemaker v. Handel, supra.

B. THE NEEDS OF THE VETERANS ADMINISTRATION

While individual patients' medical needs would seem to be the primary basis for seeking blood or urine specimens, there may be other circumstances under which blood, breath, or urine specimens may be demanded of patients in the general domiciliary population. These must be carefully delineated to conform to Fourth Amendment constraints. Such circumstances could conceivably arise where, for example, the well-being of a group of patients makes it imperative that facility officials discover the identity of residents who are using alcohol or illicit drugs. Clearly, the VA has an interest in keeping patients in its medical facilities, including domiciliaries, free of illicit alcohol and drugs, particularly in view of 38 C.F.R. § 1.218(a)(7), which proscribes their use, possession and introduction on, or the entrance of any person under their influence onto VA property. The unlawful availability of such substances within domiciliaries is antithetical to the VA's mission to restore health to veterans residing in domiciliaries. In addressing the reasonableness of such investigative searches, however, one must consider the scope of the demand for specimens, the manner in which the testing procedure is accomplished, the physical surroundings where the testing is performed and whether other less intrusive means are available to accomplish the intended results. We assume from the information we have obtained that the scope of the demand would require the domiciliary patient, while physically within the confines of the domiciliary, to present himself for testing. With respect urinalysis, we further assume that only the minimal necessary supervision will be exercised by VA personnel to guarantee the collection of a bona fide urine specimen, such as posting a nursing aid outside an individual commode facility in order to prevent the opportunity for contact between domiciliary patients during the procedure. Assessing the reasonableness of instituting substance abuse testing on administrative grounds requires a review of recent judicial decisions on this subject.

C. RECENT CASE LAW--STANDARDS FOR A LAWFUL SUBSTANCE-ABUSE SEARCH

In the case of McDonell v. Hunter, 612 F.Supp. 1122 (S.D.Iowa,1985), prison employees brought an action challenging the constitutionality of the Iowa Department of Corrections' policy requiring employees to provide blood, breath or urine specimens for chemical analysis in order to help the employer discover drug use and to prevent drug smuggling to inmates. The Court found that the possibility of discovering who might be using drugs and therefore likely to

smuggle drugs to inmates was far too attenuated to make the seizure of body fluids constitutionally reasonable. The Court held, however, that it was only permissible under the Fourth Amendment for the defendant corrections department to demand of an employee a urine, blood, or breath specimen for chemical analysis on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic beverages or controlled substances.

In Allen v. City of Marietta, supra, a federal district court upheld a requirement by the City Lights and Water Division that certain employees suspected of drug use submit to urinalysis. The court reasoned that because the tests were administered as part of the employer's legitimate inquiry into the use of drugs by employees engaged in extremely hazardous work with high voltage electric wires and not for criminal investigatory purposes, and because an employee could not claim a legitimate expectation of privacy from searches to discover misconduct relevant to the employee's performance of duties, the city had a right to demand such testing without a warrant. In the case of Shoemaker v. Handel, supra, the court held that the New Jersey Racing commission's regulations authorizing breathalyzer and urine tests of race horse jockeys for alcohol and drug use do not violate the jockeys' Fourth Amendment rights. The Court found that the State had made a sufficient and convincing showing of the need to conduct randomized testing in the absence of any individualized suspicion based on the necessity to promote safety and integrity and to rehabilitate those jockeys found to abuse alcohol and drugs. The Shoemaker Court reasoned that potential for harm in the facts of that case justified abrogation of an individualized suspicion standard for testing because (1) horseracing is subject to pervasive and continuous regulation by the state, (2) jockeys have significantly diminished expectations of privacy while engaged in licensed activities on regulated premises, such as race tracks, and (3) the state has a vital interest in ensuring that horse races are safely and honestly run and that the public perceives them as so. In contrast to the close nexus existing between substance abuse and its effect on horse racing, the Shoemaker Court mentioned that the potential for harm in the facts of McDonell (the State's seeking to obviate drug smuggling to prisoners by identifying drug abuse among prison guards) was too far attenuated to make random seizes of bodily fluids constitutionally reasonable.

It appears that one of the purposes for having VA domiciliary staff obtain blood, breath or urine specimens from patients prior to and after admittance to the domiciliary is to discover and prevent patient drug and alcohol use and prevent smuggling to fellow domiciliary patients. The relationship between discovering who might be using drugs or alcohol (which may be revealed by substance abuse testing), however, and preventing smuggling of drugs or alcohol into the domiciliary, for example, seems far too remote to make random searches constitutionally reasonable. On the other hand, evidence that a specific person or persons has been using drugs or alcohol would generally permit a

demand for a blood, breath, or urine specimen. There remains a question regarding the quantum of evidence needed to justify a warrantless search. Specifically, the courts have considered whether it is necessary to administer proposed testing on the basis of individualized suspicion or whether in the absence of such individualized suspicion, other means can be relied upon to assure that the individual's expectation of privacy is not subject to the unbridled discretion of the official in the field. Delaware v. Prouse, 440 U.S. 648, 654-55 (1979); Shoemaker, supra. Finally, in assessing the reasonableness of a proposed search, one must consider the manner in which the testing is performed and whether some less intrusive means exists to satisfy the institution's objective. New Jersey v. T.L.O., supra; Schmerber v. California, supra; Hunter v. Auger, 672 F.2d 668, 674 (8th Cir.1982).

