

Public Safety: Best Practices in Hiring



A Resource Guide for Connecticut Municipal Public Safety Agencies

Presented in partnership by:



Public Safety: Best Practices in Hiring - A Resource Guide for Connecticut Municipal Public Safety Agencies

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PUBLIC SAFETY: BEST PRACTICES IN HIRING

**A Resource Guide for Connecticut
Municipal Public Safety Agencies**

PRESENTED IN PARTNERSHIP BY:



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*** Legend:**



Indicates for Police only



Indicates for Fire only



Indicates more information on this topic can be found in the FordHarrison Labor and Employment Sourcebook. The FordHarrison Labor and Employment Law SourceBook is a comprehensive, yet concise, arsenal of labor and employment information to provide reference on a variety of labor and employment topics. To access the Sourcebook, please [click here](#) and use the search tool to quickly locate the topic on which you seek more information.

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Password: sourcebook1617

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INTRODUCTION

Although local governments generally operate in a heightened state of awareness about the potential for claims or charges arising from the **termination** of an employee, the possibility of lawsuits arising from the recruiting and hiring process draws less attention. But recruiting and hiring procedures can generate claims from unsuccessful applicants, specifically, in desired fields such as law enforcement and public safety. In addition, employees who initiate lawsuits concerning later phases of their employment often reach back to the hiring process in an attempt to show systemic or long-term unlawful practices. In order to limit potential claims and charges, municipalities should exercise diligence in all employment practices, including the recruiting and hiring processes. This Guide will provide general best practices for recruiting and hiring employees in public safety positions of municipal entities.

SECTION 1: INITIATING THE HIRING PROCESS

The beginning of any hiring process begins with a vacancy. When a vacancy is identified, the hiring process begins.

Most, but not all, municipalities have a classified service under which *strict* rules must be followed and from which there can be no deviation. However, these policies and procedures will vary by municipality. Moreover, some municipalities may adopt the Merit System set out by [Conn. Gen. Stat. § 7-407, et seq.](#) by act of the governing body to govern hiring in the civil service. If the municipality has adopted this Merit System, all hiring decisions must be in compliance with the statutes as well as any local civil service rules. It is advised that the municipality should make it known to applicants if civil service rules will be followed during the hiring process.

This guide provides a general overview of the hiring process for municipalities both with and without civil services rules.

A. THE ANNOUNCEMENT


- There should be an announcement.
- **Notice** – Most civil service rules require at least 21 days' notice.¹



¹ For promotional opportunities, employers should also be aware of any posting requirements in the relevant collective bargaining agreement that may require a longer posting period or an internal posting for a specified time before the posting is made public.

- **Content** – The announcement should provide the closing date for applications. If a specific application form is required, the announcement should provide information about where the application for the position can be found. The announcement should also specify what other information and/or documents are needed from the applicant in order for the application to be complete.


EXAMPLE: If the applicant is required to take an agility test on his/her own, the municipality should specify in the application that proof that the applicant has passed the agility test must be provided by a certain date for the application to be considered timely and complete.

- **Job Description** – Typically consists of six major components: 1) essential job functions; 2) knowledge and critical skills; 3) physical demands; 4) environmental factors; 5) the roles of the ADA and other federal and state laws; and 6) any explanatory information that may be necessary to clarify job duties or responsibilities.
 - Job descriptions help a municipality cover all of an employer’s legal bases. As an example, for compliance with the Americans with Disabilities Act (ADA), a municipality should make certain the description of the physical requirements of the job is accurate. Moreover, if there is a requirement that employees work on weekends or holidays, the job description should state that to avoid claims of religious discrimination.² 
 - Poorly-written job descriptions can serve as evidence of wrong-doing, wrong-telling and pretext in a wrongful termination lawsuit. Job descriptions also become problematic during litigation when they are vague, unmeasurable, untimely, and unused. Any new or amended job description may require approval by the municipality’s civil service or personnel board and/or a Memorandum of Understanding with any relevant collective bargaining unit.
- **Examination** – The announcement should specify the time, place and general scope of any required examination. In doing so, the phases of the examination process must be specified.


EXAMPLES:




- Written examination
- Oral examination
- Practical examinations
- [Physical agility tests](#)

² For employees who observe religious holidays or cannot work on certain days due to religious beliefs, an interactive process may be necessary. The interactive process is only required for *bona fide* religious beliefs. See [29 C.F.R. § 1605.1, et seq.](#)

- Post [conditional offer](#) of employment tests (outlined more below), may include but are not limited to:
 - [Medical examination](#)
 - [Psychological examination](#)
 - [Background check](#)
 -  [Polygraph test](#)
 - Additionally, the announcement must specify the weight to be given to each phase of the examination. For example, if there will be written and oral portions of the examination that each account for 50% of the total score, and a post-conditional offer of employment background check on a pass/fail basis, this must be specified.
 - If movement onto the next phase of the examination process is contingent upon passing each phase, this should be stated in the announcement.
 - **Requirements** – The minimum entrance requirements, including level of education or work/technical experience, for the position should be specified. It is also good practice to include the job description whenever possible.
 - **Duties** – The position’s general duties should be provided.
 - **Fees** – If there are any application or examination fees, those should be specified. In general, if fees are required, there should be a process for waiving them in cases of financial hardship. Any processing for waiving fees should also be included in the announcement.
 - **Preference Points** – If any preference points will be offered, those should be included in the announcement.

EXAMPLES:

- Veterans Preference Points for those who served in time of war. In a municipality that has adopted the Merit System, [Conn. Gen. Stat. § 7-415](#) requires preference points as follows:
 - 5 points if not eligible for disability or pension from the United States Veterans’ Administration.
 - 10 points if eligible for disability or pension from the United States Veterans’ Administration.
 - Residency points.
 - It is recommended that no more than 10 preference points be awarded for residency.
 - The municipality cannot impose a duration on the residency requirement.
 - Points for specific certifications relevant to the public safety position (i.e.,  Firefighter I and Firefighter II certification).



- Preference points *cannot* be applied for status as a minority candidate.
- Preference points are not applied until *after* final scores are compiled. In other words, the final scores should be calculated, and then the preference points are added to the final score.
-  ***Nondiscrimination Statement*** – A best practice is to include a statement regarding the municipality’s [Equal Employment Opportunity \(“EEO”\) Statement](#) on the announcement and language which refers to all prohibited forms of discrimination.
- ***Disabled Applicants*** – It is recommended that a statement appear in the announcement directing applicants with a disability to contact human resources if any reasonable [accommodation](#)  is needed in the testing process.
- ***Dishonesty in Application*** – The application form should prominently state that misstatements or omissions on the application may result in a failure to hire or in discipline up to and including termination if later discovered by the employer.
-  ***Prohibition Against Hiring Police Officers Previously Dismissed for Malfeasance***³- The law prohibits any law enforcement agency from hiring any person as a police officer who was previously employed as a police officer who: (1) was terminated for malfeasance or other serious misconduct that calls into question his/her fitness to be a police officer; or (2) resigned/retired while under investigation for malfeasance or other serious misconduct.
 - “Malfeasance” means the commonly approved usage of “malfeasance.”
 - “Serious misconduct” must be in connection with such officer’s official duties and should be such that it could result in a miscarriage of justice or discrimination.
 - Felony conviction
 - Fabrication of evidence
 - Repeated use of excessive force
 - Accepting a bribe
 - Fraud
 - Does not apply if the officer has been exonerated of the conduct at issue.

B. THE APPLICATION

³ See [Conn. Gen. Stat. § 7-291c](#).



Employment applications are the starting point for gathering information about prospective employees.

- **Format** – It is recommended that a form be provided on which those interested can make their application. Some municipalities still require a paper application, others have online systems. In designing a job application form, employers should strive for questions that will result in securing complete, accurate, and useful information about the applicant and his or her qualifications for the position.
- The manner of [application](#) should be specified on the announcement.
- **Deadline** – No applications received (or post marked) after the close of business on the due date specified in the announcement should be accepted. It is good practice that an applicant be sent a rejection letter expressing that they did not meet the deadline requirement.
- **Criminal History** – Under Connecticut’s [“Ban the Box” Law](#) , effective January 1, 2017, a municipality **cannot** request information about an applicant’s prior arrests, criminal charges or convictions on an employment application.⁴ 

 - There are (2) exceptions to the “Ban the Box” law: (1) when the employer is required by state or federal law to inquire about prior arrests, criminal charges or convictions for the position in question; and (2) when the position requires a security, fidelity or equivalent bond (*which exceptions generally will not be applicable to public safety positions*). Where one of these exceptions is met, the application must contain “clear and conspicuous language” providing “notice.”
 - The law still **prohibits** Connecticut employers, including all public safety agencies, from requiring an applicant to disclose a prior arrest, criminal charge or conviction if the records of such arrest, charge or conviction have been erased or are subject to erasure under various Connecticut regulations.
 - This law does not prohibit inquiry into an applicant’s criminal background at any other time in the hiring process, including during a background check.

SECTION 2: RECRUITMENT AND DIVERSITY

⁴ See [Conn. Gen. Stat. § 31-51i](#).

A goal of many municipalities in hiring for public safety positions is diversity. This has taken center stage given recent events that have swarmed both the news and social media. Diversity should be of the utmost importance, especially in municipalities with a diverse population. It should be the municipality's goal is to have the workforce reflect the diversity of the population.

In evaluating a municipality's diversity needs, the municipality should consider things such as whether its workforce resembles the community in which it operates and the demographic it serves. If not, the municipality may want to consider developing a hiring strategy to increase workforce diversity.







A. HOW TO OBTAIN A DIVERSE POOL



To be successful, recruitment and retention of a diverse workforce must be implemented as a core value of public safety departments.

- Adopt fair and equitable recruitment processes, such as search committees or hiring committees that are diverse in representation.
 - Remember that where there is a claim of failure to hire, the hiring process is *always* challenged. Any deviation from established practice will look suspicious and will probably be sufficient to go to a jury regardless of whether there was actual discrimination.
- **Note** – Employers must be aware of the potential for reverse discrimination claims if it appears that the employer is giving preferential treatment to individuals in protected classes. This can occur with respect to any protected class (with the exception of age), but it most often occurs with respect to race and sex. One way of precluding such claims is to ensure that diversity is broadly defined to include factors other than race and sex, such as experience, education, residency and interests.

B. AFFIRMATIVE ACTION PLANS

- In general, Connecticut does not require its municipalities to have an Affirmative Action Plan, however, it is highly recommended. 🏰 **Exception: please see below for requirements for law enforcement agencies.**
 - A qualified professional with an expertise in Affirmative Action should be used to draft and update any plan. This is a highly specialized field.
 - If the municipality does have an Affirmative Action Plan, it is important to make sure it is up to date and reflects the proper law. It is recommended that it is updated at regular intervals, and at least once every two (2) years.

-  [Law Enforcement Agency Recruitment, Retention and Promotion of Minority Officers](#):⁵ Municipal police departments that serve a population that has “a relatively high concentration of minority residents” *must* take affirmative steps in recruiting minority officers.
 -  The goal is to have racial and ethnic diversity consistent with that of the community.
 -  “Minority” is anyone whose race is “defined as other than white” or whose “ethnicity” is “Hispanic” or “Latino.”
 -  Departments are encouraged to “attract young persons” from the community served with mentoring, sporting, explorer and educational programs and other community outreach.
 -  The law also encourages, and even seems to favor, the promotion of minority candidates.
 -  Departments must implement policies consistent with this law. It is recommended that a professional with experience in diversity and inclusion prepare this policy.

 **IMPORTANT NOTE**: While the law *seems* to suggest that race and ethnicity should be considered in hiring decisions within law enforcement agencies, it is important to remember that using race/ethnicity to make an employment-related decision, even if well-intentioned, is not generally permissible under the [Connecticut Fair Employment Practice Act](#) and  [Title VII](#). In reading the state and federal laws together, municipalities should increase recruitment and retention efforts without focusing simply on race. A municipality must use other non-race-based considerations in its effort to recruit, retain and promote minority police officers, which is consistent with other Affirmative Action mandates.

C. FLEXIBILITY IN HIRING

⁵ See [Conn. Gen. Stat. § 7-291a](#).

- Department Heads have flexibility in hiring only to the extent that is permitted by law.
- A municipality may have hiring rules that govern what is permitted. The municipality must remain within those rules. See below regarding how to compile an [eligibility list](#).

SECTION 3: TESTING AND ACCOMMODATIONS (prior to the conditional offer)



Some tests are permitted prior to a [conditional offer of employment](#), and some are only permitted after a conditional offer. There are many types of tests, including written, oral, practical, physical agility, physical fitness, cognitive, medical, psychological, and other background inquiries, that can be used to assist a municipality in screening applicants. This section will discuss the types of tests that can be conducted prior to a conditional offer of employment.

A proper and effective testing process provides objectivity in hiring decisions, which is necessary to hire quality personnel that will carry out the municipality's governmental functions. However, employment tests and other conditions of employment must not screen out, or tend to screen out, intentionally or unintentionally, individuals in a protected class under state and/or federal law, unless doing so can be shown to be job-related and consistent with business necessity. To ensure an employment test is not discriminatory, the test should measure only the skills or capabilities that are essential for the job in question.

A. TYPES OF TESTS GIVEN TO APPLICANTS

- **Written Tests** – Designed to evaluate predictors of job-related skills and behaviors.
- **Oral Tests**
- **Physical Tests**
 - The municipality may require an applicant to take a physical agility test on his/her own. However, if the municipality chooses this option, the announcement should specify the requirement and that proof of passage of the agility test must be provided by a certain date for the application to be considered timely and complete.



- **Physical agility tests** – Measures an individual's ability to perform actual or simulated job tasks, as long as the tests do not include examinations that could be considered medical, such as, for example, measuring heart rate or blood pressure.
- **Physical fitness tests** – measures an individual's performance of physical tasks, such as running or lifting.
 -  [Candidate Physical Ability Test](#) (“CPAT”)
 -  [Complete Health & Injury Prevention Test](#) (“Cooper test”)
 - The CPAT and Cooper tests are mandatory under state law.
 - It is permissible to require CPAT or Cooper certification before any other testing is done.
 - As discussed in more detail below, an applicant may require an [accommodation](#) during the CPAT or Cooper tests. The Academy may have to provide accommodations when administering such tests.

B. TESTING NEEDS TO BE NECESSARY AND REASONABLY RELATED TO THE JOB DUTIES⁶

The following are best practices for employment testing:

- Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age, disability or any other protected class.
- The test or selection procedures must be job-related and its results appropriate for the employer’s purpose. It is highly recommended that municipalities use a third-party vendor that can verify that the employment test(s) and other selection procedures are properly validated for the positions and purposes for which they are used.
- If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure.
- To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.

⁶ See [42 U.S.C. § 12112\(d\)\(2\)](#); 29 C.F.R. §§ [1611](#), [1630.10\(a\)](#), [1630.14\(a\)-\(b\)](#).

C. APPLICANT MAY BE ENTITLED TO ACCOMMODATIONS IN THE TESTING PROCESS

- If an applicant requires a reasonable accommodation to take any required test, it must be provided; however, a reasonable accommodation that would impose an undue hardship on an employer is not required. Such requests will be reviewed on a case-by-case basis.
- Where it seems obvious that an applicant has a disability that will require a reasonable accommodation for the testing process, you may ask whether he/she will need one and the nature of the accommodation requested.
 - This is an exception to the usual rule that questions regarding disability and reasonable accommodation should not be made during the application process; therefore, any discussion about the need for an accommodation should come after making a conditional job offer.
 - Such inquiries should be made with extreme caution and only where the disability is blatantly obvious to the casual observer.
- Accommodations must allow the applicant to compete on a level playing field with other applicants taking the same examination to the maximum extent reasonably possible.
- The accommodation provided does not have to be the one preferred by the applicant, it need only be a reasonable and *effective* accommodation.
- Tests must be selected and administrated in the most effective manner to ensure that, when a test is administered to an applicant who has a disability, the test results accurately reflect the skills, aptitude, or other factor of the applicant that the test purports to measure, rather than reflecting any physical or mental disability the applicant may have (except where such skills are the factors that the test purports to measure).



SECTION 4: COMPILING THE ELIGIBILITY LIST AND DECIDING WHO TO HIRE

As with everything in the hiring procedure, requirements will vary depending on whether the municipality has civil service rules and how those rules are written. In general, most municipalities have some way of evaluating their candidates through a testing procedure. Based on how they score, an eligibility list is formed. The eligibility list serves as a guide as to who can be considered for an opening.

The method of compiling the eligibility list must justify the hiring decision, and should demonstrate that the hiring decision made is based upon a non-discriminatory legitimate basis. The method of compiling the eligibility list should be memorialized as the municipality proceeds through the process.

A. THE ELIGIBILITY LIST

- Once all testing is complete, scores should be weighted and added. Preference points should be added after the final scores are tallied. Candidates should be ranked based on their total scores. The candidate with the highest score with preference points added is ranked first with the list ending with the candidate who has the lowest passing score.
- If the municipality has a civil service commission, personnel board, or board of commissioners, this list should be presented to it for approval.

B. NOTIFYING CANDIDATES ABOUT THE ELIGIBILITY LIST

- A best practice is to send each candidate a letter informing him/her of his/her score on each part of the examination, number of preference points awarded, total score and his/her rank on the eligibility list.
- It is also best practice to send a letter indicating the outcome of his/her application to any candidate that has not met the minimum score to appear on the eligibility list.

C. DECIDING WHO TO HIRE FROM THE ELIGIBILITY LIST

- In a municipality that does not have civil service rules, and in some which do, you may have the option to choose from any person who has received a passing score.
 - This type of system provides the most flexibility. However, it is best practice to hire a candidate with the highest ranking score unless there is a legitimate, non-discriminatory reason to hire another candidate on the eligibility list.

- This type of system might also be the most likely to generate claims of bias/discrimination.
- Very few municipalities have a “Rule of One.” Under the “Rule of One,” hiring from the eligibility list must be conducted in rank order, starting at number 1 and moving through the list as positions become available.
 - This type of system provides for no flexibility at all.
 - Therefore, this provides the most protection against claims of bias.
 - However, it also does not permit screening out of applicants who simply may not fit in the department or who simply are not the “best” candidate based on factors that cannot be quantified.
- Most municipalities follow a variant of the “Rule of Three” or “Rule of Six.” Under this method, the top three candidates (or six in the case of the “Rule of Six”) are eligible for hire for any one (1) open position. If there is more than one (1) vacancy, for each additional vacancy, one (1) more candidate is considered. Therefore, if there are two (2) positions available, the top three (3) ranked candidates plus the candidate ranked as number four (4) would be considered. The appointing authority may then choose from among all those who are eligible to fill the position(s) available. Who will be chosen is often determined during the [interview](#) process.
 - The “Rule of Three/Six” provides for some flexibility. It requires that only the top three (3) (or six (6)) scoring candidates be considered for the position, but also allows for flexibility in who is ultimately appointed to the open position.
 - There is some protection against claims of bias, but they are not eliminated entirely since discretion is inherent in choosing amongst those who are eligible.

D. CANDIDATES WHO REMAIN ON THE LIST

- Because of the cost and expense associated with the hiring process, most municipalities maintain an eligibility list for a year or two after it is finalized. Some also permit the eligibility list to be extended for additional time, usually about one year.
- All candidates who are not hired remain on the eligibility list during that time.
- If a new opening for a position becomes available and there is an existing eligibility list, that eligibility list is used instead of starting the entire hiring process over again.

