

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA EDUCATION ASSOCIATION;
and DALE LEE, its President; on behalf of its members
and representatives of similarly situated individuals,

Petitioners,

v. Civil Action No. _____

KANAWHA COUNTY BOARD OF EDUCATION;
KANAWHA COUNTY SCHOOLS; and RONALD
DUERRING, Superintendent,

Respondents.

**VERIFIED PETITION FOR WRIT OF MANDAMUS,
DECLARATORY JUDGMENT, AND INJUNCTIVE RELIEF**

INTRODUCTION

Starting January 1, 2009, Respondents will seek to compel and analyze the bodily fluids of most of their employees, including teachers, administrative assistants, cooks, locksmiths, and clerks—all without any individualized suspicion that these dedicated public servants have engaged in wrongdoing. Despite the fact that school employees have among the lowest rates of drug use in the country, Respondents' dragnet drug-testing policy presumes these employees' guilt until they prove their innocence by producing their urine for the government's inspection. Suspicionless drug testing will inform the government about its teachers' most sensitive medical information, such as whether they have certain diseases, whether they take prescription medication, and whether they are pregnant. This action for a writ of mandamus, declaratory judgment, and injunctive relief challenges this search policy as an unlawful infringement of the employees' privacy.

I. JURISDICTION

1. Jurisdiction and venue are proper in the Circuit Court of Kanawha County pursuant to West Virginia Code §§ 29A-4-2, 53-1-2, and 53-5-3.

II. PETITIONERS AND RESPONDENTS

2. Petitioner West Virginia Education Association (“WVEA”) is the State’s largest education employee organization. WVEA represents employees of the state’s public schools, including, among other school employees, classroom teachers, administrative assistants, service workers, cooks, locksmiths, and clerks. The purpose of WVEA is to advance the educational interests of the state, improve the welfare of education employees, promote the health and welfare of children, elevate the standards of instruction in the schools, and facilitate professional fellowship among the organization’s members. WVEA has countless members who do not use illegal drugs and have never seen any Kanawha County teacher using drugs. While these members have no drug use to hide, they want their privacy respected.

3. Petitioner Dale Lee is the President of the WVEA and is authorized to act in the best interests of its membership.

4. Respondents Kanawha County Board of Education and Kanawha County Schools, governmental or state actors, exist by virtue of West Virginia Code § 18-5-1 *et seq.*, and are required to perform their duties in compliance therewith, subject to the West Virginia Constitution.

5. Respondent Ronald Duerring is the Superintendent of Kanawha County Schools. He is required to perform his duties consistent with West Virginia Code § 18-4-1 *et seq.*, subject to the West Virginia Constitution.

III. FACTS

6. Petitioners hereby incorporate by reference each and every prior paragraph of this Complaint as if fully set forth herein.

7. Since its inception, approximately 160 years ago, Kanawha County public schools have never imposed suspicionless drug testing on its teachers and the vast majority of its other employees.

8. Kanawha County education employees are currently subject to suspicion-based drug testing—i.e., where the school “suspects that an employee’s work performance or on-the-job behavior may have been affected in any way by illegal drugs or alcohol.” Exh. A, § 81.11. Throughout its history, Kanawha County public schools have not experienced problems associated with their employees being intoxicated during the workday that were not addressable through *suspicion-based* drug testing.

9. The vast majority of Kanawha County education employees are not currently subject to suspicionless drug testing—i.e., where the school requires the production and analysis of an employee’s bodily fluids without suspicion that the employee is illegally using drugs. The only such employees who are currently subjected to suspicionless drug testing are those who are classified by the Kanawha County Board of Education as “safety-sensitive” employees. In its considered judgment, the Board of Education presently classifies as “safety sensitive” only those employees who operate dangerous machinery, who operate a county-owned vehicle, who routinely drive their own vehicles on school business, and who administer medication to students. Exh. A, § 81.05.6.

10. The Kanawha County Board of Education's current drug-testing policy does not provide for suspicionless drug testing of teachers, administrative assistants, cooks, locksmiths, clerks, and most of its other employees. These job classifications are not deemed "safety sensitive" under the current drug-testing policy.