We have not found any judicial decisions specifically on point which provide guidance in assessing the legitimate expectation of privacy a domiciliary (or any) patient may have with regard to any administrative search or seizure or the reasonableness of searches in that context. There are cases, however, which provide some direction. By way of contrast to the domiciliary setting, we note the extreme example of the prison setting where, the Supreme Court has held that the need to maintain order is such that prisoners retain no legitimate expectations of privacy in their cells. Perhaps a closer analogy to the domiciliary is the public school setting. As the Supreme Court has noted " t he prisoner and school child stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." Ingraham v. Wright, 430 U.S. 651 669 (1977).

In New Jersey v. T.L.O., supra, the supreme Court considered a case involving the search of a high school student's purse for cigarettes. School officials had conducted the search after discovering cigarette smoke in the girls' lavatory where the student had been observed a short time prior to the discovery. The search yielded contraband which ultimately was used as evidence in a delinquency prosecution for marijuana posession and distribution. In finding the search lawful, the Court held that "there is no reason to conclude that they the students have necessarily waived all rights to privacy in such personal items as photographs, letters, diaries and other articles of property needed in connection with extracurricular or recreational activities merely by bringing them onto school grounds." However "against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." Id., ---. In this context, the Court held that:

Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to

the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

Id., ---. In these circumstances, the court established a reasonableness standard which amounts essentially to a standard of individualized suspicion.

In the case of Anable v. Ford, supra, a student accused of smoking marijuana in the girls' lavatory had been "required" under the school's regulations to submit to urinalysis. Although the student was not required to submit to the test, refusal to submit constituted a violation of the regulation justifying expulsion from school. With the consent from her parent, the female student was escorted into the girls' lavatory by a female adult school official and required to disrobe from the waist down while the school official watched the student urinate in the "open" into a tube. Id. 41-42. The Court, relying on the analysis in T.L.O., concluded that this procedure was an "excessive intrusion upon the student's legitimate expectations of privacy under the circumstances present," and that its intrusive nature was not justified by its need and was therefore unreasonable. Id., 42.

A third case, Piazzola v. Watkins, 442 F2d 284 (5th Cir.1971) held that a university dormitory room is analogous to an apartment or hotel room such that the occupant is entitled to have a reasonable expectation of freedom from governmental intrusion and thereby enjoys the protection of the Fourth Amendment. In this case, local police officers accompanied by university officials searched six or seven dormitory rooms in response to information from two student informers who advised the police and university authorities which rooms should be searched. The rooms were searched without warrants and without the consent of the residents. The Court found such a search unreasonable and a violation of Fourth Amendment protections. The fact that the domiciliary is primarily a health care facility providing ongoing medical treatment to its patients tends to cast its function in a different light and to suggest generally a somewhat reduced expectation of privacy.

D. PRIVACY CONSIDERATIONS

VA patients' rights regulations, however, do strongly convey to patients that they are to be afforded maximum privacy consistent with patient status. We note, in that connection, that the regulation at 38 C.F.R. § 1734a requires that " p atients have a right to be treated with dignity in a humane environment that affords them both reasonable protection from harm and appropriate privacy with regard to their personal needs." Id, § 17.34a(a). The regulations provide that the enumerated rights may be restricted, but only on an individualized basis pursuant to a professional determination in accordance with a specified procedure. Patients are to receive personal notice of these rights. Id., § 17.34a(h). these regulations thus tend to show that domiciliary patients would have a legitimate expectation of privacy as regards submitting to procedures directed to purposes other than the affected patients' care and treatment.

E. ANALYSIS: STANDARDS FOR CONDUCTING A SUBSTANCE-ABUSE SEARCH IN A VA DOMICILIARY

Although drug and alcohol free patients may reside at the domiciliary, we understood that 45-50% of all domiciliary patients have either a primary or secondary diagnosis of alcoholism, but only a very small percentage are believed to be drug abusers. On the other hand, 65% of all domiciliary residents are psychotics who are maintained on thorazine or other stabilizing drugs. We have been advised that thorazine and other similar drugs in combination with alcohol can lead to death and that domiciliary patients so medicated have a propensity to ingest alcohol in order to reduce their psychotic "pain" by becoming oblivious to their surroundings. It appears therefore, that the purpose for having VA domiciliary staff obtain blood, breath or urine specimens from patients prior to and after admittance to the domiciliary is not only to discover patient drug and alcohol use and prevent drug and alcohol smuggling to fellow domiciliary patients, but also to avoid dire health consequences to those patients who may continue to abuse alcoholand drugs. In these circumstances, one could reasonably conclude that VA's need to protect its domiciliary patients by the detection of drug and alcohol abuse or to prevent drug and alcohol smuggling to fellow domiciliary patients is such that, in light of the patients' somewhat reduced expectation of privacy, "probable cause" to believe a violation of law has occurred is too demanding a standard on which to base a search. "Where a careful balancing ... suggests that the public interest is best served by a ... standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." T.L.O., supra, 743.