- Candidates generally cannot be removed from the eligibility list.⁷ Some exceptions to apply as follow:
 - The candidate is hired.
 - The candidate requests to be removed from the list. Best practice would be to require the candidate to make this request in writing.
 - The candidate has been considered for openings on numerous occasions but has not been hired. This is usually only applicable where a “Rule of Three”/“Rule of Six” is used. Hiring rules should specify the number of times a candidate can be considered before being taken off of the eligibility list.
 - It is discovered that the candidate was dishonest on his/her application or in the testing process.
- **Note** – In a municipality with a civil service commission, board of commissioners, personnel board or any other committee, commission or board that oversees the hiring process, no candidate should be hired or removed from an eligibility list without affirmative action of the committee, commission or board in accordance with the governing rules. Similarly, this committee, commission or board should be the body that decides whether to extend an eligibility list and for how long an eligibility list should be extended.

SECTION 5:



The interview process is one of the most essential parts of the hiring process, especially where some discretion is left up to the appointing authority in the hiring process. Some municipalities, by its rules, direct the Chief of the department to conduct the interview. Others require the Mayor/First Selectman/Town Manager to conduct the interview but allow the responsibility to be delegated to the Chief. Regardless of who conducts the interview, there are a number of factors to be considered.

⁷ Unlike in other public sector employment decisions, generally there is no due process implication when a candidate is not hired or is removed from an eligibility list, especially where a “Rule of Three/Six” is followed. Nevertheless, civil service rules generally forbid it unless a specific process is followed. Therefore, a failure to follow that process could be seen as pretext for other unlawful employment practices. Thus, it is highly recommended that all processes be followed as spelled out in the relevant civil service rules.

A. TIMING

Timing of the interview is important. There are pros and cons associated with each stage of the hiring process. Additionally, when the interview is conducted may affect who is interviewed. In those municipalities that have civil service rules or other hiring rules, the timing of the interview is often set out in the rules.

- Before the eligibility list is finalized – This would be the earliest time in the process that the interview could be conducted. The interview is usually only conducted at this early stage when the results will be part of the applicant’s final score.
 - Pros: Every applicant gets his/her chance at an interview. If someone interviews particularly well, this increases his/her chance at success in the hiring process. It also weeds out candidates who are not a good fit for the department at an earlier stage before going through the time and expense of post-conditional offer testing.
 - Cons: Every applicant has to be interviewed. This is time consuming and costly. Applicants who have scored very low on other testing and who therefore have little chance of being hired still need to be interviewed. Additionally, the interviewer could learn information about an applicant – such as status as a disabled person, the applicant’s race/ethnicity/national origin/ancestry, protected conduct, etc. – that should not be taken into consideration in the hiring process. An unsuccessful applicant could more easily raise a claim of bias in the hiring process.
- Before the conditional offer is made but after the eligibility list has been finalized – Under this method, after all other testing is done, but before conditional offers are made, applicants are interviewed. Some municipalities still interview all applicants on the eligibility list at this stage, others, in which a “Rule of Three” or the like is followed, only interview those who are high enough on the eligibility list to be considered for the open position(s).
 - Pros: In the latter scenario, this method greatly limits the number of applicants who are interviewed. This cuts down on the time and expense of interviewing all applicants by making the interview process only available if the applicant could be hired for the position(s) open. In the former scenario, the pros are that the interview is completed for all applicants on the list, eliminating the need to interview applicants if future positions open before the expiration of the eligibility list. Either way, it limits the number of conditional offers that need to be extended and then rescinded by doing the interview before the conditional offer is sent.
 - Cons: The cons are similar to those in conducting all interviews before the eligibility list is finalized.

B. WHAT TO ASK DURING THE INTERVIEW

- Questions and inquiries should be limited to those that elicit information relevant to the applicant's qualifications and skills.
- Questions and inquires that elicit information about how the applicant will contribute to the work environment may be acceptable.
- Questions and inquiries about the applicant's ability to interact with coworkers and citizens should be asked.



C. WHAT NOT TO ASK DURING THE INTERVIEW

- Any question that would elicit an answer about an applicant's protected class or activity should be avoided.
 - No inquiry or discussion should be made about:⁸
 - Religion
 - Age
 - Sex/gender
 - Disability (see section on [accommodations](#))
 - Race/Color
 - National origin/Ancestry/Ethnicity
 - Familial/Marital Status
 - Political Association
 - Sexual Orientation/Gender Identity/Gender Expression
 - Genetic information
 - Protected Activity
 - **Note:** If an applicant raises the applicant's protected class or activity, the applicant should be instructed to raise the issue once they have received a conditional offer of employment. If the applicant raises his or her disability, this will initiate the obligation for the employer to engage in the interactive process necessary to determine if there is a reasonable accommodation that would allow the applicant to perform the essential functions of the position or complete the required testing for the position.
- Avoid any inquiries or discussions about issues that will not affect the applicant's ability to perform the job for which he/she is being interviewed.

⁸ See, e.g., [Conn. Gen. Stat. §§ 46a-60\(a\)\(1\)](#) and [§ 46a-81c, Title VII](#), the [Age Discrimination in Employment Act](#), the [Americans with Disabilities Act](#) and the [Genetic Information Nondiscrimination Act](#).

- Questions and inquiries should be straight forward. If an applicant has a question about the meaning of an inquiry, he/she should be encouraged to seek clarification.
- The setting should be formal to ensure that the applicant is ready to join the paramilitary structure under which most public safety departments operate.

SECTION 6: THE CONDITIONAL OFFER OF EMPLOYMENT

A conditional offer of employment is an offer that is binding unless the individual to whom it is extended does not meet certain conditions, such as successfully completing or passing additional testing. Certain testing, as described in this section, **cannot** be conducted prior to a conditional offer of employment; adherence is important because certain information that cannot be considered during the hiring process could be revealed during testing.

It is not recommended that a conditional offer of employment be given to every candidate that is eligible for hire.

The conditional offer of employment should be made only after the municipality is sure that the candidate is the one it wants to hire, provided that all conditions based on testing, as herein described, are met.

A. WHAT THE CONDITIONAL OFFER MUST CONTAIN (for example [click here](#))

- It should be in letter format. This protects the municipality by clarifying the conditions of the job offer for the applicant while demonstrating that the job offer is not a contract for employment.
- It must state employment is contingent on completion of required testing.
- It must state the position.

B. FAIR CREDIT REPORTING ACT (for example documents needed, please [click here](#)).

When an employer seeks to obtain background checks or other consumer reports from a third-party consumer reporting agency (“CRA”), it triggers additional obligations under the Fair Credit Reporting Act (“FCRA”). FCRA is a misnomer in that it does not apply only to credit checks, but rather it applies to a wide array of consumer reports, including information on an individual’s criminal record, job and education verification, credit standing, and reference checks, drug tests, and other reports, if performed by a CRA. An employer cannot rely on standard forms provided by vendors for compliance with FCRA and should have its own legal counsel review the vendor’s forms and process to determine compliance, as liability can fall on both the user of the consumer report (the employer) and the CRA.

- *Note* – When an employer conducts its own background investigation internally, without using a CRA, the FCRA obligations do not apply. Additionally, when an employer obtains background information, such as criminal records, from a government source that is not considered a third-party CRA, such as the FBI or the equivalent state authority, the FCRA obligations would not apply. The state or federal agency may still require that the individual consent to the employer’s obtaining such records, however. The best practice is to obtain the individual’s authorization before obtaining background information on the individual, whether internally or from a non-CRA source, even when FCRA does not apply.
- **General Procedures to Follow When Using a Consumer Reporting Agency to Obtain a Consumer Report**

- *Provide a Stand-Alone Disclosure* (for an example [click here](#))

One of the key FCRA requirements is that employers who seek to obtain a consumer report on an applicant or employee must provide the individual with a *stand-alone* disclosure that consists *solely* of the disclosure. Recent cases have found that a release of liability in a disclosure document, extraneous information in the disclosure, and including the disclosure as part of an employment application can all violate this stand-alone disclosure provision.



An employer must ensure that the disclosure is a distinct and separate stand-alone document, particularly in the context of electronic onboarding systems.

There are differences in the disclosures required for employers who obtain consumer reports, which include primarily objective information, such as basic identifying and biographical information, and those who obtain investigative consumer reports, which include subjective information based upon personal interviews. Employers should know what type of consumer report they are obtaining and ensure they are providing the appropriate corresponding disclosures. The disclosure should specify the report is being obtained for a permissible purpose, such as for employment purposes.

- *Obtain the Individual’s Authorization to Obtain a Consumer Report:* In addition to the disclosure, an employer must obtain written authorization from the consumer allowing the employer to obtain the consumer report.
- *Provide a Copy of the FCRA [Summary of Rights](#):* The employer must provide a copy of the FCRA Summary of Rights document prepared by the Consumer Financial Protection Bureau (“CFPB”).

- *Certify to the CRA that the Employer is in Compliance with FCRA:* The employer must certify to the consumer reporting agency that it is in compliance with the FCRA and will not misuse the information it receives. Generally, CRAs have form language they provide for the certification, but an employer should be aware of this requirement.
- *Provide a Pre-Adverse Action Letter and Opportunity to Correct Before Taking Adverse Action:* After receiving a consumer report with negative information about a candidate, and prior to taking an adverse action, such as not hiring an applicant, an employer must provide a pre-adverse action letter. This letter should provide notice to the individual of the potential adverse action, include a copy of the report in question, and a summary of the individual's rights under the FCRA. Importantly, prior to making the final decision, the employer must provide a reasonable amount of time for the individual to dispute information in the consumer report. The best practice is to allow at least seven (7) business days.
- *Provide an Adverse Action Notice:* If the individual does not dispute the information in the report or confirms the negative information, the employer can proceed with taking the adverse action, but must also provide the applicant with an adverse action notice regarding the decision and the individual's rights under the FCRA. If the consumer report the employer obtained contained a credit score, certain information should be included in the adverse action notice regarding the credit score.

C. TESTING THAT REQUIRES A CONDITIONAL OFFER

Note - Many tests require authorization prior to the testing procedure. These should be obtained from candidates prior to proceeding with any of these testing procedures (for an example [click here](#)).

- **Background Investigations**

- Background investigations are the most common form of consumer report obtained by an employer from a third-party consumer reporting agency, and the FCRA obligations apply when employers obtain a report from a CRA.
- Background investigations may include inquiries into an applicant's credit, criminal history, driver history, employment history, educational history, neighborhood canvassing, and references. 🚔 Police may also inquire into past [polygraph test](#) results.
- When obtaining a background investigation from a CRA, the process [described above](#) must be followed.



- With respect to *credit checks*, [Connecticut law](#)⁹ prohibits employers from requesting a credit report containing the individual's credit score, credit account balances, payment history, savings or checking account balances, or account numbers, unless (1) such employer is a financial institution, (2) such report is required by law, (3) the employer reasonably believes that the employee has engaged in specific activity that constitutes a violation of the law related to the employee's employment, or (4) such report is substantially related to the employee's current or potential job or the employer has a bona fide purpose for requesting or using information in the credit report that is substantially job-related **and is disclosed in writing to the employee or applicant.**

- The credit report must substantially relate to the job when the employment:
 - Is a managerial position which involves setting the direction or control of a business, division, unit or an agency of a business;
 - Involves access to customers', employees' or the employer's personal or financial information other than information customarily provided in a retail transaction;
 - Involves a fiduciary responsibility to the employer, including, but not limited to, the authority to issue payments, collect debts, transfer money or enter into contracts;
 - Provides an expense account or corporate debit or credit card;
 - Provides access to (i) confidential or proprietary business information, or (ii) information, including a formula, pattern, compilation, program, device, method, technique, process or trade secret that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from the disclosure or use of the information; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; or

⁹ See [Conn. Gen. Stat. § 31-51tt](#).

- Involves access to the employer’s nonfinancial assets valued at \$2005.00 or more, including, but not limited to, museum and library collections and to prescription drugs and other pharmaceuticals.
 - Therefore, not all public safety departments will be able to inquire into an applicant’s credit. 🏠 Generally, the only department that may be an exception will be police departments, and police departments should be sure to disclose such inquiry in writing to the applicant.
- 📄 **Medical & Psychological Tests**
 - The employer may condition the offer on the outcome of the exam if:
 - The test is job-related;
 - All entering employees in the same job category are subjected to the examinations;
 - The examination is performed by a medical professional;
 - The results of the examination are limited to a statement that the applicant can or cannot perform the essential functions of the job; and
 - The information obtained during the examination is kept on separate forms and in separate files which are to be treated as 📄 ***confidential medical records***.
 - It is highly recommended that a corporate health agency or an industrial psychologist be used in conducting medical tests and examinations.
 - **Note:** If the employer uses a third-party consumer reporting agency to conduct any medical or psychological tests, or obtains reports from a CRA of prior tests, the [FCRA](#) obligations described above would apply.
- 📄 **Drug Testing**
 - Drug testing is generally permitted with respect to applicants for public safety positions. The test should be conducted via urinalysis method.
 - Drug tests can be conducted without individualized suspicion when there is a “special need” that outweighs the individual’s privacy interest. The U.S. Supreme Court has concluded that public safety constitutes a “special need.”¹⁰ The special need that is derived from public safety employment occurs when the employee carries



¹⁰ [Skinner v. Ry. Labor Exec. As’sn.](#), 489 U.S. 602 (1989); [Nat’l Treasury Emps. v. Von Raab](#), 489 U.S. 656 (1989).

a firearm, is involved in drug interdiction or has access to sensitive or private information.

- **Note:** The courts are split as to whether firefighters may be subject to drug testing. It is recommended that drug testing of firefighters be conducted only when their employment involves drug interdiction or access to sensitive or private information
 - The applicant should be informed in writing that a urinalysis drug test will be required as part of the application process.
 - The applicant should be provided a copy of any positive result.
- Current illegal drug users are not protected by the ADA; however, a person in recovery is protected. Therefore, more information may be needed when an applicant tests positive for use of illegal drugs.
- **Be careful** – Drug tests could reveal information about disabilities that are protected.
- **Note:** Whether a drug test falls within [FCRA's](#) purview depends on who conducts the drug test, whether it is a laboratory, for example, or a consumer reporting agency. Drug test reports are not "consumer reports" covered by FCRA when they are provided directly to the employer by the laboratory. On the other hand, an intermediary that retains copies of tests performed by drug labs and regularly sells the information to third parties for a fee is a CRA whose reports of drug test results are "consumer reports" covered by the FCRA.
- If a drug test report is provided by a party that is indisputably a CRA because of the general nature of its business (e.g., a credit bureau or employment screening service), the report would clearly be a "consumer report," and the employer would need to follow the above FCRA procedures.
- **Polygraph Tests**¹¹
 - Generally an employer is prohibited from requesting or requiring a prospective employee to submit to or take a polygraph examination as a condition of obtaining employment.
 - Additionally, an employer may not condition continued employment or threaten to discipline an employee for failing, refusing or declining to submit to or take a polygraph examination.

¹¹ See [Conn. Gen. Stat. § 31-51g](#).

- 🏰 **However, the statute provides an exception for police departments in hiring for non-civilian positions.** A police department may conduct polygraph tests after a conditional offer of employment has been made.
- **Social Media Review** (Applicant/Employee Privacy)¹²
 - 🏰 **Note - This section does not apply to hiring in law enforcement. Law enforcement agencies conducting pre-employment screening of law enforcement personnel are excluded from its definition of “employer” for purposes of social media review.**
 - An employer **cannot** request or require an applicant to:
 - Provide user names and passwords to personal online accounts;
 - Authenticate or access a personal online account in the presence of the employer;
 - Accept an invitation from an employer to join any online group affiliated with the employer; or
 - Invite an employer to join the applicant’s online affiliated groups.
 - An employer is prohibited from failing to hire an applicant who refuses to engage in conduct prohibited by the statute, as set forth above.
 - “Personal online account” is defined as any online account used by the applicant solely for personal uses that are not related to the employer’s business. The statute specifically references electronic mail, social media and retail-based Internet web sites. However, it is not limited to only these types of accounts.
 - An employer is allowed to include a social media review in an applicant’s background check, as long as the employer does not require the applicant to provide access to his/her personal online accounts.
 - Social media inquiries should be done with extreme caution because of the information that can be revealed about the applicant’s personal life. Before conducting a social media review, employers should be aware of these other factors, some of which are outlined herein. Additionally, some of these issues are discussed more in depth below in [Section 9](#).

¹² See [Conn. Gen. Stat. § 31-40x](#).

- **Note:** If the employer uses a third-party consumer reporting agency to conduct a social media review, the [FCRA](#) obligations described above would apply.

C. RETRACTING THE CONDITIONAL OFFER

It is best practice to notify the applicant in writing when a conditional offer of employment is retracted; and the reason for rescinding the conditional offer should be stated.




- Understanding the Grounds:
 - **Medical**
 - If medical findings cause an employment offer to be withdrawn, the employer must be able to show that the rejection was job-related and a business necessity, and that no reasonable accommodation would enable the individual to perform the job's essential functions.
 - A post-offer medical examination may not disqualify an individual with a disability who is currently able to perform the essential functions of the job because of speculation that the disability may cause a risk of future injury.
 - **Prevarication**
 - Prior to employment, dishonesty could be a legitimate reason for not hiring an applicant, especially if the applicant is untruthful on an application for employment or during an interview.
 - When dishonesty is discovered during employment, however, the terms of any collective bargaining agreement and/or contract regarding just cause discipline or termination apply.

EXAMPLE: With respect to a police officer, dishonesty may be a legitimate reason for refusing to hire the applicant. However, Connecticut Courts have held that untruthfulness is not *per se* just cause for termination—there is a public policy against intentional police officer dishonesty *in connection with the officer's official duties*.¹³




- Therefore, it is to the benefit of the employer to discover dishonesty in the application process as soon as possible.

¹³ See [Town of Stratford v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 15, Local 407](#), 315 Conn. 49 (2014); but see [Cox v. Onondaga Cnty. Sheriff's Dep't](#), 760 F.3d 139 (2d Cir. 2014).

-  **Illegal Drug Use** (see below regarding [medical marijuana](#))
 - Illegal drug use may be grounds for rescinding a job offer.
 -  The [ADA](#) does not protect employees who are currently engaging in the illegal use of drugs; however, a person in recovery is protected. Therefore, more information may be needed when an applicant tests positive for use of illegal drugs.
-  **Criminal convictions** – The grounds for disqualifying an applicant for having a criminal conviction must be applied equally to all applicants.

Reminder: The “[Ban the Box](#)” Law prohibits all public safety employers from asking information about criminal convictions on the employment application.




- Factors that must be analyzed when retracting a conditional offer based on a criminal conviction
 - The nature and gravity of the offense(s) (i.e. violent vs. non-violent);
 - The time that has passed since the conviction and/or completion of the sentence; and
 - The nature of the job held or sought.
- A blanket exclusion of persons convicted of any crime would not be job-related and consistent with business necessity if it creates a disparate impact. Instead, the above factors must be applied to each circumstance. Generally, employers will be able to justify their decision when the conduct that was the basis of the conviction is related to the position, or if the conduct was particularly egregious.
-  **Direct Threat**¹⁴ – An employer may withdraw an offer of employment from an applicant with a disability only if it becomes clear that the applicant would pose a direct threat (i.e., a significant risk of substantial harm) to the health or safety of him/herself or others.
 - This is an individualized analysis to be made on a case-by-case basis.

¹⁴ See 42 U.S.C. [§§ 12111\(3\), 12113\(b\)](#).