11. Beginning January 1, 2009, Defendants will implement a new suspicionless drug-testing policy. The new policy significantly and unreasonably expands the definition of "safety-sensitive" employees to include Kanawha County Board of Education's teachers, administrative assistants, cooks, locksmiths, clerks, along with most of its other employees. *See* Exh. B, § 81.15. Because these job classifications are now considered "safety sensitive" under the policy, all of these employees are subject to random and suspicionless searches of their bodily fluids.

12. Defendants' Policy defines "Safety Sensitive Positions" so broadly that it includes employees, such as teachers, whose tools are not dangerous equipment, but instead are books and chalk. The Policy's new definition of safety sensitive is vastly overbroad: employees who are not in safety-sensitive positions will nonetheless be subjected to bodily searches without cause or suspicion of wrongdoing.

13. The Policy fails to ensure that employees' medical privacy will be protected. The policy indicates only that results will be shared on a "need to know" basis. This vague, undefined provision does not guarantee that the employees' results—and additional personal medical information such as pregnancy, illness, and medication—will be protected from embarrassing or even illegal use.

14. Random and suspicionless drug tests imposed under the Policy will reveal to school officials their teachers' most sensitive, otherwise secret information: their

medical histories. Drug tests may disclose that a teacher has HIV, for example, is pregnant, or takes prescription medication (even with a valid prescription).

15. The Policy requires that employees agree they may be observed as they provide a urine sample for drug testing. When this Policy goes into effect, teachers and other school employees will be required to leave their students during school hours—without reason or warning—so that they may be observed urinating.

IV. CAUSES OF ACTION

(All Petitioners Against All Respondents, for Violations of the
State Right to Privacy and Public Policy)

16. Petitioners hereby incorporate by reference each and every prior paragraph of this Complaint as if fully set forth herein.

17. The Supreme Court of Appeals of West Virginia has held that even a private employer violates the public policy of the State of West Virginia when it requires its employees to submit to suspicionless drug testing. *Twigg v. Hercules Corp.*, 185 W. Va. 155 (1990).

18. Respondents' actions violate the State Constitution and the State's public policy, as provided by the Supreme Court of Appeals of West Virginia in *Twigg*, by compelling searches of employees' bodily fluids without any suspicion of wrongdoing. The proposed random drug tests are searches that lack any nexus to suspicion or cause. Moreover, these searches unnecessarily and unjustifiably infringe on Petitioners' members' bodily integrity and on their right to privacy. Respondents' actions effectively require public servants to surrender their constitutional rights as a condition of serving their community.

19. There is a great likelihood that Petitioners will succeed on the merits of their claim.

20. Petitioners will suffer irreparable harm by being subjected to suspicionless and unreasonable drug testing. Once Respondents compel their employees' bodily fluids and learn of their employees' sensitive medical information, this cannot be "undone" or "unlearned."

21. Respondents will suffer no injury as the result of the issuance of injunctive relief, whereas Petitioners will suffer or be exposed to serious, unlawful invasions of their privacy if no injunction issues.

22. The public interest will be served by the issuance of injunctive relief protecting the right of privacy and effectuating the public policy of the State.

23. A declaratory judgment and/or writ of mandamus should issue because Respondents' drug-testing policy is unlawful insofar as it permits random and suspicionless searches of the bodily fluids of public-school employees who do not hold safety-sensitive positions.

V. PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for the following relief:

a. A declaratory judgment declaring that Section 81.15 of the Kanawha County Board of Education Policy ("Random Selection Testing"), which provides for suspicionless drug testing of school employees, is unconstitutional insofar as it subjects employees to unreasonable searches of their bodily fluids.

- b. A preliminary and permanent injunction prohibiting Respondents from enforcing Section 81.15 of the Kanawha County Board of Education Policy (“Random Selection Testing”).
- c. A writ of mandamus ordering Respondents to comply with their constitutional and other legal duties to respect employees’ privacy and thus to suspend implementation of Section 81.15 of the Kanawha County Board of Education Policy (“Random Selection Testing”).
- d. An award of Petitioners’ costs and attorneys’ fees incurred in this matter.
- e. Any and all such other relief as the Court deems appropriate.

West Virginia Education Association,
And Dale Lee,
By counsel

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