



PORT OF GUAM

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Governor of Guam
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February 5, 2021

The Honorable Telena Cruz Nelson
Chairperson, Committee on Education & Infrastructural Advancement,
Border Protection & Maritime Transportation, Guåhan Preservation
& Self-Determination, & Federal & Foreign Relations
I Mina'trentai Sais na Liheslaturan Guåhan
36th Guam Legislature
173 Aspinall Avenue, Suite 202A
Ada Plaza Center
Hagåtña, Guam 96910

SENATOR TELENA CRUZ NELSON

Date / Time: 2/5/21 / 4:25pm

Initials: [Signature]

Dear Madam Chairperson Nelson:

Buenas yan Hafa Adai! I am writing in response to your legislative inquiry into the Port's Drug-Free Workplace Program Policy ("DFWPP") with respect to random drug testing. At the February 2, 2021, informational hearing, you and several of your senatorial colleagues posed the question: Why did random drug testing at the Port not happen sooner? Specifically, one of your fellow lawmakers opined that more random drug testing should occur at the Port, and done so regularly, considering the Port's critical nature for Guam and the community. Further, you yourself also suggested that the Port should implement more frequent random drug testing, instead of waiting for accidents to happen. It is your opinion that the Port's DFWPP and Personnel Rules and Regulations give the Port the authority to conduct random drug testing on all of its employees without reasonable suspicion. Respectfully, I disagree.

As I have mentioned previously, the Port, pursuant to its DFWPP and Personnel Rules and Regulations, may conduct random drug testing of its employees when a degree of reasonable suspicion arises. Although suspicionless drug testing is allowed for certain positions, particularly those employees with "test designated positions," random drug testing of *all* employees based on a general need, or a broad-stroke approach to deter drug use, is unconstitutional.

The Fourth Amendment to the United States Constitution prohibits the government from conducting unreasonable searches and seizures. The United States Supreme Court has held that drug testing generally intrudes upon reasonable expectations of privacy and thus, such intrusions are deemed searches under the Fourth Amendment. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1982) (Collection and testing of urine pursuant to government directive constitutes a search). Courts are in agreement that a public employee does not have a diminished expectation of privacy and thus, drug testing of a public employee must be based on a reasonable suspicion of wrongdoing to withstand constitutional muster. *Chandler v. Miller*, 520 U.S. 305, 313 (1997). Applying the above principles and other relevant case law involving suspicionless testing of public employees, the former Attorney General of Guam, in her 2017 Opinion, warned against mass random drug testing, stating that "[r]andom drug testing of all government employees based

solely on a general need to deter drug use by government employees . . .” is insufficient and would violate Fourth Amendment protections against warrantless searches. Thus, in order to pass constitutional muster, the government must demonstrate a “special need” to conduct suspicionless drug testing. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

While broadly instituting random, suspicionless drug testing of government employees would be unconstitutional, I recognize that random, suspicionless drug testing may be reasonable in some instances, particularly among public employees with “test designated positions” or safety sensitive positions. At the Port, there are indeed some of those positions, **but not all**, that fall within such category – i.e., port police officers, mechanics, crane and equipment operations, cargo checker, electricians, harbor master, safety inspector, armed security guards, stevedores, welders, etc. However, the government’s mere interest in public safety still does not justify a plan for suspicionless, random drug testing of **all** its employees. *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied* 493 U.S. 1056 (1990). In fact, according to the well-established case law, even those employees holding “test designated positions” or safety sensitive positions are still afforded reasonable expectations of privacy. *Id.* (The government may search its employees only when a clear, direct nexus exists between the nature of the employee’s duty and the nature of the feared violation). In weighing the needs of employers, safety issues, and employees’ privacy interests, courts have favored giving precedence to safety interest for jobs that involve genuine dangers to the public, while still upholding privacy rights in instances where jobs do not significantly impact public safety. *Loder v. City of Glendale*, 14 Cal.4th 846, 922 P.2d 1200 (1997). Accordingly, courts have only upheld suspicionless drug testing in limited circumstances: employees who carry firearms (*Von Raab*, 489 U.S. 656 (1989)); motor vehicle operators carrying passengers (*NTEU v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990); *AFGE v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 923 (1990)); aviation flight crew members and air traffic controllers (*Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990)); and railroad operating crews (*Skinner*, 489 U.S. 602 (1989)). Thus, subjecting those public employees whose job performance do not necessarily jeopardize public safety to suspicionless, random drug testing would likely be problematic as it infringes on employees’ privacy rights.

Nevertheless, the guidance from the attorney general is clear that “a broad brushed attempt to institute random, suspicionless drug testing of all government of Guam employees without regard to the nature of the employee’s duties and the specific violation intended to be addressed will offend constitutional protections against warrantless searches.” As government employers, we are limited by constitutional considerations. With all due respect Madam Chair, contrary to what you have previously advised, although the Port’s DFWPP refers to random drug testing, the law is clear that random drug testing of **all** employees based on a general need, or a broad-stroke approach to deter drug use, is unconstitutional. I think we can both agree that we cannot, and must not, run afoul of the Constitution, and must implement our policies and procedures within the parameters established by the courts and in accordance with the law.

Madam Chair, I assure you that the Port has been diligent in its efforts to enforce and maintain a drug free workplace consistent with the law and in conformance with both our DFWPP and Personnel Rules and Regulations. As I have explained, pursuant to our DFWPP and Personnel Rules and Regulations, Port employees are automatically tested after workplace accidents.

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However, when the test results come back negative, there is no evidence invoking reasonable suspicion to justify random drug testing of all Port employees as a chilling effect. Nonetheless, the Port is committed to maintaining a safe and healthy work environment free from the influence of drugs and alcohol, and will continue to do random drug testing when a degree of reasonable suspicion arises. The Port will take severe disciplinary action against any employee who violates the DFWPP.

Should you have any questions, please do not hesitate to contact me. *Si Yu'os Ma'åse!*

Respectfully,



Rory J. Respicio
General Manager

CC: Governor and Lt. Governor
Speaker and All Senators, 36th Guam Legislature
PAG Board Chair and Board of Directors