- Be sure to consider whether any reasonable accommodation(s) would enable the individual to perform the job’s essential functions and/or would reduce any safety risk the individual might pose.
- In assessing whether the person is a “direct threat,”¹⁵ you should consider:
 - The applicant’s present ability to safely perform the essential functions on the job;
 - The duration of the risk;
 - The nature and severity of the potential harm;
 - Whether the potential harm is likely to occur;
 - The imminence of the potential harm; and
 - Whether there is a reasonable accommodation that could eliminate the risk.
- In determining whether a person poses a “direct threat,” an employer should not make generalizations or act on unfounded fears. Rather, the determination must be based on reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence, unless the risk of harm is self-evident.
 - A doctor’s note or an Independent Medical Examination at the employer’s expense may be necessary to determine if an accommodation can be made.

SECTION 7: LATERAL TRANSFERS AND HIRES

A. WHAT TESTING PROCESS SHOULD THEY UNDERGO?

-  Police Departments¹⁶
 - A *lateral hire* occurs when a municipal police department hires an officer who has previously served in another Connecticut municipal police department.
 - No additional training is usually required.


¹⁵ See [29 C.F.R. § 1630.2\(r\)](#).

¹⁶ See <http://www.ct.gov/post/site/default.asp> for further information.

- An exception to this would be if it has been more than three (3) years since the officer has served in another municipality. When this occurs, certification has usually expired. To hire such a lateral officer, he/she will have to attend the Police Academy.
 - A *comparative hire* occurs when a municipal police department hires an officer who has previously served in either: (1) the State Police; or (2) a municipal police department outside of Connecticut.
 - The officer must obtain a comparative certification from the Police Academy, which requires some additional training and testing.
 - *Reminder* - Pursuant to [Conn. Gen. Stat. § 7-291c](#), there is a prohibition against hiring a police officer that was previously dismissed by any law enforcement agency for malfeasance or other serious misconduct, or that resigned or retired while under investigation for the same. The [National Decertification Index](#) should be referenced through the Police Academy.
- In other public safety departments, lateral hires generally do not require additional training unless certification has expired or has been suspended. Some municipal departments may choose to require additional training for lateral hires. If it does, then all lateral hires should be subjected to the same training requirements.

B. HIRING PROCESS FOR LATERALS AND TRANSFERS

- In general, the same hiring process should be undertaken as has been described throughout this Guide. As a matter of best practice, when posting the announcement, it should be specified that lateral applicants are sought.
- It is permissible to hire both lateral and entry level candidates at the same time.
 - It should be decided *before* the announcement is posted how many entry level and lateral positions are open. This should be documented.
 - There should be two (2) separate announcements—one for entry level and a second for lateral applicants. Each one should specify the total number of positions available in each category.
 - There should not be any change in the number of positions available throughout the hiring process.
 - There should also be two (2) separate testing processes and eligibility lists—one for each category of applicants.
- Whenever hiring a lateral, the municipality should be sure to obtain evidence of training before making a conditional offer.

-  **Note:** Whenever a police officer obtains certification while employed by a law enforcement agency and is subsequently hired by another law enforcement agency within two years of certification, the new law enforcement agency must reimburse the first one for 50% of the total cost.¹⁷
 - Even when hiring a lateral, it is recommended that a conditional offer be extended and that the department undertake post conditional offer testing.
 - If the background involves a review of prior employment records at another public safety department, make sure to obtain all necessary authorizations from the lateral applicant to enable a review of those records.
-

SECTION 8: CONFLICT AT THE ACADEMY

To the extent that any applicable collective bargaining agreement so permits, it is recommended that time spent at the academy by an applicant be considered a period of probationary employment during which the employment is “at-will.” The employer and the staff at the training program into which the applicant enters should communicate regularly about the progress that any applicant is making. The ability to work together with others at the academy is as equally important as academic success and satisfying any skills tests because it may be indicative as to the employee’s ability to interact with co-workers and citizens.

Any issues that arise while at the academy should be addressed immediately. Candidates attending the relevant academies must comply with all applicable rules of conduct.¹⁸ If discipline is warranted, it should be reasonable with respect to the prohibited conduct. Anti-discrimination and anti-retaliation laws are applicable to employees attending the Academy.

SECTION 9: EMERGING ISSUES

A. MEDICAL MARIJUANA¹⁹

- Despite the fact that the palliative use of marijuana is permitted by [Connecticut law](#), federal law still considers any use of marijuana to be illegal.

¹⁷ See [Conn. Gen. Stat. § 7-294dd](#).

¹⁸ Please contact POST, the Fire Academy or the governing training authority for applicable rules of conduct.

¹⁹ Before disqualifying any candidate for marijuana use, legal counsel should be consulted. Connecticut law does consider palliative use to be legal. Therefore, to avoid any potential conflict with the ADA, legal advice is required.

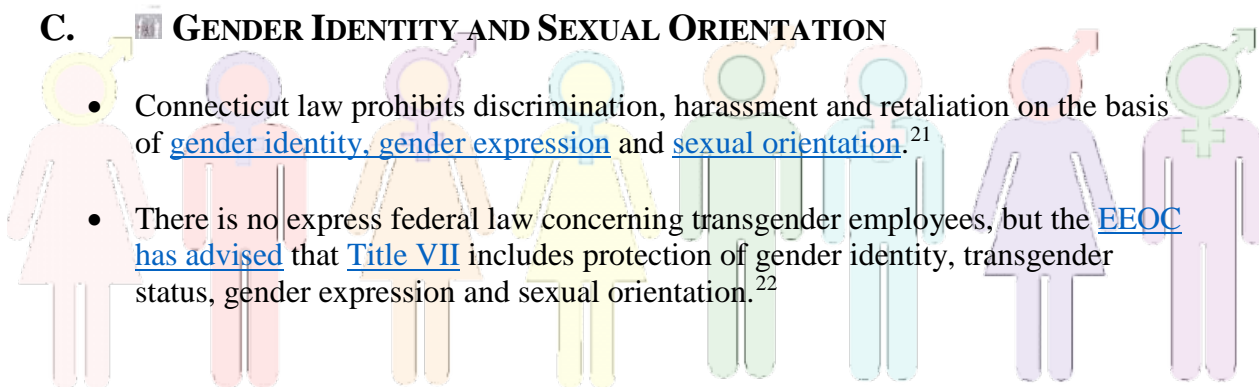
- Given the illegality of marijuana use under federal law, the position of these authors and CIRMA is that a municipality generally may withdraw a conditional offer of employment if a candidate tests positive for or admits to using marijuana.
 - 🏠 This is especially true for police officers who are tasked with enforcing the law.
- Policies allowing for a candidate to be hired despite past marijuana use should be applied equally to all applicants, regardless if it was for medicinal purposes or used in a state where marijuana is legal for recreational purposes.
- All employers may prohibit the use of intoxicating substances during work hours, including marijuana being used for medicinal purposes.²⁰

B. MENTAL STABILITY

- Inherent in all public safety positions is a duty to protect the public. State agencies and courts have found this duty to be a legitimate business reason for public safety departments to act when confronted with employees who pose a [direct threat](#) to the public.
- However, remember that individuals with mental disabilities are also protected under the ADA.
- Therefore, the duty to protect the public must also be weighed with an applicant's right to not be subjected to discrimination. It is recommended that the direct threat analysis, described above, should be applied when encountered with such a situation.

C. GENDER IDENTITY AND SEXUAL ORIENTATION

- Connecticut law prohibits discrimination, harassment and retaliation on the basis of [gender identity](#), [gender expression](#) and [sexual orientation](#).²¹
- There is no express federal law concerning transgender employees, but the [EEOC has advised](#) that [Title VII](#) includes protection of gender identity, transgender status, gender expression and sexual orientation.²²



²⁰ *But see State v. Conn. Emps. Union Ind.*, 322 Conn. 713 (2016). In reviewing this case, note that the employee was not working in public safety and marijuana was being used illegally for recreational purposes. Additionally, the Court did not hold that using marijuana during working hours was not a terminable offense, but that the arbitration award reinstating employment after a lengthy suspension did not violate clear public policy.

²¹ See [Conn. Gen. Stat. § 46a-60\(a\)\(1\)](#); [Conn. Gen. Stat. § 46a-81c](#).

²² There is also a number of cases pending before various Courts on this issue. All public safety employers should stay up to date as this law quickly changes.

- Generally, a municipality should not take into consideration an applicant’s gender identity, status as a transgender person, gender expression and/or sexual orientation in making a hiring decision. However, the applicant must otherwise be physically and mentally fit to perform the essential functions of the job without posing a [direct threat](#).

D. SOCIAL MEDIA

- **Free Speech** – When posting on social media, applicants may express positions with which the employer may not agree. This is protected by the [First Amendment of the United States Constitution](#), the [Connecticut Constitution](#) and [Conn. Gen. Stat. § 31-51q](#).
 - Speech made as a citizen on a matter of *public* concern is protected and it is illegal to take such speech into consideration when making hiring decisions.
 - Political affiliation is protected and it is generally illegal to take political affiliation or political activity into consideration when making hiring decisions.
 - Religion is protected and it is illegal to take religion into consideration when making hiring decisions.
- **Age Discrimination** – Applicants may have their birth date listed on social media sites. It is illegal to take age into consideration in making hiring decisions.
- **Sexual Orientation and Gender Identity** – Search of social media may reveal an applicant’s sexual orientation and/or gender identity. These are some of the newest protected classes. It is illegal to take an applicant’s sexual orientation and/or gender identity into consideration when making hiring decisions.
- **Familial Status** – Applicants may have pictures or statements on social media sites about his/her family, who he/she lives with, his/her marital status, etc. Familial status is a protected class and cannot be taken into consideration when making hiring decisions.
- **Race/National Origin/Ancestry/Ethnicity** – Prior to an applicant’s interview, an employer may not be aware of an applicant’s race/national origin/ancestry/ethnicity. Even at the time of the interview, race/national origin/ancestry/ethnicity may not be obvious to the observer. Social media may reveal an applicant’s race/national origin/ancestry/ethnicity that may not have otherwise been known. These are protected classes and cannot be taken into consideration when making hiring decisions.

- E. AGE:** Some testing and other hiring processes/requirements could have an unintentional disparate impact on older workers.

F. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (“USERRA”)

- USERRA is a federal statute that applies to individuals who serve or have served in the uniformed services, and protects service members’ employment and reemployment rights and benefits. It imposes an affirmative obligation on employers to provide employees with leave to serve in the military. It is one of the more protective employment statutes on the books.
- The law applies to public and private sector employers.
- **Reemployment Rights**
 - An employer **must** reemploy an employee if his or her absence from an employment position is necessitated by reason of service in the uniformed services.²³ The returning employee is to be reemployed in the same position that they would have attained had they not been absent due to military service.
 - The employee must:
 - Give advance written or verbal notice of service to the employer, except if giving such notice is precluded by military necessity, or under all relevant circumstances, the giving of such notice is unreasonable or otherwise impossible; and
 - Report or submit an application for employment to the employer.
 - **Note** – The cumulative length of absence, including all previous absences with that employer, must not exceed five (5) years; however, exceptions are provided in [38 U.S.C. § 4312i](#).
 - An employer is **not** required to reemploy a person if:
 - Reemployment is impossible or unreasonable based upon a change in the employer’s circumstances;
 - The employer would suffer an undue hardship due to the individual’s reemployment; or

²³ See [38 U.S.C. § 4312\(c\)](#).

- The individual's employment was for a brief, noncurrent period and there is no reasonable expectation that such employment would continue indefinitely or for a significant period.

- *Note* – The first two reasons are exceptionally difficult for an employer to prove.

- **Protections from Discharge**

- If an individual is reemployed after a military leave of **181 days or more**, an employer may not discharge the individual *without cause* for **one (1) year** after the date of reemployment.
- If an individual is reemployed after a military leave of **30 days, but less than 181 days**, an employer may not discharge the individual *without cause* for **six (6) months** after the date of reemployment.

- **Anti-Discrimination and Anti-Retaliation Rights**

- Adverse employment actions on the basis of an individual's uniformed service is strictly prohibited.
 - Applies to both employers and potential employers.
- An individual may not be denied initial employment, reemployment, retention in employment, promotion or any employment benefit based on his/her status as a past or present member of the uniformed service, his/her application to the uniformed service or his/her obligation to serve.
- An employer is prohibited from retaliating against any individual engaging in, or assisting in, the enforcement of rights under USERRA.

- **Health Insurance Protections**

- A qualified individual may continue existing employer-based health insurance for up to 24 months while serving in the military.
- Upon reemployment, an individual has the right to reinstate health coverage through the employer, even if the individual did not elect to continue coverage during service. Generally, reinstatement of coverage is exempt from a waiting period or other exceptions.

- **Compensation During Leave**

- Employers are not required to provide compensation to an employee absent due to military service.
- However, compensation is required during military leave if the employer provides pay to employees on “comparable nonmilitary” leaves of absences.

The U.S. Department of Labor, Veterans Employment and Training Service (“VETS”) is the department authorized to investigate and resolve complaints of USERRA violations.

G. QUO WARRANTO/MANDAMUS

- Quo warranto and mandamus often work together. An action in quo warranto is brought in court to challenge the manner in which some municipal employees are hired. If it can be proven that hiring was not done properly, the employee is ousted from the position. A writ of mandamus usually accompanies the action in quo warranto. If the writ of mandamus is granted, the court orders the municipality to hire the person who should have received the position instead of the person just ousted by way of the action in quo warranto.
- While this is a very harsh remedy, it is highly effective.
- To avoid such lawsuits, any hiring rules must be strictly followed. Any deviation, even if minor or simply technical, could lead to an order or ouster if an action in quo warranto is brought. Additionally, the steps taken in each hiring process should be properly documented.
- There is no statute of limitations for an action in quo warranto.
- Taxpayers have standing to bring an action in quo warranto (but not a writ of mandamus).
- Applicants who were on the eligibility list have standing to bring both an action in quo warranto and a writ of mandamus.
- The burden in an action in quo warranto is on the employee to prove that he/she was properly hired and has a right to the office he/she holds.
- There are no damages available in an action in quo warranto. However, a court can order back pay in a writ of mandamus.
- The burden on a writ of mandamus is on the unsuccessful candidate that, absent the deviation from the hiring rules, he/she would have been hired.

- If discretion, such as the “Rule of Three” or “Rule of Six” is built into the hiring process, a writ of mandamus cannot be successful because there is no guarantee that the unsuccessful candidate would have been hired.
- The writ of mandamus is usually only successful in municipalities have rules that require hiring in rank order from an eligibility list.

H. PHYSICAL AGILITY/PHYSICAL FITNESS TESTS AND DISPARATE IMPACT ON WOMEN

- Physical agility and physical fitness tests can have the potential to disparately impact women.

EXAMPLE: Prior to the use of a physical agility test, 46% of hires were women; after the use of the test, only 15% of hires were women.

- To ensure a physical agility test is not discriminatory towards women, the test must be job related and consistent with business necessity if it disproportionately excludes women.

I. NEPOTISM

- While not prohibited by law, hiring based on nepotism should be avoided. Allowing an applicant to gain an advantage based upon their familial connections is unfair to other applicants who may be equally or more qualified. It can also continue to give an unfair advantage for employees being supervised by a family member.
- In public safety, it could pose a safety risk.
- Given the paramilitary structure of public safety organizations, it can create problems with supervision.
- It is important that an individual with hiring authority in the municipality does not use his/her position to influence hiring decisions of an applicant that is a family member. It is advisable that family members recuse themselves from all hiring and employment decisions.

SECTION 10: OTHER IMPORTANT STATE AND FEDERAL LAWS

A. CONNECTICUT MUNICIPAL EMPLOYEE RELATIONS ACT (“NERA**”)²⁴**

- A municipality must comply with NERA.
- To the extent the position is governed by a collective bargaining agreement, and the collective bargaining agreement contains provisions concerning hiring and recruiting, the municipality must comply with such provisions during the hiring process.
- Changes in hiring processes might be subject to collective bargaining.

B. CONSTITUTIONAL ISSUES DURING HIRING

- *Equal Protection* – Both the [U.S. Constitution by way of the Fourteenth Amendment](#) and [Art. First, § 20 of the Connecticut Constitution](#) require Equal Protection of the Laws.
 - These clauses prohibit a government employer from refusing to hire, or selectively enforcing hiring rules, because of an applicant’s protected trait.
 - Race, national origin, religion, sex and alienage receive the highest level of scrutiny.
 - Sexual orientation and gender identity are subject to slightly less scrutiny but are still protected.
 - In contrast, the U.S. Supreme Court has extended the protections of the Equal Protection Clause to age and disability, but only where hiring decisions based on age and/or disability are not rationally related to a legitimate government interest.
 - Practically, when applied to the hiring process, the Equal Protection Clause operates in the same manner as Title VII and the Connecticut Fair Employment Practices Act.

²⁴ See [Conn. Gen. Stat. § 7-466 et seq.](#)

- *Free Speech, Religion and Association* – Protected by [First Amendment of the United States Constitution](#), [Art. First, §§ 3, 4, and 14 of the Connecticut Constitution](#) and [Conn. Gen. Stat. § 31-51q](#).
 - As [previously](#) described in this Guide, a government employer is generally prohibited from considering religion, speech on a matter of public concern and political affiliation/association in making hiring decisions in public safety.
 - [Conn. Gen. Stat. § 31-51q](#) creates a private statutory cause of action for a violation of the First Amendment, as well as the analogous Connecticut Constitutional provisions.
 - This type of claim has become very popular amongst plaintiffs' lawyers.
 - When making hiring decisions, a public safety department should be careful of [social media](#) and any other inquiry that could reveal protected speech, religion and political affiliation.

REFERENCES



APPENDIX A CITED STATE STATUTES

Law Enforcement Agency Recruitment, Retention and Promotion of Minority Officers Conn. Gen. Stat. § 7-291a

Conn. Gen. Stat. § 7-291a. Efforts re recruitment, retention and promotion of minority police officers

If a law enforcement unit serves a community with a relatively high concentration of minority residents, the unit shall make efforts to recruit, retain and promote minority police officers so that the racial and ethnic diversity of such unit is representative of such community. Such efforts may include, but are not limited to: (1) Efforts to attract young persons from the community such unit serves to careers in law enforcement through enrollment and participation in police athletic leagues in which police officers support young persons of the community through mentoring, sports, education and by fostering a positive relationship between such persons and police officers, the implementation of explorer programs and cadet units and support for public safety academies; (2) community outreach; and (3) implementation of policies providing that when there is a vacant position in such unit, such position shall be filled by hiring or promoting a minority candidate when the qualifications of such candidate exceed or are equal to that of any other candidate or candidates being considered for such position when such candidates are ranked on a promotion or examination register or list. For purposes of this section, “minority” means an individual whose race is defined as other than white, or whose ethnicity is defined as Hispanic or Latino by the federal Office of Management and Budget for use by the Bureau of Census of the United States Department of Commerce.

Police Officer Malfeasance Conn. Gen. Stat. § 7-291c

Conn. Gen. Stat. § 7-291c. Prohibition against hiring police officer dismissed for malfeasance or who resigned or retired while under investigation

(a) No law enforcement unit, as defined in section 7-294a, shall hire any person as a police officer, as defined in said section 7-294a, who was previously employed as a police officer by such unit or in any other jurisdiction and who (1) was dismissed for malfeasance or other serious misconduct calling into question such person's fitness to serve as a police officer; or (2) resigned or retired from such officer's position while under investigation for such malfeasance or other serious misconduct.

(b) Any law enforcement unit that has knowledge that any former police officer of such unit who (1) (A) was dismissed for malfeasance or other serious misconduct, or (B) resigned or retired from such officer's position while under investigation for such malfeasance or other serious misconduct; and (2) is an applicant for the position of police officer with any other law enforcement unit, shall inform such other unit of such dismissal, resignation or retirement.