Under the circumstances presented by the domiciliary situation and the caselaw discussed above, we believe a demand that a patient provide a blood, breath or urine specimen may be based on a "reasonable suspicion" standard. Such a reasonable suspicion must be based on specific objective facts and reasonable interferences draw from those facts. However, that standard does not permit across-the-board group or random testing; the standard requires that demands for blood, breath or urine specimens to be made only on a case-by- case basis. While random substance-abuse testing has been upheld in one case, that court's analysis clearly turned on factors not present in this context. Thus, in Shoemaker, supra, the court had before it a case involving a unique, highly regulated industry. The courts have long distinguished administrative searches of Government regulated industries from the stricter standards required in other settings. See Colonnade Corp. v. United States, 397 U.S. 72 (1970) and United States v. Biswell, 406 U.S. 311 (1972), discussed in Almeida- Sanchez v. United States, 413 U.S. 266, 271 (1973). Shoemaker also involves searches of jockeys, whom the court identifies as having a low expectation of privacy as licensed participants in a trade subject to strict oversight. Compare the expectations of individuals who are assured by posted regulations that they are entitled to privacy regarding their personal needs. Reliance on a standard that requires

"some guantum of individualized suspicion" obviates the need to require other safeguards to assure that the individual's reasonable expectation of privacy is "not subject to the discretion of the official in the field." Prouse, supra, 654-5. As an incidental matter, and in view of the medical setting of the proposed procedures, we would expect that the most modern and up-to-date techniques would be utilized in detecting the suspected substances in order that the possibility of false positive results be minimized.

F. AGENCY-WIDE REGULATIONS AND PROCEDURES

We have previously suggested that the development of agency-wide policy regulations by the department of Medicine and Surgery would be an important safeguard prior to instituting (more intrusive) body searches. Unpub.Op.G.C., supra., para. 1 and 10. In this context, we believe such regulations would be useful in implementing the nonmedical taking of blood, breath or urine specimens for drug and alcohol analysis based on "reasonable suspicion" where "specific objective facts and reasonable inferences drawn from those facts in light of experience" indicate that a patient has been using alcohol or illicit drugs. Undertaking such testing presupposes, however, that no less intrusive means are available to achieve the purposes sought. It would seem advisable, in this connection, to develop an administrative plan to address the circumstances and procedures for taking specimens when there is a reasonable suspicion that a patient has been using alcohol or drugs, in order that a definite degree of uniformity is applied to such circumstances. The fact that agency-wide policy on this subject has not been promulgated does not preclude the medical center from establishing administrative plans, as discussed above, consistent with law.

If such plans are to be implemented, we believe it advisable that patients be reasonably and appropriately notified on admission to the domiciliary that they may be required to submit specimens on a reasonable suspicion that they may be under the influence of alcohol or drugs. Patients must also be notified that failure or withdrawal of consent to the submission of a specimen in the above circumstances or test findings showing drug or alcohol ingestion provide a sufficient basis for discharge from the facility under 38 C.F.R. § 17.66. Obviously, in the event of the failure or withdrawal of consent, the forceable extraction of a specimen from an unwilling patient would be antithetical to VA policy and to the VA mission.

HELD:

It is our opinion that testing undertaken as part of the patient's treatment or rehabilitation, to include periodic analyses of blood and or urine specimens as part of a required physical examination, does not violate protections afforded by the Fourth Amendment. Medical testing associated with monitoring a patient's medical progress is clearly integral to provision of medical care; thus conducting periodic testing as part of examinations furnished domiciliary members would

appear to be perfectly reasonable. Secondly, collection and testing on a case-by-case basis where facts give rise to a reasonable suspicion that an individual is under the influence of, or abusing, alcohol or drugs would not violate Fourth Amendment protections. Presentation of a domiciliary patient demonstrating characteristically erratic behavior may well require that that individual be tested to preserve institutional security by detecting and preventing alcohol and drug abuse as well to determine whether an individual patient requires treatment. Such a response may be necessary to protect the health and safety of all those participating in the program. We recommend the formulation of an administrative plan or guidelines to govern the initiation of case-by-case substance abuse testing and to assure its reasonableness, as that term is discussed above. We also recommend that the domiciliary give appropriate notice to the patient that he may be required to submit to testing and possible sanctions associated with noncompliance or positive test findings. Finally, we do not envision a basis under which random, generalized substance abuse testing of domiciliary patients would be permissible.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 46-91