F I S C A L I M P A C T R E P O R T

SPONSOR Komadina **ORIGINAL DATE** 2/1/07 **LAST UPDATED** **HB**

SHORT TITLE Elected Official Drug Testing Act **SB** 36

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	**FY08**		
	50.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Pharmacy Board
Attorney General's Office (AGO)
Public Education Department (PED)

Responses Received From
Secretary of State (SOS)

SUMMARY

Synopsis of Bill

Senate Bill 36, Elected Official Drug Testing Act, appropriates $50 thousand from the GENERAL FUND to the Secretary of State for the purpose of randomly select "elected officials of the state" for "voluntary" drug testing at laboratories designated to perform the testing. The secretary of state shall receive and publish the results of these tests as well as any written explanation offered by the elected official regarding the test results or the official's written explanation of his or her declination to participate in drug testing.

FISCAL IMPLICATIONS

The appropriation of $50 thousand contained in this bill is a RECURRING expense to the GENERAL FUND. Any unexpended or unencumbered balance remaining at the end of FISCAL YEAR 2008 shall revert to the GENERAL FUND.

SIGNIFICANT ISSUES

According to AOC, SB 36 does not explicitly include elected judicial officers although it does include the elected members of the New Mexico congressional delegation, state government, counties and municipalities. The "voluntary" nature of the testing appears to address separation of powers concerns that might arise from compulsory testing of elected officials. Lack of clarity arises from the language stating that an official who fails to report for drug testing "shall be requested to submit a written explanation to the secretary of state within twenty-four hours of notification." It is unclear whether the written explanation is intended to be mandatory or discretionary. This type of suspicionless drug testing has been the subject of significant litigation in recent years. *See Chandler v. Miller*, 520 U.S. 305, 307 (1997) (striking down a Georgia statute requiring candidates for elective office to pass a drug test, holding such testing did not "fit within the closely guarded category of constitutionally permissible suspicionless searches"), *cited in Jaramillo v. City of Albuquerque,*125 N.M. 194, 196 (Ct.App. 1998) (holding suspicionless drug testing for city heavy vehicle mechanic constituted an unreasonable search).

The Attorney General's Office also references Chandler v. Miller, 520 U.S. 305 (1997), where the United States Supreme Court struck down a Georgia law that required each candidate for elective state office to be tested for illegal drugs and, in order to be certified as a candidate, the test result had to be negative. Nominees of a political party sued seeking declaratory and injunctive relief barring enforcement of the statute. The Court granted the requested relief. The record in that case was devoid of evidence of drug abuse by elected officials in Georgia. It was uncontested in that case that Georgia's drug-testing requirement, imposed by law and enforced by state officials, affected a "search" within the meaning of the Fourth and Fourteenth Amendments. The Court opined that Georgia had failed to show, in justification of its statute, a "special need" sufficient to override the individual's acknowledged privacy interest and to suppress the Fourth Amendment's normal requirement of "individualized suspicion" necessary to conduct a search. The Court rejected the State's argument that the statute served to deter unlawful drug users from becoming candidates and thus stopping them from attaining high state office, because "[n]otably lacking in the respondent's [State's] presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." The Court further explained:

> What is left, after a close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse. The suspicionless tests, according to respondents, signify that candidates, if elected, will be fit to serve their constituents free from the influence of illegal drugs. But Georgia asserts no evidence of a drug problem among the State's elected officials…. The need revealed, in short, is symbolic, not "special," as that term draws meaning from our case law.
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> However well meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action.

As applied to SB 36, the Chandler opinion would indicate that, in the absence of a demonstrated problem of drug use among elected officials, a state law that required all elected officials, state, federal, etc., to report within 48 hours for drug testing or write a letter, within 48 hours, stating

"why not," and then posting those test results and excuse letters on a state web site, would likewise diminish personal privacy for a symbol's sake. This, states Chandler, the Fourth Amendment prohibits.

It is not at all clear that Chandler, in its application of the Fourth Amendment, would allow "consent" to serve as an exception to the state-imposed diminution of personal privacy for a symbol's sake. But even if it does, under traditional Fourth Amendment "consent" analyses, the ability of the State to prove genuine "voluntary consent" may be difficult, for the reason that under the bill the government orders an individual to report for testing or state why not. If that individual reports for testing as instructed, the individual may claim that he or she merely acquiesced to the government's claim of authority to require him or her to report. Consent is not voluntary if it is a mere acquiescence to a claim of lawful authority. State v. Shaulis-Powell, 1999-NMCA-090, ¶ 10, 127 N.M. 667, 986 P.2d 463, cert. denied, 127 N.M. 391, 981 P.2d 1209. See also United States v. Biswell, 442 F.2d 1189 (10th Cir. 1971) (statute authorizing entry into premises of any firearms dealer for purposes of inspecting records was unconstitutional; consent to entry and inspection not valid under Fourth Amendment, as being merely acquiescence to a claim of lawful authority, in this case, an invalid law, where shop owner stated, in response to the assertion of authority under the law, "Okay, if that's the law").

In order to be "voluntary," consent must be "unequivocal" and "specific" and may not be the result of "duress" or "coercion." State v. Shaulis-Powell, ¶ 8; State v. Duffy, 1998-NMSC-014, ¶ 72, 126 N.M. 132, 967 P.2d 807 (constitution requires that consent not be coerced, by explicit or implicit means, by implied threat or covert force) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973)). The government's evidence of "voluntariness" is evaluated in light of the "presumption disfavoring the waiver of constitutional rights." State v. Shaulis-Powell, ¶ 8. The central question is whether "a reasonable person would believe he was free to leave or disregard the officer's request." U.S. v. Ledesma, 447 F.3d 1307, 1314 (10th Cir. 2006) (quoting United States v. Manjarrez, 348 F.3d 881, 885-86 (10th Cir. 2003)). The voluntariness of consent is a factual question, to be determined based on the "totality of circumstances." State v. Anderson, 107 N.M. 165, 167, 754 P.2d 542, 544 (Ct. App. 1998) (citing Schneckloth v. Bustamonte, 412 U.S. at. 248-49).

SB 36 incorporates no method by which the Secretary of State can obtain "specific" and "unequivocal" consent from each participant in the program. SB 36 incorporates no method by which the Secretary of State can, on an individual basis, evaluate the "totality of circumstances" surrounding the voluntary consent by each individual to participation in the program. To "presume" consent from each participant based on his or her participation, without evaluating the individual circumstances, is to ignore the "presumption disfavoring the waiver of constitutional rights." State v. Shaulis-Powell

ADMINISTRATIVE IMPLICATIONS

AOC suspects that legal challenges to drug testing of elected officials can be expected. It is also likely that the courts will be required to rule upon challenges to drug testing results. There may be an administrative impact on the courts as the result of an increase in caseload and/or in the amount of time necessary to dispose of cases.

TECHNICAL ISSUES

The AOC points out that the brief time limits involved in SB 36 (forty-eight hours from when "notified" to report for drug testing or decline, seven days from mailing to prepare an explanation of results), suggest that a requirement for certified or return-receipt mail might be appropriate to provide documentation that will establish when the applicable time limits begin and end.

OTHER SUBSTANTIVE ISSUES

The Pharmacy Board notes that drug testing does not appear to be completely voluntary; substances to be tested are not indicated in the bill. Does it include alcohol and all prescription drugs?

EO/mt