(c) The provisions of this section shall not apply to any police officer who is exonerated of each allegation against such officer of such malfeasance or other serious misconduct.

(d) For purposes of this section, (1) "malfeasance" means the commonly approved usage of "malfeasance"; and (2) "serious misconduct" means improper or illegal actions taken by a police officer in connection with such officer's official duties that could result in a miscarriage of justice or discrimination, including, but not limited to, (A) a conviction of a felony, (B) fabrication of evidence, (C) repeated use of excessive force, (D) acceptance of a bribe, or I the commission of fraud.

Social Media Review

Conn. Gen. Stat. § 31-40x

§ 31-40x. Employer inquiries re employee's or prospective employee's personal online accounts. Exceptions. Enforcement

(a) For purposes of this section:

(1) "Applicant" means any person actively seeking employment from an employer;

(2) "Employee" means any person engaged in service to an employer in the business of his or her employer;

(3) "Employer" means any person engaged in business who has employees, including the state and any political subdivision thereof, except "employer" shall not include any state or municipal law enforcement agency conducting a preemployment investigation of law enforcement personnel;

(4) "Electronic communications device" means any electronic device that is capable of transmitting, accepting or processing data, including, but not limited to, a computer, computer network and computer system, as those terms are defined in section 53a-250, and a cellular or wireless telephone;

(5) "Personal online account" means any online account that is used by an employee or applicant exclusively for personal purposes and unrelated to any business purpose of such employee's or applicant's employer or prospective employer, including, but not limited to, electronic mail, social media and retail-based Internet web sites. "Personal online account" does not include any account created, maintained, used or accessed by an employee or applicant for a business purpose of such employee's or applicant's employer or prospective employer.

(b) Except as provided in subsection (c) of this section, no employer shall:

(1) Request or require that an employee or applicant provide such employer with a user name and password, password or any other authentication means for accessing a personal online account;

(2) Request or require that an employee or applicant authenticate or access a personal online account in the presence of such employer;

(3) Require that an employee or applicant invite such employer or accept an invitation from the employer to join a group affiliated with any personal online account of the employee or applicant;

(4) Discharge, discipline, discriminate against, retaliate against or otherwise penalize any employee who (A) refuses to provide such employer with a user name and password, password or any other authentication means for accessing his or her personal online account, (B) refuses to authenticate or access a personal online account in the presence of such employer, (C) refuses to invite such employer or accept an invitation from the employer to join a group affiliated with any personal online account of the employee, or (D) files, or causes to be filed, any complaint, whether verbally or in writing, with a public or private body or court concerning such employer's violation of this subdivision and subdivisions (1) to (3), inclusive, of this subsection; or

(5) Fail or refuse to hire any applicant as a result of his or her refusal to (A) provide such employer with a user name and password, password or any other authentication means for accessing a personal online account, (B) authenticate or access a personal online account in the presence of such employer, or (C) invite such employer or accept an invitation from the employer to join a group affiliated with any personal online account of the applicant.

(c) (1) An employer may request or require that an employee or applicant provide such employer with a user name and password, password or any other authentication means for accessing (A) any account or service provided by such employer or by virtue of the employee's employment relationship with such employer or that the employee uses for such employer's business purposes, or (B) any electronic communications device supplied or paid for, in whole or in part, by such employer.

(2) No employer shall be prohibited from discharging, disciplining or otherwise penalizing an employee or applicant that has transferred, without such employer's permission, such employer's proprietary information, confidential information or financial data to or from such employee or applicant's personal online account.

(d) Nothing in this section shall prevent an employer from:

(1) (A) Conducting an investigation for the purpose of ensuring compliance with applicable state or federal laws, regulatory requirements or prohibitions against work-related employee misconduct based on the receipt of specific information about activity on an employee's or applicant's personal online account, or (B) conducting an investigation based on the receipt of specific information about an employee's or applicant's unauthorized transfer of such employer's proprietary information, confidential information or financial data to or from a personal online account operated by an employee, applicant or other source. Any employer conducting an investigation pursuant to this subdivision may require an employee or applicant to allow such employer to access his or her personal online account for the purpose of conducting such investigation, provided such employer shall not require such employee or applicant to disclose the user name and password, password or other authentication means for accessing such personal online account; or

(2) Monitoring, reviewing, accessing or blocking electronic data stored on an electronic communications device paid for, in whole or in part, by an employer, or traveling through or stored on an employer's network, in compliance with state and federal law.

(e) Nothing in this section shall be construed to prevent an employer from complying with the requirements of state or federal statutes, rules or regulations, case law or rules of self-regulatory organizations.

(f) Any employee or applicant may file a complaint with the Labor Commissioner alleging violations of subsection (b) of this section. Upon receipt of the complaint, the commissioner shall investigate such complaint and may hold a hearing. After the hearing, the commissioner shall send each party a written copy of his or her decision. Any employee or applicant who prevails in such hearing shall be awarded reasonable attorney's fees and costs.

(g) If the commissioner finds an employee has been aggrieved by an employer's violation of subdivision (1), (2), (3) or (4) of subsection (b) of this section, the commissioner may (1) levy against the employer a civil penalty of up to five hundred dollars for the first violation and one thousand dollars for each subsequent violation, and (2) award such employee all appropriate relief including rehiring or reinstatement to his or her previous job, payment of back wages, reestablishment of employee benefits or any other remedies that the commissioner may deem appropriate.

(h) If the commissioner finds an applicant has been aggrieved by an employer's violation of subdivision (1), (2), (3) or (5) of subsection (b) of this section, the commissioner may levy against the employer a civil penalty of up to twenty-five dollars for the first violation and five hundred dollars for each subsequent violation.

(i) Any party aggrieved by the decision of the commissioner may appeal the decision to the Superior Court in accordance with the provisions of chapter 54.¹

(j) The commissioner may request the Attorney General to bring an action in the Superior Court to recover the penalties levied pursuant to subsections (g) and (h) of this section.

Polygraph Testing Conn. Gen. Stat. § 31-51g

§ 31-51g. Use of polygraph prohibited. Penalty. Exceptions

(a) For the purposes of this section “polygraph” means any mechanical or electrical instrument or device of any type used or allegedly used to examine, test or question individuals for the purpose of determining truthfulness.

(b) (1) No person, firm, corporation, association or the state or any political subdivision thereof shall request or require any prospective employee or any employee to submit to, or take, a polygraph examination as a condition of obtaining employment or of continuing employment with such employer or dismiss or discipline in any manner an employee for failing, refusing or declining to submit to or take a polygraph examination. (2) No employment agency, as defined in section 31-129, and no agent for an employer shall require any person to submit to, or take, a polygraph examination for any purposes whatsoever.

(c) Any person, firm, corporation or association which violates any provision of this section shall be fined not less than two hundred fifty dollars nor more than one thousand dollars for each violation.

(d) The provisions of this section shall not apply to persons to be employed (1) by the state or any local government or any political subdivision thereof in any police department except for civilian employees within the department or (2) by the Department of Correction, but shall apply with respect to obtaining and maintaining employment of other persons by the state or any local government or political subdivision thereof.

“Ban the Box”
Conn. Gen. Stat. § 31-51i
(effective Jan. 1, 2017)

Conn. Gen. Stat. § 31-51i. Employer inquiries about erased criminal record prohibited. Discrimination on the basis of erased criminal record, provisional pardon or certificate of rehabilitation prohibited. Availability of information on employment application form. Duties of consumer reporting agency issuing consumer report for employment purposes containing criminal matters of public record

(a) For the purposes of this section, “employer” means any person engaged in business who has one or more employees, including the state or any political subdivision of the state.

(b) No employer shall inquire about a prospective employee’s prior arrests, criminal charges or convictions on an initial employment application, unless (1) the employer is required to do so by an applicable state or federal law, or (2) a security or fidelity bond or an equivalent bond is required for the position for which the prospective employee is seeking employment.

(c) No employer or employer’s agent, representative or designee may require an employee or prospective employee to disclose the existence of any arrest, criminal charge or conviction, the records of which have been erased pursuant to section 46b-146, 54-760 or 54-142a.

(d) An employment application form that contains any question concerning the criminal history of the applicant shall contain a notice, in clear and conspicuous language: (1) That the applicant is not required to disclose the existence of any arrest, criminal charge or conviction, the records of which have been erased pursuant to section 46b-146, 54-760 or 54-142a, (2) that criminal records subject to erasure pursuant to section 46b-146, 54-760 or 54-142a are records pertaining to a finding of delinquency or that a child was a member of a family with service needs, an adjudication as a youthful offender, a criminal charge that has been dismissed or nolle, a criminal charge for which the person has been found not guilty or a conviction for which the person received an absolute pardon, and (3) that any person whose criminal records have been erased pursuant to section 46b-146, 54-760 or 54-142a shall be deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath.

(e) No employer or employer’s agent, representative or designee shall deny employment to a prospective employee solely on the basis that the prospective employee had a prior arrest, criminal charge or conviction, the records of which have been erased pursuant to section 46b-146, 54-760 or 54-142a or that the prospective employee had a prior conviction for which the prospective employee has received a provisional pardon or certificate of rehabilitation pursuant to section 54-130a, or a certificate of rehabilitation pursuant to section 54-108f.

(f) No employer or employer’s agent, representative or designee shall discharge, or cause to be discharged, or in any manner discriminate against, any employee solely on the basis that the employee had, prior to being employed by such employer, an arrest, criminal charge or

conviction, the records of which have been erased pursuant to section 46b-146, 54-760 or 54-142a or that the employee had, prior to being employed by such employer, a prior conviction for which the employee has received a provisional pardon or certificate of rehabilitation pursuant to section 54-130a, or a certificate of rehabilitation pursuant to section 54-108f.

(g) The portion of an employment application form that contains information concerning the criminal history record of an applicant or employee shall only be available to the members of the personnel department of the company, firm or corporation or, if the company, firm or corporation does not have a personnel department, the person in charge of employment, and to any employee or member of the company, firm or corporation, or an agent of such employee or member, involved in the interviewing of the applicant.

(h) Notwithstanding the provisions of subsection (g) of this section, the portion of an employment application form that contains information concerning the criminal history record of an applicant or employee may be made available as necessary to persons other than those specified in said subsection (g) by:

(1) A broker-dealer or investment adviser registered under chapter 672a¹ in connection with (A) the possible or actual filing of, or the collection or retention of information contained in, a form U-4 Uniform Application for Securities Industry Registration or Transfer, (B) the compliance responsibilities of such broker-dealer or investment adviser under state or federal law, or (C) the applicable rules of self-regulatory organizations promulgated in accordance with federal law;

(2) An insured depository institution in connection with (A) the management of risks related to safety and soundness, security or privacy of such institution, (B) any waiver that may possibly or actually be sought by such institution pursuant to section 19 of the Federal Deposit Insurance Act, 12 USC 1829(a), (C) the possible or actual obtaining by such institution of any security or fidelity bond, or (D) the compliance responsibilities of such institution under state or federal law; and

(3) An insurance producer licensed under chapter 701a² in connection with (A) the management of risks related to security or privacy of such insurance producer, or (B) the compliance responsibilities of such insurance producer under state or federal law.

(i) (1) For the purposes of this subsection: (A) “Consumer reporting agency” means any person who regularly engages, in whole or in part, in the practice of assembling or preparing consumer reports for a fee, which reports compile and report items of information on consumers that are matters of public record and are likely to have an adverse effect on a consumer’s ability to obtain employment, but does not include any public agency; (B) “consumer report” means any written, oral or other communication of information bearing on an individual’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living; and (C) “criminal matters of public record” means information obtained from the Judicial Department relating to arrests, indictments, convictions, outstanding judgments, and any other conviction information, as defined in section 54-142g.

(2) Each consumer reporting agency that issues a consumer report that is used or is expected to be used for employment purposes and that includes in such report criminal matters of public record concerning the consumer shall:

(A) At the time the consumer reporting agency issues such consumer report to a person other than the consumer who is the subject of the report, provide the consumer who is the subject of the consumer report (i) notice that the consumer reporting agency is reporting criminal matters of public record, and (ii) the name and address of the person to whom such consumer report is being issued;

(B) Maintain procedures designed to ensure that any criminal matter of public record reported is complete and up-to-date as of the date the consumer report is issued, which procedures shall, at a minimum, conform to the requirements set forth in section 54-142e.

(3) This subsection shall not apply in the case of an agency or department of the United States government seeking to obtain and use a consumer report for employment purposes if the head of the agency or department makes a written finding pursuant to 15 USC 1681b(b)(4)(A).

(j) An employee or prospective employee may file a complaint with the Labor Commissioner alleging an employer's violation of this section.

APPENDIX B CITED CASE LAW

Skinner v. Ry. Labor Exec. Ass'n, **489 U.S. 602 (1989)**

Railway labor organizations filed suit to enjoin regulations promulgated by Federal Railroad Administration governing drug and alcohol testing of railroad employees. The United States District Court for the Northern District of California, Charles A. Legge, J., upheld constitutionality of regulations, and labor organizations appealed. The Court of Appeals, 839 F.2d 575, Tang, Circuit Judge, reversed. The Government petitioned for writ of certiorari. The Supreme Court, Justice Kennedy, held that: (1) the Fourth Amendment was applicable to drug and alcohol testing mandated or authorized by Federal Railroad Administration regulations; but (2) drug and alcohol tests mandated or authorized by the regulations were reasonable under the Fourth Amendment even though there was no requirement of a warrant or a reasonable suspicion that any particular employee might be impaired due to the compelling government interest served by the regulations, which outweighed employees' privacy concerns.

Reversed.

Justice Stevens filed opinion concurring in part and concurring in judgment.

Justice Marshall filed dissenting opinion in which Justice Brennan joined.

**1405 *602 Syllabus*

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Upon the basis of evidence indicating that alcohol and drug abuse by railroad employees had caused or contributed to a number of significant train accidents, the Federal Railroad Administration (FRA) promulgated regulations under petitioner Secretary of Transportation's statutory authority to adopt safety standards for the industry. Among other things, Subpart C of the regulations requires railroads to see that blood and urine tests of covered employees are conducted following certain major train accidents or incidents, while Subpart D authorizes, but does not require, railroads to administer breath or urine tests or both to covered employees who violate certain safety rules. Respondents, the Railway Labor Executives' Association and various of its member labor organizations, brought suit in the Federal District Court to enjoin the regulations. The court granted summary judgment for petitioners, concluding that the regulations did not violate the Fourth Amendment. The Court of Appeals reversed, ruling, *inter alia*, that a requirement of particularized suspicion is essential to a finding that toxicological testing of railroad employees is reasonable under the Fourth Amendment. The court stated that such a requirement would ensure that the tests, which reveal the presence of drug metabolites that may remain in the body for weeks following ingestion, are confined to the detection of current impairment.

Held:

1. The Fourth Amendment is applicable to the drug and alcohol testing mandated or authorized by the FRA regulations. Pp. 1411–1413.

(a) The tests in question cannot be viewed as private action outside the reach of the Fourth Amendment. A railroad that complies with Subpart C does so by compulsion of sovereign authority and therefore must be viewed as an instrument or agent of the Government. Similarly, even though Subpart D does not compel railroads to test, it cannot be concluded, in the context of this facial challenge, that such testing will be primarily the result of private initiative, since specific features of the regulations combine to establish that the Government has actively encouraged, endorsed, and participated in the testing. Specifically, since 603 *603 the regulations pre-empt state laws covering the same subject matter and are intended to supersede collective-bargaining and arbitration-award provisions, the Government has removed all legal barriers to the testing authorized by Subpart D. Moreover, by conferring upon the FRA the right to receive biological samples and test results procured by railroads, Subpart D makes plain a strong preference for

testing and a governmental desire to share the fruits of such intrusions. In addition, the regulations mandate that railroads not bargain away their Subpart D testing authority and provide that an employee who refuses to submit to such tests must be withdrawn from covered service. Pp. 1411–1412.

(b) The collection and subsequent analysis of the biological samples required or authorized by the regulations constitute searches of the person subject to the Fourth Amendment. This Court has long recognized that a compelled intrusion into the body for blood to be tested for alcohol content and the ensuing chemical analysis constitute searches. Similarly, subjecting a person to the breath test authorized by Subpart D must be deemed a search, since it requires the production of “deep lung” breath and thereby implicates concerns about bodily integrity. Moreover, although ****1406** the collection and testing of urine under the regulations do not entail any intrusion into the body, they nevertheless constitute searches, since they intrude upon expectations of privacy as to medical information and the act of urination that society has long recognized as reasonable. Even if the employer’s antecedent interference with the employee’s freedom of movement cannot be characterized as an independent Fourth Amendment seizure, any limitation on that freedom that is necessary to obtain the samples contemplated by the regulations must be considered in assessing the intrusiveness of the searches affected by the testing program. Pp. 1412–1413.

2. The drug and alcohol tests mandated or authorized by the FRA regulations are reasonable under the Fourth Amendment even though there is no requirement of a warrant or a reasonable suspicion that any particular employee may be impaired, since, on the present record, the compelling governmental interests served by the regulations outweigh employees’ privacy concerns. Pp. 1413–1421.

(a) The Government’s interest in regulating the conduct of railroad employees engaged in safety-sensitive tasks in order to ensure the safety of the traveling public and of the employees themselves plainly justifies prohibiting such employees from using alcohol or drugs while on duty or on call for duty and the exercise of supervision to assure that the restrictions are in fact observed. That interest presents “special needs” beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements. Pp. 1413–1415.

604 ***604** (b) Imposing a warrant requirement in the present context is not essential to render the intrusions at issue reasonable. Such a requirement would do little to further the purposes of a warrant, since both the circumstances justifying toxicological testing and the permissible limits of such intrusions are narrowly and specifically defined by the regulations and doubtless are well known to covered employees, and since there are virtually no facts for a neutral magistrate to evaluate, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program. Moreover, imposing a warrant requirement would significantly hinder, and in many cases frustrate, the objectives of the testing program, since the delay necessary to procure a warrant could result in the destruction of valuable evidence, in that alcohol and drugs are eliminated from the bloodstream at a constant rate, and since the railroad supervisors who set the testing process in motion have little familiarity with the intricacies of Fourth Amendment jurisprudence. Pp. 1415–1416.

(c) Imposing an individualized suspicion requirement in the present context is not essential to render the intrusions at issue reasonable. The testing procedures contemplated by the regulations pose only limited threats to covered employees’ justifiable privacy expectations, particularly since they participate in an industry subject to pervasive safety regulation by the Federal and State Governments. Moreover, because employees ordinarily consent to significant employer-imposed restrictions on their freedom of movement, any additional interference with that freedom that occurs in the time it takes to procure a sample from a railroad employee is minimal. Furthermore, *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, established that governmentally imposed blood tests do not constitute an unduly extensive imposition on an individual’s privacy and bodily integrity, and the breath tests authorized by Subpart D are even less intrusive than blood tests. And, although urine tests require employees to perform an excretory function traditionally shielded by great privacy, the regulations reduce the intrusiveness of the collection process by requiring that samples be furnished in a medical environment without direct observation. In contrast, the governmental interest in testing without a showing of individualized suspicion is compelling. A substance-impaired ****1407** railroad employee in a safety-sensitive job can cause great human loss before any signs of the impairment become noticeable, and the regulations supply an effective means of deterring such employees from using drugs or alcohol by putting them on notice that they are likely to be discovered if an accident occurs. An individualized suspicion requirement would also impede railroads’ ability to obtain valuable information about the causes of accidents or incidents and how to protect the public, since obtaining evidence giving rise to the suspicion **605 *605** that a particular employee is impaired is impracticable in the chaotic aftermath of an accident when it is

difficult to determine which employees contributed to the occurrence and objective indicia of impairment are absent. The Court of Appeals' conclusion that the regulations are unreasonable because the tests in question cannot measure current impairment is flawed. Even if urine test results disclosed nothing more specific than the recent use of controlled substances, this information would provide the basis for a further investigation and might allow the FRA to reach an informed judgment as to how the particular accident occurred. More importantly, the court overlooked the FRA's policy of placing principal reliance on blood tests, which unquestionably can identify recent drug use, and failed to recognize that the regulations are designed not only to discern impairment but to deter it. Pp. 1416–1421.

839 F.2d 575 (CA9 1988), reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined, and in all but portions of Part III of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. ——. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. ——.

Attorneys and Law Firms

Attorney General Thornburgh argued the cause for petitioners. On the briefs were *Solicitor General Fried*, *Assistant Attorney General Bolton*, *Deputy Solicitor General Merrill*, *Deputy Assistant Attorneys General Spears* and *Cynkar*, *Lawrence S. Robbins*, *Leonard Schaitman*, *Marc Richman*, *B. Wayne Vance*, *S. Mark Lindsey*, and *Daniel Carey Smith*.

Lawrence M. Mann argued the cause for respondents. With him on the brief were *W. David Holsberry*, *Harold A. Ross*, and *Clinton J. Miller III*.*

* Briefs of *amici curiae* urging reversal were filed for the American Public Transit Association by *Donald T. Bliss*; for the Bendiner-Schlesinger Laboratory et al. by *David G. Evans* and *William J. Judge*; for the California Employment Law Council by *Victor Schachter*; for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, *Stephen C. Yohay*, and *Garen E. Dodge*; for the National Railroad Passenger Corporation et al. by *Erwin N. Griswold*; for the Pacific Legal Foundation by *Ronald A. Zumbun* and *Anthony T. Caso*; for the Private Truck Council of America, Inc., et al. by *Peter A. Susser*, *William H. Borghesani, Jr.*, *G. William Frick*, and *Alan B. Friedlander*; and for Thomas Colley et al. by *John G. Kester*, *John J. Buckley, Jr.*, *Stephen L. Urbanczyk*, *William C. Sammons*, *Stanley J. Glod*, *Charles I. Appler*, *Thomas L. Bright*, *Robert W. Katz*, *William L. Pope*, and *Bertram D. Fisher*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *James D. Holzhauser*, *John A. Powell*, *Stephen R. Shapiro*, *Harvey Grossman*, and *Edward M. Chen*; for the American Federation of Labor and Congress of Industrial Organizations by *David Silberman* and *Laurence Gold*.

Scott D. Raphael filed a brief for the Aircraft Owners & Pilots Association as *amicus curiae*.

Opinion

606 *606 Justice KENNEDY delivered the opinion of the Court.

The Federal Railroad Safety Act of 1970 authorizes the Secretary of Transportation to “prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety.” 84 Stat. 971, 45 U.S.C. § 431(a). Finding that alcohol and drug abuse by railroad employees poses a serious threat to safety, the Federal Railroad Administration (FRA) has promulgated regulations that mandate blood and urine tests of employees who are involved in certain train accidents. The FRA also has adopted regulations that do not require, but do authorize, railroads to administer breath and urine tests to employees who violate certain safety rules. The question presented by this case is whether these regulations violate the Fourth Amendment.

I

A

The problem of alcohol use on American railroads is as old as the industry itself, and efforts to deter it by carrier rules began at least a century ago. For many years, railroads have prohibited operating employees from possessing alcohol or being intoxicated while on duty and from consuming alcoholic beverages while subject to being called for duty. More recently, these proscriptions have been expanded to forbid possession or use of certain drugs. These restrictions are 607 *607 embodied in “Rule G,” an industry-wide operating rule promulgated by the Association of American Railroads, and are enforced, in various formulations, by virtually every railroad in the country. The customary sanction for Rule G violations is dismissal.

In July 1983, the FRA expressed concern that these industry efforts were not adequate to curb alcohol and drug abuse by **1408 railroad employees. The FRA pointed to evidence indicating that on-the-job intoxication was a significant problem in the railroad industry.¹ The FRA also found, after a review of accident investigation reports, that from 1972 to 1983 “the nation’s railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor,” and that these accidents “resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at \$19 million (approximately \$27 million in 1982 dollars).” 48 Fed.Reg. 30726 (1983). The FRA further identified “an additional 17 fatalities to operating employees working on or around rail rolling stock that involved alcohol or drugs as a contributing factor.” *Ibid.* In light of these problems, the FRA solicited comments from interested parties on various regulatory approaches to the problems of alcohol and drug abuse throughout the Nation’s railroad system.

¹ The FRA noted that a 1979 study examining the scope of alcohol abuse on seven major railroads found that “[a]n estimated one out of every eight railroad workers drank at least once while on duty during the study year.” 48 Fed.Reg. 30724 (1983). In addition, “5% of workers reported to work ‘very drunk’ or got ‘very drunk’ on duty at least once in the study year,” and “13% of workers reported to work at least ‘a little drunk’ one or more times during that period.” *Ibid.* The study also found that 23% of the operating personnel were “problem drinkers,” but that only 4% of these employees “were receiving help through an employee assistance program, and even fewer were handled through disciplinary procedures.” *Ibid.*

Comments submitted in response to this request indicated that railroads were able to detect a relatively small number of Rule G violations, owing, primarily, to their practice of 608 *608 relying on observation by supervisors and co-workers to enforce the rule. 49 Fed.Reg. 24266–24267 (1984). At the same time, “industry participants ... confirmed that alcohol and drug use [did] occur on the railroads with unacceptable frequency,” and available information from all sources “suggest[ed] that the problem includ[ed] ‘pockets’ of drinking and drug use involving multiple crew members (before and during work), sporadic cases of individuals reporting to work impaired, and repeated drinking and drug use by individual employees who are chemically or psychologically dependent on those substances.” *Id.*, at 24253–24254. “Even without the benefit of regular post-accident testing,” the FRA “identified 34 fatalities, 66 injuries and over \$28 million in property damage (in 1983 dollars) that resulted from the errors of alcohol and drug-impaired employees in 45 train accidents and train incidents during the period 1975 through 1983.” *Id.*, at 24254. Some of these accidents resulted in the release of hazardous materials and, in one case, the ensuing pollution required the evacuation of an entire Louisiana community. *Id.*, at 24254, 24259. In view of the obvious safety hazards of drug and alcohol use by railroad employees, the FRA announced in June 1984 its intention to promulgate federal regulations on the subject.

B

After reviewing further comments from representatives of the railroad industry, labor groups, and the general public, the FRA, in 1985, promulgated regulations addressing the problem of alcohol and drugs on the railroads. The final regulations apply to employees assigned to perform service subject to the Hours of Service Act, ch. 2939, 34 Stat. 1415, as amended, 45 U.S.C. § 61 *et seq.* The regulations prohibit covered employees from using or possessing alcohol or any controlled substance. 49 CFR § 219.101(a)(1) (1987). The regulations further prohibit those employees from reporting for covered service while under the influence of, or 609 *609 impaired by, alcohol, while having a blood

alcohol concentration of .04 or more, or while under the influence of, or impaired by, any controlled substance. § 219.101(a)(2). The regulations do not restrict, however, a railroad's authority to impose an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its ****1409** employ, § 219.101(c), and, accordingly, they do not "replace Rule G or render it unenforceable." 50 Fed.Reg. 31538 (1985).

To the extent pertinent here, two subparts of the regulations relate to testing. Subpart C, which is entitled "Post-Accident Toxicological Testing," is mandatory. It provides that railroads "shall take all practicable steps to assure that all covered employees of the railroad directly involved ... provide blood and urine samples for toxicological testing by FRA," § 219.203(a), upon the occurrence of certain specified events. Toxicological testing is required following a "major train accident," which is defined as any train accident that involves (i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of \$500,000 or more. § 219.201(a)(1). The railroad has the further duty of collecting blood and urine samples for testing after an "impact accident," which is defined as a collision that results in a reportable injury, or in damage to railroad property of \$50,000 or more. § 219.201(a)(2). Finally, the railroad is also obligated to test after "[a]ny train incident that involves a fatality to any on-duty railroad employee." § 219.201(a)(3).

After occurrence of an event which activates its duty to test, the railroad must transport all crew members and other covered employees directly involved in the accident or incident to an independent medical facility, where both blood and urine samples must be obtained from each employee.² After 610 ***610** the samples have been collected, the railroad is required to ship them by prepaid air freight to the FRA laboratory for analysis. § 219.205(d). There, the samples are analyzed using "state-of-the-art equipment and techniques" to detect and measure alcohol and drugs.³ The FRA proposes to place primary reliance on analysis of blood samples, as blood is "the only available body fluid ... that can provide a clear indication not only of the presence of alcohol and drugs but also their current impairment effects." 49 Fed.Reg. 24291 (1984). Urine samples are also necessary, however, because drug traces remain in the urine longer than in blood, and in some cases it will not be possible to transport employees to a medical facility before the time it takes for certain drugs to be eliminated from the bloodstream. In those instances, a "positive urine test, taken with specific information on the pattern of elimination for the particular drug and other information on the behavior of the employee and the circumstances of the accident, may be crucial to the determination of" the cause of an accident. *Ibid.*

² The regulations provide a limited exception from testing "if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident." 49 CFR § 219.203(a)(3)(i) (1987). No exception may be made, however, in the case of a "major train accident." *Ibid.* In promulgating the regulations, the FRA noted that, while it is sometimes possible to exonerate crew members in other situations calling for testing, it is especially difficult to assess fault and degrees of fault in the aftermath of the more substantial accidents. See 50 Fed.Reg. 31544 (1985).

³ See Federal Railroad Administration, United States Dept. of Transportation Field Manual: Control of Alcohol and Drug Use in Railroad Operations B-12 (1986) (Field Manual). Ethyl alcohol is measured by gas chromatography. *Ibid.* In addition, while drug screens may be conducted by immunoassays or other techniques, "[p]ositive drug findings are confirmed by gas chromatography/mass spectrometry." *Ibid.* These tests, if properly conducted, identify the presence of alcohol and drugs in the biological samples tested with great accuracy.

The regulations require that the FRA notify employees of the results of the tests and afford them an opportunity to respond in writing before preparation of any final investigative report. See § 219.211(a)(2). Employees who refuse to provide required blood or urine samples may not perform covered ***611** service for nine months, but they are entitled to a hearing concerning their refusal to take the test, § 219.213.

****1410** Subpart D of the regulations, which is entitled "Authorization to Test for Cause," is permissive. It authorizes railroads to require covered employees to submit to breath or urine tests in certain circumstances not addressed by Subpart C. Breath or urine tests, or both, may be ordered (1) after a reportable accident or incident, where a supervisor has a "reasonable suspicion" that an employee's acts or omissions contributed to the occurrence or severity of the accident or incident, § 219.301(b)(2); or (2) in the event of certain specific rule violations, including noncompliance with a signal and excessive speeding, § 219.301(b)(3). A railroad also may require breath tests where a supervisor has a "reasonable suspicion" that an employee is under the influence of alcohol, based upon specific, personal observations

concerning the appearance, behavior, speech, or body odors of the employee. § 219.301(b)(1). Where impairment is suspected, a railroad, in addition, may require urine tests, but only if two supervisors make the appropriate determination, § 219.301(c)(2)(i), and, where the supervisors suspect impairment due to a substance other than alcohol, at least one of those supervisors must have received specialized training in detecting the signs of drug intoxication. § 219.301(c)(2)(ii).

Subpart D further provides that whenever the results of either breath or urine tests are intended for use in a disciplinary proceeding, the employee must be given the opportunity to provide a blood sample for analysis at an independent medical facility. § 219.303(c). If an employee declines to give a blood sample, the railroad may presume impairment, absent persuasive evidence to the contrary, from a positive showing of controlled substance residues in the urine. The railroad must, however, provide detailed notice of this presumption to its employees, and advise them of their right to provide a contemporaneous blood sample. As in the case of samples procured under Subpart C, the regulations set forth 612 *612 procedures for the collection of samples, and require that samples “be analyzed by a method that is reliable within known tolerances.” § 219.307(b).

Respondents, the Railway Labor Executives’ Association and various of its member labor organizations, brought the instant suit in the United States District Court for the Northern District of California, seeking to enjoin the FRA’s regulations on various statutory and constitutional grounds. In a ruling from the bench, the District Court granted summary judgment in petitioners’ favor. The court concluded that railroad employees “have a valid interest in the integrity of their own bodies” that deserved protection under the Fourth Amendment. App. to Pet. for Cert. 53a. The court held, however, that this interest was outweighed by the competing “public and governmental interest in the ... promotion of ... railway safety, safety for employees, and safety for the general public that is involved with the transportation.” *Id.*, at 52a. The District Court found respondents’ other constitutional and statutory arguments meritless.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. *Railway Labor Executives’ Assn. v. Burnley*, 839 F.2d 575 (1988). The court held, first, that tests mandated by a railroad in reliance on the authority conferred by Subpart D involve sufficient Government action to implicate the Fourth Amendment, and that the breath, blood, and urine tests contemplated by the FRA regulations are Fourth Amendment searches. The court also “agre[ed] that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant.” *Id.*, at 583. The court further held that “accommodation of railroad employees’ privacy interest with the significant safety concerns of the government does not require adherence to a probable cause requirement,” and, accordingly, that the legality of the searches contemplated by 613 *613 the FRA regulations **1411 depends on their reasonableness under all the circumstances. *Id.*, at 587.

The court concluded, however, that particularized suspicion is essential to a finding that toxicological testing of railroad employees is reasonable. *Ibid.* A requirement of individualized suspicion, the court stated, would impose “no insuperable burden on the government,” *id.*, at 588, and would ensure that the tests are confined to the detection of current impairment, rather than to the discovery of “the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug.” *Id.*, at 588–589. Except for the provisions authorizing breath and urine tests on a “reasonable suspicion” of drug or alcohol impairment, 49 CFR §§ 219.301(b)(1) and (c)(2) (1987), the FRA regulations did not require a showing of individualized suspicion, and, accordingly, the court invalidated them.

Judge Alarcon dissented. He criticized the majority for “fail[ing] to engage in [a] balancing of interests” and for focusing instead “solely on the degree of impairment of the workers’ privacy interests.” 839 F.2d, at 597. The dissent would have held that “the government’s compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests.” *Id.*, at 596.

We granted the federal parties’ petition for a writ of certiorari, 486 U.S. 1042, 108 S.Ct. 2033, 100 L.Ed.2d 618 (1988), to consider whether the regulations invalidated by the Court of Appeals violate the Fourth Amendment. We now reverse.

II

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....” The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary *614 and invasive acts by officers of the Government or those acting at their direction. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967). See also *Delaware v. Prouse*, 440 U.S. 648, 653–654, 99 S.Ct. 1391, 1395–1396, 59 L.Ed.2d 660 (1979); *United States v. Martinez–Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976). Before we consider whether the tests in question are reasonable under the Fourth Amendment, we must inquire whether the tests are attributable to the Government or its agents, and whether they amount to searches or seizures. We turn to those matters.

A

Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government. See *United States v. Jacobsen*, 466 U.S. 109, 113–114, 104 S.Ct. 1652, 1656–1657, 80 L.Ed.2d 85 (1984); *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct. 2022, 2048, 29 L.Ed.2d 564 (1971). See also *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 575–576, 65 L.Ed. 1048 (1921). A railroad that complies with the provisions of Subpart C of the regulations does so by compulsion of sovereign authority, and the lawfulness of its acts is controlled by the Fourth Amendment. Petitioners contend, however, that the Fourth Amendment is not implicated by Subpart D of the regulations, as nothing in Subpart D compels any testing by private railroads.

^[1] We are unwilling to conclude, in the context of this facial challenge, that breath and urine tests required by private railroads in reliance on Subpart D will not implicate the Fourth Amendment. Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government’s **1412 participation in the private party’s activities, cf. *Lustig v. United States*, 338 U.S. 74, 78–79, 69 S.Ct. 1372, 1373–1374, 93 L.Ed. 1819 (1949) (plurality opinion); *Byars v. United States*, 273 U.S. 28, 32–33, 47 S.Ct. 248, 249–250, 71 L.Ed. 520 (1927), a question that can only be resolved “in light of all the circumstances,” *615 *Coolidge v. New Hampshire*, *supra*, 403 U.S., 615at 487, 91 S.Ct., at 2026. The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct.

The regulations, including those in Subpart D, pre-empt state laws, rules, or regulations covering the same subject matter, 49 CFR § 219.13(a) (1987), and are intended to supersede “any provision of a collective bargaining agreement, or arbitration award construing such an agreement,” 50 Fed.Reg. 31552 (1985). They also confer upon the FRA the right to receive certain biological samples and test results procured by railroads pursuant to Subpart D. § 219.11(c). In addition, a railroad may not divest itself of, or otherwise compromise by contract, the authority conferred by Subpart D. As the FRA explained, such “authority ... is conferred for the purpose of promoting the public safety, and a railroad may not shackle itself in a way inconsistent with its duty to promote the public safety.” 50 Fed.Reg. 31552 (1985). Nor is a covered employee free to decline his employer’s request to submit to breath or urine tests under the conditions set forth in Subpart D. See § 219.11(b). An employee who refuses to submit to the tests must be withdrawn from covered service. See 4 App. to Field Manual 18.

In light of these provisions, we are unwilling to accept petitioners’ submission that tests conducted by private railroads in reliance on Subpart D will be primarily the result of private initiative. The Government has removed all legal barriers to the testing authorized by Subpart D and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions. In addition, it has mandated that the railroads not bargain away the authority to perform tests granted by Subpart D. These are clear indices of the Government’s encouragement, endorsement, *616 and participation, and suffice to implicate the Fourth Amendment.

B

Our precedents teach that where, as here, the Government seeks to obtain physical evidence from a person, the Fourth Amendment may be relevant at several levels. See, e.g., *United States v. Dionisio*, 410 U.S. 1, 8, 93 S.Ct. 764, 768, 35 L.Ed.2d 67 (1973). The initial detention necessary to procure the evidence may be a seizure of the person, *Cupp v. Murphy*, 412 U.S. 291, 294–295, 93 S.Ct. 2000, 2003, 36 L.Ed.2d 900 (1973); *Davis v. Mississippi*, 394 U.S. 721, 726–727, 89 S.Ct. 1394, 1397, 22 L.Ed.2d 676 (1969), if the detention amounts to a meaningful interference with his freedom of movement. *INS v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984); *United States v. Jacobsen*, *supra*, 466 U.S., at 113, n. 5, 104 S.Ct., at 1656, n. 5. Obtaining and examining the evidence may also be a search, see *Cupp v. Murphy*, *supra*, 412 U.S., at 295, 93 S.Ct., at 2003, *United States v. Dionisio*, *supra*, 410 U.S., at 8, 13–14, 93 S.Ct., at 768, 771–772, if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable, see, e.g., *California v. Greenwood*, 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30 (1988); *United States v. Jacobsen*, *supra*, 466 U.S., at 113, 104 S.Ct., at 1656.

We have long recognized that a “compelled intrusio[n] into the body for blood to be analyzed for alcohol content” must be deemed a Fourth Amendment search. See *Schmerber v. California*, 384 U.S. 757, 767–768, 86 S.Ct. 1826, 1833–1834, 16 L.Ed.2d 908 (1966). See also *Winston v. **1413 Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611, 1616, 84 L.Ed.2d 662 (1985). In light of our society’s concern for the security of one’s person, see, e.g., *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968), it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee’s privacy interests. Cf. *Arizona v. Hicks*, 480 U.S. 321, 324–325, 107 S.Ct. 1149, 1152–1153, 94 L.Ed.2d 347 (1987). Much the same is true of the breath-testing procedures required under Subpart D of the regulations. Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or “deep lung” breath for chemical analysis, see, e.g., *California v. 617 *617 Trombetta*, 467 U.S. 479, 481, 104 S.Ct. 2528, 2530, 81 L.Ed.2d 413 (1984), implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber*, should also be deemed a search, see 1 W. LaFave, *Search and Seizure* § 2.6(a), p. 463 (1987). See also *Burnett v. Anchorage*, 806 F.2d 1447, 1449 (CA9 1986); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (CA3), cert. denied, 479 U.S. 986, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986).

^[2] Unlike the blood-testing procedure at issue in *Schmerber*, the procedures prescribed by the FRA regulations for collecting and testing urine samples do not entail a surgical intrusion into the body. It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. As the Court of Appeals for the Fifth Circuit has stated:

“There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.” *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (CA5 1987).

Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.⁴

⁴ See, e.g., *Lowvorn v. Chattanooga*, 846 F.2d 1539, 1542 (CA6 1988); *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139, 1143 (CA3 1988), cert. pending No. 88–66; *Railway Labor Executives’ v. Burnley*, 839 F.2d 575, 580 (CA9 1988) (case below); *Everett v. Napper*, 833 F.2d 1507, 1511 (CA11 1987); *Jones v. McKenzie*, 266 U.S.App.D.C. 85, 88, 833 F.2d 335, 338 (CADC 1987); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (CA5 1987), aff’d in pertinent part, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685; *McDonell v. Hunter*, 809 F.2d 1302, 1307 (CA8 1987); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266–1267 (CA 7), cert. denied, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976). See also *Alverado v. Washington Public Power Supply System*, 111 Wash.2d 424, 434, 759 P.2d 427, 432–433 (1988), cert. pending, No. 88–645.

Taking a blood or urine sample might also be characterized as a Fourth Amendment seizure, since it may be viewed as a meaningful interference with the employee’s possessory interest in his bodily fluids. Cf. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). It is not necessary to our analysis in this case, however, to characterize the taking of blood or urine samples as a seizure of those bodily fluids, for the privacy expectations protected by this characterization are adequately

taken into account by our conclusion that such intrusions are searches.

[³] 618 *618 In view of our conclusion that the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches, we need not characterize the employer’s antecedent interference with the employee’s **1414 freedom of movement as an independent Fourth Amendment seizure. As our precedents indicate, not every governmental interference with an individual’s freedom of movement raises such constitutional concerns that there is a seizure of the person. See *United States v. Dionisio*, *supra*, 410 U.S., at 9–11, 93 S.Ct., at 769–770 (grand jury subpoena, though enforceable by contempt, does not effect a seizure of the person); *United States v. Mara*, 410 U.S. 19, 21, 93 S.Ct. 774, 775, 35 L.Ed.2d 99 (1973) (same). For present purposes, it suffices to note that any limitation on an employee’s freedom of movement that is necessary to obtain the blood, urine, or breath samples contemplated by the regulations must be considered in assessing the intrusiveness of the searches effected by the Government’s testing program. Cf. *United States v. Place*, 462 U.S. 696, 707–709, 103 S.Ct. 2637, 2644–2645, 77 L.Ed.2d 110 (1983).

III

A

To hold that the Fourth Amendment is applicable to the drug and alcohol testing prescribed by the FRA regulations 619 *619 is only to begin the inquiry into the standards governing such intrusions. *O’Connor v. Ortega*, 480 U.S. 709, 719, 107 S.Ct. 1492, 1499, 94 L.Ed.2d 714 (1987) (plurality opinion); *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S.Ct. 733, 741, 83 L.Ed.2d 720 (1985). For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. *United States v. Sharpe*, 470 U.S. 675, 682, 105 S.Ct. 1568, 1573, 84 L.Ed.2d 605 (1985); *Schmerber v. California*, 384 U.S., at 768, 86 S.Ct., at 1834. What is reasonable, of course, “depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 3308, 87 L.Ed.2d 381 (1985). Thus, the permissibility of a particular practice “is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.” *Delaware v. Prouse*, 440 U.S., at 654, 99 S.Ct., at 1396; *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).

In most criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. See *United States v. Place*, *supra*, 462 U.S., at 701, and n. 2, 103 S.Ct., at 2641 and n. 2; *United States v. United States District Court*, 407 U.S. 297, 315, 92 S.Ct. 2125, 2135–2136, 32 L.Ed.2d 752 (1972). Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. See, e.g., *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980); *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978). We have recognized exceptions to this rule, however, “when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’ ” *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987), quoting *New Jersey v. T.L.O.*, *supra*, 469 U.S., at 351, 105 S.Ct., at 748 (BLACKMUN, J., concurring in judgment). When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context. See, e.g., *Griffin v. Wisconsin*, *supra*, 483 U.S., at 873, 107 S.Ct., at 3168 (search of probationer’s home); *New York v. 620 *620 Burger*, 482 U.S. 691, 699–703, 107 S.Ct. 2636, 2642–2644, 96 L.Ed.2d 601 (1987) (search of premises of certain highly regulated businesses); *O’Connor v. Ortega*, *supra*, 480 U.S., at 721–725, 107 S.Ct., at 1499–1502 (work-related searches of employees’ desks and offices); *New Jersey v. T.L.O.*, *supra*, 469 U.S., at 337–342, 105 S.Ct., at 740–743 (search of student’s property by school officials); **1415 *Bell v. Wolfish*, 441 U.S. 520, 558–560, 99 S.Ct. 1861, 1884–1885, 60 L.Ed.2d 447 (1979) (body cavity searches of prison inmates).

[⁴] The Government’s interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, “likewise presents

‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.” *Griffin v. Wisconsin*, *supra*, 483 U.S., at 873–874, 107 S.Ct., at 3168. The hours of service employees covered by the FRA regulations include persons engaged in handling orders concerning train movements, operating crews, and those engaged in the maintenance and repair of signal systems. 50 Fed.Reg. 31511 (1985). It is undisputed that these and other covered employees are engaged in safety-sensitive tasks. The FRA so found, and respondents conceded the point at oral argument. Tr. of Oral Arg. 46–47. As we have recognized, the whole premise of the Hours of Service Act is that “[t]he length of hours of service has direct relation to the efficiency of the human agencies upon which protection [of] life and property necessarily depends.” *Baltimore & Ohio R. Co. v. ICC*, 221 U.S. 612, 619, 31 S.Ct. 621, 625, 55 L.Ed. 878 (1911). See also *Atchison, T. & S.F.R. Co. v. United States*, 244 U.S. 336, 342, 37 S.Ct. 635, 637, 61 L.Ed. 1175 (1917) (“[I]t must be remembered that the purpose of the act was to prevent the dangers which must necessarily arise to the employee and to the public from continuing men in a dangerous and hazardous business for periods so long as to render them unfit to give that service which is essential to the protection of themselves and those entrusted to their care”).

⁵ The FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather “to prevent accidents *621 and casualties in railroad operations that result from impairment of employees by alcohol or drugs.” 49 CFR § 219.1(a) (1987).⁵ This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. This interest also “require[s] and justifi[es] the exercise of supervision to assure that the restrictions are in fact observed.” *Griffin v. Wisconsin*, *supra*, 483 U.S., at 875, 107 S.Ct., at 3169. The question that remains, then, is whether the Government’s need to monitor compliance with these restrictions justifies the privacy intrusions at issue absent a warrant or individualized suspicion.

⁵ The regulations provide that “[e]ach sample provided under [Subpart C] is retained for not less than six months following the date of the accident or incident and may be made available to ... a party in litigation upon service of appropriate compulsory process on the custodian...” 49 CFR § 219.211(d) (1987). The FRA explained, when it promulgated this provision, that it intends to retain such samples primarily “for its own purposes (*e.g.*, to permit reanalysis of a sample if another laboratory reported detection of a substance not tested for in the original procedure).” 50 Fed.Reg. 31545 (1985). While this provision might be read broadly to authorize the release of biological samples to law enforcement authorities, the record does not disclose that it was intended to be, or actually has been, so used. Indeed, while respondents aver generally that test results might be made available to law enforcement authorities, Brief for Respondents 24, they do not seriously contend that this provision, or any other part of the administrative scheme, was designed as “a ‘pretext’ to enable law enforcement authorities to gather evidence of penal law violations.” *New York v. Burger*, 482 U.S. 691, 716–717, n. 27, 107 S.Ct. 2636, 2651, n. 27, 96 L.Ed.2d 601 (1987). Absent a persuasive showing that the FRA’s testing program is pretextual, we assess the FRA’s scheme in light of its obvious administrative purpose. We leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the FRA’s program.

B

⁶ An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search 622 **1416 *622 or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. See, *e.g.*, *New York v. Burger*, *supra*, 482 U.S., at 703, 107 S.Ct., at 2644; *United States v. Chadwick*, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed.2d 538 (1977); *Camara v. Municipal Court of San Francisco*, 387 U.S., at 532, 87 S.Ct., at 1732. A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case. See *United States v. Chadwick*, *supra*, 433 U.S., at 9, 97 S.Ct., at 2482. In the present context, however, a warrant would do little to further these aims. Both the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees. Cf. *United States v. Biswell*, 406 U.S. 311, 316, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87 (1972). Indeed, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate. Cf. *Colorado v. Bertine*, 479 U.S. 367, 376, 107 S.Ct. 738, 743, 93 L.Ed.2d 739 (1987) (BLACKMUN, J., concurring).⁶

⁶ Subpart C of the regulations, for example, does not permit the exercise of any discretion in choosing the employees who must submit to testing, except in limited circumstances and then only if warranted by objective criteria. See n. 2, *supra*. Subpart D, while conferring some discretion to choose those who may be required to submit to testing, also imposes specific constraints on the exercise of that discretion. Covered employees may be required to submit to breath or urine tests only if they have been directly involved in specified rule violations or errors, or if their acts or omissions contributed to the occurrence or severity of specified accidents or incidents. To be sure, some discretion necessarily must be used in determining whether an employee's acts or omissions contributed to the occurrence or severity of an event, but this limited assessment of the objective circumstances surrounding the event does not devolve unbridled discretion upon the supervisor in the field. Cf. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323, 98 S.Ct. 1816, 1825–1826, 56 L.Ed.2d 305 (1978).

In addition, the regulations contain various safeguards against any possibility that discretion will be abused. A railroad that requires post-accident testing in bad faith, 49 CFR § 219.201(c) (1987), or that willfully imposes a program of authorized testing that does not comply with Subpart D, § 219.9(a)(3), or that otherwise fails to follow the regulations, § 219.9(a)(5), is subject to civil penalties, see pt. 219, App. A, p. 105, in addition to whatever damages may be awarded through the arbitration process.

623 *623 We have recognized, moreover, that the government's interest in dispensing with the warrant requirement is at its strongest when, as here, “the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.” *Camara v. Municipal Court of San Francisco*, *supra*, 387 U.S., at 533, 87 S.Ct., at 1733. See also *New Jersey v. T.L.O.*, 469 U.S., at 340, 105 S.Ct., at 742; *Donovan v. Dewey*, 452 U.S. 594, 603, 101 S.Ct. 2534, 2540, 69 L.Ed.2d 262 (1981). As the FRA recognized, alcohol and other drugs are eliminated from the bloodstream at a constant rate, see 49 Fed.Reg. 24291 (1984), and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible. See *Schmerber v. California*, 384 U.S., at 770–771, 86 S.Ct., at 1835–1836. Although the metabolites of some drugs remain in the urine for longer periods of time and may enable the FRA to estimate whether the employee was impaired by those drugs at the time of a covered accident, incident, or rule violation, 49 Fed.Reg. 24291 (1984), the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence.

The Government's need to rely on private railroads to set the testing process in motion also indicates that insistence on a warrant requirement would impede the achievement of the Government's objective. **1417 Railroad supervisors, like school officials, see *New Jersey v. T.L.O.*, *supra*, 469 U.S., at 339–340, 105 S.Ct., at 742, and hospital administrators, see *O'Connor v. Ortega*, 480 U.S., at 722, 107 S.Ct., at 1500; are not in the business of investigating violations of the criminal laws or enforcing administrative codes, and otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence. “Imposing unwieldy warrant procedures ... upon supervisors, *624 who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.” *Ibid*.

In sum, imposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating, the objectives of the Government's testing program. We do not believe that a warrant is essential to render the intrusions here at issue reasonable under the Fourth Amendment.

^[7] Our cases indicate that even a search that may be performed without a warrant must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law. See *New Jersey v. T.L.O.*, *supra*, 469 U.S., at 340, 105 S.Ct., at 742. When the balance of interests precludes insistence on a showing of probable cause, we have usually required “some quantum of individualized suspicion” before concluding that a search is reasonable. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S., at 560, 96 S.Ct., at 3084. We made it clear, however, that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. *Id.*, at 561, 96 S.Ct., at 3084. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.

^[8] By and large, intrusions on privacy under the FRA regulations are limited. To the extent transportation and like restrictions are necessary to procure the requisite blood, breath, and urine samples for testing, this interference alone is minimal given the employment context in which it takes place. Ordinarily, an employee consents to significant

restrictions in his freedom of movement where necessary for 625 *625 his employment, and few are free to come and go as they please during working hours. See, e.g., *INS v. Delgado*, 466 U.S., at 218, 104 S.Ct., at 1763. Any additional interference with a railroad employee's freedom of movement that occurs in the time it takes to procure a blood, breath, or urine sample for testing cannot, by itself, be said to infringe significant privacy interests.

^[9] Our decision in *Schmerber v. California*, *supra*, indicates that the same is true of the blood tests required by the FRA regulations. In that case, we held that a State could direct that a blood sample be withdrawn from a motorist suspected of driving while intoxicated, despite his refusal to consent to the intrusion. We noted that the test was performed in a reasonable manner, as the motorist's "blood was taken by a physician in a hospital environment according to accepted medical practices." *Id.*, at 771, 86 S.Ct., at 1836. We said also that the intrusion occasioned by a blood test is not significant, since such "tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Ibid.* *Schmerber* thus confirmed "society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity." *Winston v. Lee*, 470 U.S., at 762, 105 S.Ct., at 1617. See also *South Dakota v. Neville*, 459 U.S. 553, 563, 103 S.Ct. 916, 922, 74 L.Ed.2d 748 (1983) ("The simple blood-alcohol test is ... safe, painless, and commonplace"); *Breithaupt v. Abram*, 352 U.S. 432, 436, 77 S.Ct. 408, 410, 1 L.Ed.2d 448 (1957) ("The blood test procedure has become routine in our everyday life").

^[10] The breath tests authorized by Subpart D of the regulations are even less intrusive than the blood tests prescribed by Subpart C. Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in the employee's bloodstream and nothing more. 626 *626 Like the blood-testing procedures mandated by Subpart C, which can be used only to ascertain the presence of alcohol or controlled substances in the bloodstream, breath tests reveal no other facts in which the employee has a substantial privacy interest. Cf. *United States v. Jacobsen*, 466 U.S., at 123, 104 S.Ct., at 1661-1662; *United States v. Place*, 462 U.S., at 707, 103 S.Ct., at 2644-2645. In all the circumstances, we cannot conclude that the administration of a breath test implicates significant privacy concerns.

^[11] ^[12] A more difficult question is presented by urine tests. Like breath tests, urine tests are not invasive of the body and, under the regulations, may not be used as an occasion for inquiring into private facts unrelated to alcohol or drug use.⁷ We recognize, however, that the procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood or breath tests. While we would not characterize these additional privacy concerns as minimal in most contexts, we note that the regulations endeavor to reduce the intrusiveness of the collection process. The regulations do not require that samples be furnished under the direct observation of a monitor, despite the desirability of such a procedure to ensure the integrity of the sample. See 50 Fed.Reg. 31555 (1985). See also Field Manual B-15, D-1. The sample is also collected in a medical environment, by personnel unrelated to the railroad 627 *627 employer, and is thus not unlike similar procedures encountered often in the context of a regular physical examination.

⁷ When employees produce the blood and urine samples required by Subpart C, they are asked by medical personnel to complete a form stating whether they have taken any medications during the preceding 30 days. The completed forms are shipped with the samples to the FRA's laboratory. See Field Manual B-15. This information is used to ascertain whether a positive test result can be explained by the employee's lawful use of medications. While this procedure permits the Government to learn certain private medical facts that an employee might prefer not to disclose, there is no indication that the Government does not treat this information as confidential, or that it uses the information for any other purpose. Under the circumstances, we do not view this procedure as a significant invasion of privacy. Cf. *Whalen v. Roe*, 429 U.S. 589, 602, 97 S.Ct. 869, 878, 51 L.Ed.2d 64 (1977).

^[13] More importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees. This relation between safety and employee fitness was recognized by Congress when it enacted the Hours of Service Act in 1907, *Baltimore & Ohio R. Co. v. ICC*, 221 U.S., at 619, 31 S.Ct., at 625, and also when it authorized the Secretary to "test ... railroad facilities, equipment, rolling stock, operations, or persons, as he deems necessary to carry out the provisions" of the Federal Railroad Safety Act of 1970. 45 U.S.C. § 437(a) (emphasis added). It has also been recognized by state governments,⁸ and has long **1419 been reflected in industry

practice, as evidenced by the industry's promulgation and enforcement of Rule G. Indeed, the FRA found, and the Court of Appeals acknowledged, see 839 F.2d, at 585, that "most railroads require periodic physical examinations for train and engine employees and certain other employees." 49 Fed.Reg. 24278 (1984). See also *Railway Labor Executives Assn. v. Norfolk & Western R. Co.*, 833 F.2d 700, 705–706 (CA7 1987); *Brotherhood of Maintenance of 628 *628 Way Employees, Lodge 16 v. Burlington Northern R. Co.*, 802 F.2d 1016, 1024 (CA8 1986).

⁸ See, e.g., Ala.Code § 37–2–85 (1977) (requiring that persons to be employed as dispatchers, engineers, conductors, brakemen, and switchmen be subjected to a "thorough examination" respecting, *inter alia*, their skill, sobriety, eyesight, and hearing); Mass.Gen.Laws §§ 160:178–160:181 (1979) (prescribing eyesight examination and experience requirements for railroad engineers and conductors); N.Y.R.R. Law § 63 (McKinney 1952) (requiring that all applicants for positions as motormen or gripmen "be subjected to a thorough examination ... as to their habits, physical ability, and intelligence"). See also *Nashville, C. & S.L.R. Co. v. Alabama*, 128 U.S. 96, 98–99, 9 S.Ct. 28, 28–29, 32 L.Ed. 352 (1888) (noting, in upholding a predecessor of Alabama's fitness-for-duty statute against a Commerce Clause challenge, that a State may lawfully require railway employees to undergo eye examinations in the interests of safety).

[¹⁴] We do not suggest, of course, that the interest in bodily security enjoyed by those employed in a regulated industry must always be considered minimal. Here, however, the covered employees have long been a principal focus of regulatory concern. As the dissenting judge below noted: "The reason is obvious. An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." 839 F.2d, at 593. Though some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information. We conclude, therefore, that the testing procedures contemplated by Subparts C and D pose only limited threats to the justifiable expectations of privacy of covered employees.

By contrast, the Government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities, see, e.g., *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (CA8 1988); *Alverado v. Washington Public Power Supply System*, 111 Wash.2d 424, 436, 759 P.2d 427, 433–434 (1988), cert. pending, No. 88–645, employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others. An impaired employee, the FRA found, will seldom display any outward "signs detectable by the lay person or, in many cases, even the physician." 50 Fed.Reg. 31526 (1985). This view finds 629 *629 ample support in the railroad industry's experience with Rule G, and in the judgment of the courts that have examined analogous testing schemes. See, e.g., *Brotherhood of Maintenance Way Employees, Lodge 16 v. Burlington Northern R. Co.*, *supra*, at 1020. Indeed, while respondents posit that impaired employees might be detected without alcohol or drug testing,⁹ the premise of **1420 respondents' lawsuit is that even the occurrence of a major calamity will not give rise to a suspicion of impairment with respect to any particular employee.

⁹ Respondents offer a list of "less drastic and equally effective means" of addressing the Government's concerns, including reliance on the private proscriptions already in force, and training supervisory personnel "to effectively detect employees who are impaired by drug or alcohol use without resort to such intrusive procedures as blood and urine tests." Brief for Respondents 40–43. We have repeatedly stated, however, that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983). See also *Colorado v. Bertine*, 479 U.S. 367, 373–374, 107 S.Ct. 738, 742, 93 L.Ed.2d 739 (1987). It is obvious that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers," *United States v. Martinez-Fuerte*, 428 U.S., at 556–557, n. 12, 96 S.Ct., at 3082, n. 12, because judges engaged in *post hoc* evaluations of government conduct "can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished." " *United States v. Montoya de Hernandez*, 473 U.S. 531, 542, 105 S.Ct. 3304, 3311, 87 L.Ed.2d 381 (1985), quoting *United States v. Sharpe*, 470 U.S. 675, 686–687, 105 S.Ct. 1568, 1575–1576, 84 L.Ed.2d 605 (1985). Here, the FRA expressly considered various alternatives to its drug-screening program and reasonably found them wanting. At bottom, respondents' insistence on less drastic alternatives would require us to second-guess the reasonable conclusions drawn by the FRA after years of investigation and study. This we decline to do.

While no procedure can identify all impaired employees with ease and perfect accuracy, the FRA regulations supply

an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place. 50 Fed.Reg. 31541 (1985). The railroad industry's experience with Rule G persuasively shows, and common sense confirms, that the customary dismissal sanction *630 that threatens employees who use drugs or alcohol while on duty cannot serve as an effective deterrent unless violators know that they are likely to be discovered. By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, cf. *Griffin v. Wisconsin*, 483 U.S., at 876, 107 S.Ct., at 3170, concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.

The testing procedures contemplated by Subpart C also help railroads obtain invaluable information about the causes of major accidents, see 50 Fed.Reg. 31541 (1985), and to take appropriate measures to safeguard the general public. Cf. *Michigan v. Tyler*, 436 U.S. 499, 510, 98 S.Ct. 1942, 1950, 56 L.Ed.2d 486 (1978) (noting that prompt investigation of the causes of a fire may uncover continuing dangers and thereby prevent the fire's recurrence); *Michigan v. Clifford*, 464 U.S. 287, 308, 104 S.Ct. 641, 654, 78 L.Ed.2d 477 (1984) (REHNQUIST, J., dissenting) (same). Positive test results would point toward drug or alcohol impairment on the part of members of the crew as a possible cause of an accident, and may help to establish whether a particular accident, otherwise not drug related, was made worse by the inability of impaired employees to respond appropriately. Negative test results would likewise furnish invaluable clues, for eliminating drug impairment as a potential cause or contributing factor would help establish the significance of equipment failure, inadequate training, or other potential causes, and suggest a more thorough examination of these alternatives. Tests performed following the rule violations specified in Subpart D likewise can provide valuable information respecting the causes of those transgressions, which the FRA found to involve "the potential for a serious train accident or grave personal injury, or both." 50 Fed.Reg. 31553 (1985).

631 *631 A requirement of particularized suspicion of drug or alcohol use would seriously impede an employer's ability to obtain this information, despite its obvious importance. Experience confirms the FRA's judgment that the scene of a serious rail accident is chaotic. Investigators who arrive at the scene shortly after a major accident has occurred may find it difficult to determine which members of a train crew contributed to its occurrence. Obtaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a **1421 serious accident. While events following the rule violations that activate the testing authority of Subpart D may be less chaotic, objective indicia of impairment are absent in these instances as well. Indeed, any attempt to gather evidence relating to the possible impairment of particular employees likely would result in the loss or deterioration of the evidence furnished by the tests. Cf. *Michigan v. Clifford*, *supra*, at 293, n. 4, 104 S.Ct., at 647, n. 4 (plurality opinion); *Michigan v. Tyler*, *supra*, 436 U.S., at 510, 98 S.Ct., at 1950. It would be unrealistic, and inimical to the Government's goal of ensuring safety in rail transportation, to require a showing of individualized suspicion in these circumstances.

Without quarreling with the importance of these governmental interests, the Court of Appeals concluded that the postaccident testing regulations were unreasonable because "[b]lood and urine tests intended to establish drug use other than alcohol ... cannot measure current drug intoxication or degree of impairment." 839 F.2d, at 588. The court based its conclusion on its reading of certain academic journals that indicate that the testing of urine can disclose only drug metabolites, which "may remain in the body for days or weeks after the ingestion of the drug." *Id.*, at 589. We find this analysis flawed for several reasons.

[15] As we emphasized in *New Jersey v. T.L.O.*, "it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but 632 *632 only have 'any tendency to make the existence of any fact that is of consequence to the determination [of the point in issue] more probable or less probable than it would be without the evidence.'" 469 U.S., at 345, 105 S.Ct., at 746, quoting Fed.Rule Evid. 401. Even if urine test results disclosed nothing more specific than the recent use of controlled substances by a covered employee, this information would provide the basis for further investigative work designed to determine whether the employee used drugs at the relevant times. See Field Manual B-4. The record makes clear, for example, that a positive test result, coupled with known information concerning the pattern of elimination for the particular drug and information that may be gathered from other sources about the employee's activities, may allow the FRA to reach an informed judgment as to how a particular accident occurred. See *supra*, at 1409.

More importantly, the Court of Appeals overlooked the FRA's policy of placing principal reliance on the results of

blood tests, which unquestionably can identify very recent drug use, see, *e.g.*, 49 Fed.Reg. 24291 (1984), while relying on urine tests as a secondary source of information designed to guard against the possibility that certain drugs will be eliminated from the bloodstream before a blood sample can be obtained. The court also failed to recognize that the FRA regulations are designed not only to discern impairment but also to deter it. Because the record indicates that blood and urine tests, taken together, are highly effective means of ascertaining on-the-job impairment and of deterring the use of drugs by railroad employees, we believe the Court of Appeals erred in concluding that the postaccident testing regulations are not reasonably related to the Government objectives that support them.¹⁰

¹⁰ The Court of Appeals also expressed concern that the tests might be quite unreliable, and thus unreasonable. 839 F.2d, at 589. The record compiled by the FRA after years of investigation and study does not support this conclusion. While it is impossible to guarantee that no mistakes will ever be made in isolated cases, respondents have challenged the administrative scheme on its face. We deal therefore with whether the tests contemplated by the regulations can *ever* be conducted. Cf. *Bell v. Wolfish*, 441 U.S. 520, 560, 99 S.Ct. 1861, 1885, 60 L.Ed.2d 447 (1979). Respondents have provided us with no reason for doubting the FRA's conclusion that the tests at issue here are accurate in the overwhelming majority of cases.

633 *633 We conclude that the compelling Government interests served by the FRA's regulations would be significantly hindered if railroads were required to point to specific **1422 facts giving rise to a reasonable suspicion of impairment before testing a given employee. In view of our conclusion that, on the present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy concerns.

IV

The possession of unlawful drugs is a criminal offense that the Government may punish, but it is a separate and far more dangerous wrong to perform certain sensitive tasks while under the influence of those substances. Performing those tasks while impaired by alcohol is, of course, equally dangerous, though consumption of alcohol is legal in most other contexts. The Government may take all necessary and reasonable regulatory steps to prevent or deter that hazardous conduct, and since the gravamen of the evil is performing certain functions while concealing the substance in the body, it may be necessary, as in the case before us, to examine the body or its fluids to accomplish the regulatory purpose. The necessity to perform that regulatory function with respect to railroad employees engaged in safety-sensitive tasks, and the reasonableness of the system for doing so, have been established in this case.

Alcohol and drug tests conducted in reliance on the authority of Subpart D cannot be viewed as private action outside the reach of the Fourth Amendment. Because the testing procedures mandated or authorized by Subparts C and D effect *634 searches of the person, they must meet the Fourth Amendment's reasonableness requirement. In light of the limited discretion exercised by the railroad employers under the regulations, the surpassing safety interests served by toxicological tests in this context, and the diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees, we believe that it is reasonable to conduct such tests in the absence of a warrant or reasonable suspicion that any particular employee may be impaired. We hold that the alcohol and drug tests contemplated by Subparts C and D of the FRA's regulations are reasonable within the meaning of the Fourth Amendment. The judgment of the Court of Appeals is accordingly reversed.

It is so ordered.

Justice STEVENS, concurring in part and concurring in the judgment.

In my opinion the public interest in determining the causes of serious railroad accidents adequately supports the validity of the challenged regulations. I am not persuaded, however, that the interest in deterring the use of alcohol or drugs is either necessary or sufficient to justify the searches authorized by these regulations.

I think it a dubious proposition that the regulations significantly deter the use of alcohol and drugs by hours of service employees. Most people—and I would think most railroad employees as well—do not go to work with the expectation that they may be involved in a major accident, particularly one causing such catastrophic results as loss of life or the release of hazardous material requiring an evacuation. Moreover, even if they are conscious of the possibilities that such an accident might occur and that alcohol or drug use might be a contributing factor, if the risk of serious personal injury does not deter their use of these substances, it seems highly unlikely that the additional threat of loss of employment would have any effect on their behavior.

635 *635 For this reason, I do not join the portions of Part III of the Court’s opinion that rely on a deterrence rationale; I do, however, join the balance of the opinion and the Court’s judgment.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

The issue in this case is not whether declaring a war on illegal drugs is good **1423 public policy. The importance of ridding our society of such drugs is, by now, apparent to all. Rather, the issue here is whether the Government’s deployment in that war of a particularly Draconian weapon—the compulsory collection and chemical testing of railroad workers’ blood and urine—comports with the Fourth Amendment. Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943); *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), and the Red scare and McCarthy–era internal subversion cases, *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919); *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951), are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.

In permitting the Government to force entire railroad crews to submit to invasive blood and urine tests, even when it lacks any evidence of drug or alcohol use or other wrongdoing, the majority today joins those shortsighted courts which have allowed basic constitutional rights to fall prey to momentary emergencies. The majority holds that the need of the Federal Railroad Administration (FRA) to deter and diagnose train accidents outweighs any “minimal” intrusions on personal dignity and privacy posed by mass toxicological testing of persons who have given no indication whatsoever of 636 *636 impairment. *Ante*, at 1416. In reaching this result, the majority ignores the text and doctrinal history of the Fourth Amendment, which require that highly intrusive searches of this type be based on probable cause, not on the evanescent cost-benefit calculations of agencies or judges. But the majority errs even under its own utilitarian standards, trivializing the raw intrusiveness of, and overlooking serious conceptual and operational flaws in, the FRA’s testing program. These flaws cast grave doubts on whether that program, though born of good intentions, will do more than ineffectually symbolize the Government’s opposition to drug use.

The majority purports to limit its decision to postaccident testing of workers in “safety-sensitive” jobs, *ante*, at 1414, much as it limits its holding in the companion case to the testing of transferees to jobs involving drug interdiction or the use of firearms. *Treasury Employees v. Von Raab*, 489 U.S. 656, 664, 109 S.Ct. 1384, 1390, 103 L.Ed.2d 685 (1989). But the damage done to the Fourth Amendment is not so easily cabined. The majority’s acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens. I therefore dissent.

I

The Court today takes its longest step yet toward reading the probable-cause requirement out of the Fourth Amendment. For the fourth time in as many years, a majority holds that a “ ‘special need[d], beyond the normal need for law enforcement,’ ” makes the “ ‘requirement’ ” of probable cause “ ‘impracticable.’ ” *Ante*, at 1414 (citations

omitted). With the recognition of “[t]he Government’s interest in regulating the conduct of railroad employees to ensure safety” as such a need, *ante*, at 1414, the Court has now permitted “special needs” to displace constitutional text in each of the four categories of searches enumerated in the Fourth Amendment: searches of “persons,” *ante*, at —; “houses,” *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); “papers,” *O’Connor v. Ortega*, *637 637 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987); and “ effects,” *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

****1424** The process by which a constitutional “requirement” can be dispensed with as “impracticable” is an elusive one to me. The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The majority’s recitation of the Amendment, remarkably, leaves off after the word “violated,” *ante*, at 1411, but the remainder of the Amendment—the Warrant Clause—is not so easily excised. As this Court has long recognized, the Framers intended the provisions of that Clause—a warrant and probable cause—to “provide the yardstick against which official searches and seizures are to be measured.” *T.L.O.*, *supra*, at 359–360, 105 S.Ct., at 753 (opinion of BRENNAN, J.). Without the content which those provisions give to the Fourth Amendment’s overarching command that searches and seizures be “reasonable,” the Amendment lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term. See *Dunaway v. New York*, 442 U.S. 200, 213, 99 S.Ct. 2248, 2257, 60 L.Ed.2d 824 (1979) (“[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases”). Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when “special needs” make them seem not.

Until recently, an unbroken line of cases had recognized probable cause as an indispensable prerequisite for a full-scale search, regardless of whether such a search was conducted pursuant to a warrant or under one of the recognized exceptions to the warrant requirement. *638 *T.L.O.*, *supra*, 469 U.S., at 358 638 and 359, n. 3, 105 S.Ct., at 752 and 753, n. 3 (opinion of BRENNAN, J.); see also *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970). Only where the government action in question had a “substantially less intrusive” impact on privacy, *Dunaway*, 442 U.S., at 210, 99 S.Ct., at 2255, and thus clearly fell short of a full-scale search, did we relax the probable-cause standard. *Id.*, at 214, 99 S.Ct., at 2257 (“For all but those narrowly defined intrusions, the requisite ‘balancing’ ... is embodied in the principle that seizures are ‘reasonable’ only if supported by probable cause”); see also *T.L.O.*, *supra*, 469 U.S., at 360, 105 S.Ct., at 753 (opinion of BRENNAN, J.). Even in this class of cases, we almost always required the government to show some individualized suspicion to justify the search.¹ The few searches which we upheld in the absence of individualized justification were routinized, fleeting, and ****1425** nonintrusive encounters conducted pursuant to regulatory programs which entailed no contact with the person.²

¹ The first, and leading, case of a minimally intrusive search held valid when based on suspicion short of probable cause is *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968), where we held that a police officer who observes unusual conduct suggesting criminal activity by persons he reasonably suspects are armed and presently dangerous may “conduct a carefully limited search of the outer clothing of such persons.” See also *United States v. Hensley*, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (upholding brief stop of person described on wanted flyer while police ascertain if arrest warrant has been issued); *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (invalidating discretionary stops of motorists to check licenses and registrations when not based on reasonable suspicion that the motorist is unlicensed, the automobile is unregistered, or that the vehicle or an occupant should otherwise be detained); *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (upholding limited search where officers who had lawfully stopped car saw a large bulge under the driver’s jacket); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (upholding brief stops by roving border patrols where officers reasonably believe car may contain illegal aliens); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) (upholding brief stop to interrogate suspicious individual believed to be carrying narcotics and gun).

² See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (brief interrogative stop at permanent border checkpoint to ascertain motorist’s residence status); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (routine annual inspection by city housing department).

639 *639 In the four years since this Court, in *T.L.O.*, first began recognizing “special needs” exceptions to the Fourth

Amendment, the clarity of Fourth Amendment doctrine has been badly distorted, as the Court has eclipsed the probable-cause requirement in a patchwork quilt of settings: public school principals' searches of students' belongings, *T.L.O.*; public employers' searches of employees' desks, *O'Connor*; and probation officers' searches of probationers' homes, *Griffin*.³ Tellingly, each time the Court has found that "special needs" counseled ignoring the literal requirements of the Fourth Amendment for such full-scale searches in favor of a formless and unguided "reasonableness" balancing inquiry, it has concluded that the search in question satisfied that test. I have joined dissenting opinions in each of these cases, protesting the "jettison[ing of] ... the only standard that finds support in the text of the Fourth Amendment" and predicting that the majority's "Rohrschach-like 'balancing test' " portended "a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens." *T.L.O.*, *supra*, 469 U.S., at 357–358, 105 S.Ct., at 752 (opinion of BRENNAN, J.).

³ The "special needs" the Court invoked to justify abrogating the probable-cause requirement were, in *New Jersey v. T.L.O.*, 469 U.S., at 341, 105 S.Ct., at 743–744, "the substantial need of teachers and administrators for freedom to maintain order in the schools"; in *O'Connor v. Ortega*, 480 U.S., at 725, 107 S.Ct., at 1502, "the efficient and proper operation of the workplace"; and in *Griffin v. Wisconsin*, 483 U.S., at 878, 107 S.Ct., at 3171, the need to preserve "the deterrent effect of the supervisory arrangement" of probation.

The majority's decision today bears out that prophecy. After determining that the Fourth Amendment applies to the FRA's testing regime, the majority embarks on an extended inquiry into whether that regime is "reasonable," an inquiry in which it balances " 'all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' " *Ante*, at 1414, quoting *United States v. Montoya de 640 *640 Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 3308–3309, 87 L.Ed.2d 381 (1985). The result is "special needs" balancing analysis' deepest incursion yet into the core protections of the Fourth Amendment. Until today, it was conceivable that, when a government search was aimed at a person and not simply the person's possessions, balancing analysis had no place. No longer: with nary a word of explanation or acknowledgment of the novelty of its approach, the majority extends the "special needs" framework to a regulation involving compulsory blood withdrawal and urinary excretion, and chemical testing of the bodily fluids collected through these procedures. And until today, it was conceivable that a prerequisite for surviving "special needs" analysis was the existence of individualized suspicion. No longer: in contrast to the searches in *T.L.O.*, *O'Connor*, and *Griffin*, which were supported by individualized evidence suggesting the culpability of the persons whose property was searched,⁴ the regulatory regime upheld today requires the postaccident collection and testing of the blood and urine of *all* covered employees—even if every member of ****1426** this group gives every indication of sobriety and attentiveness.

⁴ See *T.L.O.*, *supra*, 469 U.S., at 346, 105 S.Ct., at 746 (teacher's report that student had been smoking provided reasonable suspicion that purse contained cigarettes); *O'Connor*, *supra*, 480 U.S., at 726, 107 S.Ct., at 1503 (charges of specific financial improprieties gave employer individualized suspicion of misconduct by employee); *Griffin*, *supra*, 483 U.S., at 879–880, 107 S.Ct., at 3171–3172 (tip to police officer that probationer was storing guns in his apartment provided reasonable suspicion).

In widening the "special needs" exception to probable cause to authorize searches of the human body unsupported by *any* evidence of wrongdoing, the majority today completes the process begun in *T.L.O.* of eliminating altogether the probable-cause requirement for civil searches—those undertaken for reasons "beyond the normal need for law enforcement." *Ante*, at 1414 (citations omitted). In its place, the majority substitutes a manipulable balancing inquiry under which, upon the mere assertion of a "special need," even the deepest dignitary and privacy interests become vulnerable ***641** to governmental incursion. See *ibid.* (distinguishing criminal from civil searches). By its terms, however, the Fourth Amendment—unlike the Fifth and Sixth—does not confine its protections to either criminal or civil actions. Instead, it protects generally "[t]he right of the people to be secure."⁵

⁵ That the Fourth Amendment applies equally to criminal and civil searches was emphasized, ironically enough, in the portion of *T.L.O.* holding the Fourth Amendment applicable to schoolhouse searches. 469 U.S., at 335, 105 S.Ct., at 739. The malleability of "special needs" balancing thus could not be clearer: the majority endorses the applicability of the Fourth Amendment to civil searches in determining whether a search has taken place, but then wholly ignores it in the subsequent inquiry into the validity of that search.

The fact is that the malleable “special needs” balancing approach can be justified only on the basis of the policy results it allows the majority to reach. The majority’s concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its cavalier disregard for the text of the Constitution is not. There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971). Because abandoning the explicit protections of the Fourth Amendment seriously imperils “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men,” *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 578, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), I reject the majority’s “special needs” rationale as unprincipled and dangerous.

II

The proper way to evaluate the FRA’s testing regime is to use the same analytic framework which we have traditionally used to appraise Fourth Amendment claims involving full-scale searches, at least until the recent “special needs” cases. Under that framework, we inquire, serially, whether a 642 *642 search has taken place, see, e.g., *Katz v. United States*, 389 U.S. 347, 350–353, 88 S.Ct. 507, 510–512, 19 L.Ed.2d 576 (1967); whether the search was based on a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement, see, e.g., *Welsh v. Wisconsin*, 466 U.S. 740, 748–750, 104 S.Ct. 2091, 2096–2098, 80 L.Ed.2d 732 (1984); whether the search was based on probable cause or validly based on lesser suspicion because it was minimally intrusive, see, e.g., *Dunaway*, 442 U.S., at 208–210, 99 S.Ct., at 2254–2255 and, finally, whether the search was conducted in a reasonable manner, see, e.g., *Winston v. Lee*, 470 U.S. 753, 763–766, 105 S.Ct. 1611, 1618–1619, 84 L.Ed.2d 662 (1985). See also *T.L.O.*, 469 U.S., at 354–355, 105 S.Ct., at 749–750 (opinion of BRENNAN, J.) (summarizing analytic framework).

The majority’s threshold determination that “covered” railroad employees have been searched under the FRA’s testing program is certainly correct. *Ante*, at 1412–1413. Who among us is not prepared to consider reasonable a person’s expectation of privacy with respect to the extraction of his blood, the collection of his urine, or the chemical testing of these fluids? **1427 *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984).⁶ The majority’s ensuing conclusion that the warrant requirement may be dispensed with, however, conveniently overlooks the fact that there are three distinct searches at issue. Although the importance of collecting blood and urine samples before drug or alcohol metabolites disappear justifies waiving the warrant requirement for those two searches under the narrow “exigent circumstances” exception, see *Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966) (“[T]he delay necessary to obtain a warrant ... threaten[s] ‘the destruction of evidence’”), no such exigency prevents railroad officials from securing a warrant before chemically testing the samples they obtain. Blood and urine do not spoil if 643 *643 properly collected and preserved, and there is no reason to doubt the ability of railroad officials to grasp the relatively simple procedure of obtaining a warrant authorizing, where appropriate, chemical analysis of the extracted fluids. It is therefore wholly unjustified to dispense with the warrant requirement for this final search. See *Chimel v. California*, 395 U.S. 752, 761–764, 89 S.Ct. 2034, 2039–2041, 23 L.Ed.2d 685 (1969) (exigency exception permits warrantless searches only to the extent that exigency exists).

⁶ The FRA’s breath-testing procedures also constitute searches subject to constitutional safeguards. See *ante*, at 1413 (reaching same conclusion). I focus my discussion on the collection and testing of blood and urine because those more intrusive procedures better demonstrate the excesses of the FRA’s scheme.

It is the probable-cause requirement, however, that the FRA’s testing regime most egregiously violates, a fact which explains the majority’s ready acceptance and expansion of the countertextual “special needs” exception. By any measure, the FRA’s highly intrusive collection and testing procedures qualify as full-scale personal searches. Under our precedents, a showing of probable cause is therefore clearly required. But even if these searches were viewed as entailing only minimal intrusions on the order, say, of a police stop-and-frisk, the FRA’s program would still fail to pass constitutional muster, for we have, without exception, demanded that even minimally intrusive searches of the person be founded on individualized suspicion. See *supra*, at 1424, and n. 1. The federal parties concede it does not satisfy this standard. Brief for Federal Parties 18. Only if one construes the FRA’s collection and testing procedures as akin to the routinized and fleeting regulatory interactions which we have permitted in the absence of individualized

suspicion, see n. 2, *supra*, might these procedures survive constitutional scrutiny. Presumably for this reason, the majority likens this case to *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), which upheld brief automobile stops at the border to ascertain the validity of motorists' residence in the United States. *Ante*, at 1417. Case law and common sense reveal both the bankruptcy of this absurd analogy and the constitutional imperative of adhering to the textual standard of probable cause to evaluate the FRA's multifarious full-scale searches.

644 *644 Compelling a person to submit to the piercing of his skin by a hypodermic needle so that his blood may be extracted significantly intrudes on the "personal privacy and dignity against unwarranted intrusion by the State" against which the Fourth Amendment protects. *Schmerber*, *supra*, 384 U.S., at 767, 86 S.Ct., at 2042. As we emphasized in *Terry v. Ohio*, 392 U.S. 1, 24–25, 88 S.Ct. 1868, 1881–1882, 20 L.Ed.2d 889 (1968), "Even a limited search of the outer clothing ... constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S., at 24–25, 88 S.Ct., at 1881–1882. We have similarly described the taking of a suspect's fingernail scrapings as a "severe, though brief, intrusion upon cherished personal security." **1428 *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 2003, 36 L.Ed.2d 900 (1973) (quoting *Terry*, *supra*, 392 U.S., at 24–25, 88 S.Ct., at 1882, and upholding this procedure upon a showing of probable cause). The government-compelled withdrawal of blood, involving as it does the added aspect of physical invasion, is surely no less an intrusion. The surrender of blood on demand is, furthermore, hardly a quotidian occurrence. Cf. *Martinez-Fuerte*, *supra*, 428 U.S., at 557, 96 S.Ct. at 3082 (routine stops involve "quite limited" intrusion).

In recognition of the intrusiveness of this procedure, we specifically required in *Schmerber* that police have evidence of a drunken-driving suspect's impairment before forcing him to endure a blood test:

"The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear...." 384 U.S., at 769–770, 86 S.Ct., at 1835.

Schmerber strongly suggested that the "clear indication" needed to justify a compulsory blood test amounted to a showing of probable cause, which "plainly" existed in that case. *Id.*, at 768, 86 S.Ct., at 1834. Although subsequent cases interpreting *Schmerber* have differed over whether a showing of individualized *645 suspicion would have sufficed, compare *Winston*, 470 U.S., at 760, 105 S.Ct. at 1616 (*Schmerber* "noted the importance of probable cause"), with *Montoya de Hernandez*, 473 U.S., at 540, 105 S.Ct., at 3310 (*Schmerber* "indicate[d] the necessity for particularized suspicion"), by any reading, *Schmerber* clearly forbade compulsory blood tests on any lesser showing than individualized suspicion. Exactly why a blood test which, if conducted on one person, requires a showing of at least individualized suspicion may, if conducted on many persons, be based on no showing whatsoever, the majority does not—and cannot—explain.⁷

⁷ The majority, seeking to lessen the devastating ramifications of *Schmerber v. California*, and to back up its assertion that Government-imposed blood extraction does not "infringe significant privacy interests," *ante*, at 1417, emphasizes *Schmerber*'s observation that blood tests are commonplace and can be performed with "virtually no risk, trauma, or pain," quoting 384 U.S., at 771, 86 S.Ct., at 1836. The majority, however, wrenches this statement out of context. The *Schmerber* Court made this statement only *after* it established that the blood test fell within the "exigent circumstances" exception to the warrant requirement, *and* that the test was supported by probable cause. Indeed, the statement was made only in the context of the separate inquiry into whether the compulsory blood test was conducted in a reasonable manner. 384 U.S., at 768–772, 86 S.Ct., at 1834–1836; see also *Winston v. Lee*, 470 U.S. 753, 760–761, 105 S.Ct. 1611, 1612–1613, 84 L.Ed.2d 662 (1985) ("*Schmerber* recognized that the ordinary requirements of the Fourth Amendment would be the *threshold requirements* for conducting this kind of surgical search and seizure.... Beyond these standards, *Schmerber*'s inquiry considered a number of other factors in determining the 'reasonableness' of the blood test") (emphasis added). The majority also cites *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983), and *Breithaupt v. Abram*, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957), for the proposition that blood tests are commonplace. *Ante*, at 1417. In both those cases, however, the police officers who attempted to impose blood tests on drunken-driving suspects had exceptionally strong evidence of the driver's inebriation. 459 U.S., at 554–556, 103 S.Ct., at 917–918; 352 U.S., at 433, 77 S.Ct., at 409.

Compelling a person to produce a urine sample on demand also intrudes deeply on privacy and bodily integrity. Urination is among the most private of activities. It is generally forbidden in public, eschewed as a matter of

conversation, and performed in places designed to preserve this tradition of 646 *646 personal seclusion. Cf. *Martinez–Fuerte*, 428 U.S., at 560, 96 S.Ct., at 3084 (border-stop questioning involves no more than “some annoyance” and is neither “frightening” nor “offensive”). The FRA, however, gives scant regard to personal privacy, for its Field Manual instructs supervisors monitoring urination that railroad **1429 workers must provide urine samples “*under direct observation* by the physician/technician.” Federal Railroad Administration, United States Dept. of Transportation, Field Manual: Control of Alcohol and Drug Use in Railroad Operations D–5 (1986) (emphasis added).⁸ That the privacy interests offended by compulsory and supervised urine collection are profound is the overwhelming judgment of the lower courts and commentators. As Professor—later Solicitor General—Charles Fried has written:

⁸ The majority dismisses as nonexistent the intrusiveness of such “direct observation,” on the ground that FRA regulations state that such observation is not “require[d].” 50 Fed.Reg. 31555 (1985), cited *ante*, at 1418. The majority’s dismissal is too hasty, however, for the regulations—in the very same sentence—go on to state: “[B]ut observation is the most effective means of ensuring that the sample is that of the employee and has not been diluted.” 50 Fed.Reg. 31555 (1985). Even if this were not the case, the majority’s suggestion that officials monitoring urination will disregard the clear commands of the Field Manual with which they are provided is dubious, to say the least.

“[I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one’s dignity and self esteem.” Privacy, 77 Yale L.J. 475, 487 (1968).⁹

⁹ See, e.g., *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (CA5 1987), *aff’d* in pertinent part, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685; *Taylor v. O’Grady*, 669 F.Supp. 1422, 1433–1434 (ND Ill.1987); *Feliciano v. Cleveland*, 661 F.Supp. 578, 586 (ND Ohio 1987); *American Federation of Government Employees, AFL–CIO v. Weinberger*, 651 F.Supp. 726, 732–733 (SD Ga.1986); *Capua v. Plainfield*, 643 F.Supp. 1507, 1514 (NJ 1986).

The majority’s characterization of the privacy interests implicated by urine collection as “minimal,” *ante*, at 1417, is nothing *647 short of startling. This characterization is, furthermore, belied by the majority’s own prior explanation of why compulsory urination constitutes a search for the purposes of the Fourth Amendment:

“There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.” *Ante*, at 1413, quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (CA5 1987).

The fact that the majority can invoke this powerful passage in the context of deciding that a search has occurred, and then ignore it in deciding that the privacy interests this search implicates are “minimal,” underscores the shameless manipulability of its balancing approach.

Finally, the chemical analysis the FRA performs upon the blood and urine samples implicates strong privacy interests apart from those intruded upon by the collection of bodily fluids. Technological advances have made it possible to uncover, through analysis of chemical compounds in these fluids, not only drug or alcohol use, but also medical disorders such as epilepsy, diabetes, and clinical depression. Cf. *Martinez–Fuerte*, *supra*, at 558, 96 S.Ct., at 3083, quoting *United States v. Brignoni–Ponce*, 422 U.S. 873, 880, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975) (check-point inquiry involves only “‘a brief question or two’” about motorist’s residence). As the Court of Appeals for the District of Columbia Circuit has observed: “[S]uch tests may provide Government officials with a periscope through which they can peer into an individual’s behavior in her private life, even in her own home.” *Jones v. McKenzie*, 266 U.S.App.D.C. 85, 89, 833 F.2d 335, 339 (1987); see also *Capua v. Plainfield*, 643 F.Supp. 1507, 1511 (NJ 1986) (urine testing is “form of surveillance” which “reports on a person’s off-duty activities just as surely as someone had been present and 648 *648 watching”). The FRA’s requirement that workers disclose the medications they **1430 have taken during the 30 days prior to chemical testing further impinges upon the confidentiality customarily attending personal health secrets.

By any reading of our precedents, the intrusiveness of these three searches demands that they—like other full-scale searches—be justified by probable cause. It is no answer to suggest, as does the majority, that railroad workers have

relinquished the protection afforded them by this Fourth Amendment requirement, either by “participat[ing] in an industry that is regulated pervasively to ensure safety” or by undergoing periodic fitness tests pursuant to state law or to collective-bargaining agreements. *Ante*, at 1418.

Our decisions in the regulatory search area refute the suggestion that the heavy regulation of the railroad industry eclipses workers’ rights under the Fourth Amendment to insist upon a showing of probable cause when their bodily fluids are being extracted. This line of cases has exclusively involved searches of employer *property*, with respect to which “[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a *proprietor* over the *stock* of such an enterprise.” *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313, 98 S.Ct. 1816, 1821, 56 L.Ed.2d 305 (1978) (emphasis added; citation omitted), quoted in *New York v. Burger*, 482 U.S. 691, 700, 107 S.Ct. 2636, 2642, 96 L.Ed.2d 601 (1987). Never have we intimated that regulatory searches reduce employees’ rights of privacy in their *persons*. See *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 537, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967) (“[T]he inspections are [not] personal in nature”); cf. *Donovan v. Dewey*, 452 U.S. 594, 598–599, 101 S.Ct. 2534, 2538, 69 L.Ed.2d 262 (1981); *Marshall, supra*, 436 U.S. at 313, 98 S.Ct. at 1821. As the Court pointed out in *O’Connor*, individuals do not lose Fourth Amendment rights at the workplace gate, 480 U.S., at 716–718, 107 S.Ct., at 1497–1498; see also *Oliver v. United States*, 466 U.S. 170, 178, n. 8, 104 S.Ct. 1735, 1741, n. 8, 80 L.Ed.2d 214 (1984), any more than they relinquish these rights at the schoolhouse door, *T.L.O.*, 469 U.S., at 333, 105 S.Ct., at 739, or the hotel room threshold, *Hoffa v. United States*, 385 U.S. 293, 301, 87 S.Ct. 408, 413, 17 L.Ed.2d 374 (1966). These rights mean 649 *649 little indeed if, having passed through these portals, an individual may remain subject to a suspicionless search of his person justified solely on the grounds that the government already is permitted to conduct a search of the inanimate contents of the surrounding area. In holding that searches of persons may fall within the category of regulatory searches permitted in the absence of probable cause or even individualized suspicion, the majority sets a dangerous and ill-conceived precedent.

The majority’s suggestion that railroad workers’ privacy is only minimally invaded by the collection and testing of their bodily fluids because they undergo periodic fitness tests, *ante*, at 1418–1419, is equally baseless. As an initial matter, even if participation in these fitness tests did render “minimal” an employee’s “interest in bodily security,” *ante*, at 1418–1419, such minimally intrusive searches of the person require, under our precedents, a justificatory showing of individualized suspicion. See *supra*, at 1424. More fundamentally, railroad employees are *not* routinely required to submit to blood or urine tests to gain or to maintain employment, and railroad employers do not ordinarily have access to employees’ blood or urine, and certainly not for the purpose of ascertaining drug or alcohol usage. That railroad employees sometimes undergo tests of eyesight, hearing, skill, intelligence, and agility, *ante*, at 1418, n. 8, hardly prepares them for Government demands to submit to the extraction of blood, to excrete under supervision, or to have these bodily fluids tested for the physiological and psychological secrets they may contain. Surely employees who release basic information about their financial and personal history so that employers may ascertain their “ethical fitness” do **1431** not, by so doing, relinquish their expectations of privacy with respect to their personal letters and diaries, revealing though these papers may be of their character.

I recognize that invalidating the full-scale searches involved in the FRA’s testing regime for failure to comport with the Fourth Amendment’s command of probable cause **650** may hinder the Government’s attempts to make rail transit as safe as humanly possible. But constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well intentioned, must always be pursued within constitutional boundaries. Were the police freed from the constraints of the Fourth Amendment for just one day to seek out evidence of criminal wrongdoing, the resulting convictions and incarcerations would probably prevent thousands of fatalities. Our refusal to tolerate this specter reflects our shared belief that even beneficent governmental power—whether exercised to save money, save lives, or make the trains run on time—must always yield to “a resolute loyalty to constitutional safeguards.” *Almeida-Sanchez v. United States*, 413 U.S. 266, 273, 93 S.Ct. 2535, 2539–2540, 37 L.Ed.2d 596 (1973). The Constitution demands no less loyalty here.

III

Even accepting the majority’s view that the FRA’s collection and testing program is appropriately analyzed under a multifactor balancing test, and not under the literal terms of the Fourth Amendment, I would still find the program

invalid. The benefits of suspicionless blood and urine testing are far outstripped by the costs imposed on personal liberty by such sweeping searches. Only by erroneously deriding as “minimal” the privacy and dignity interests at stake, and by uncritically inflating the likely efficacy of the FRA’s testing program, does the majority strike a different balance.

For the reasons stated above, I find nothing minimal about the intrusion on individual liberty that occurs whenever the Government forcibly draws and analyzes a person’s blood and urine. Several aspects of the FRA’s testing program exacerbate the intrusiveness of these procedures. Most strikingly, the agency’s regulations not only do not forbid, but, in fact, appear to invite criminal prosecutors to obtain the blood and urine samples drawn by the FRA and use them as the basis of criminal investigations and trials. See *651 49 CFR 651§ 219.211(d) (1987) (“Each sample ... may be made available to ... a party in litigation upon service of appropriate compulsory process on the custodian of the sample ...”). This is an unprecedented invitation, leaving open the possibility of criminal prosecutions based on suspicionless searches of the human body. Cf. *Treasury Employees*, 489 U.S., at 666, 109 S.Ct., at 1390 (Customs Service drug-testing program prohibits use of test results in criminal prosecutions); *Camara*, 387 U.S., at 537, 87 S.Ct., at 1735.

To be sure, the majority acknowledges, in passing, the possibility of criminal prosecutions, *ante*, at 1415, n. 5, but it refuses to factor this possibility into its Fourth Amendment balancing process, stating that “the record does not disclose that [49 CFR § 219.211(d) (1987)] was intended to be, or actually has been, so used.” *Ibid*. This demurrer is highly disingenuous. The federal parties concede that they find “no prohibition on the release of FRA testing results to prosecutors.” Brief for Federal Parties 10, n. 15. The absence of prosecutions to date—which is likely due to the fact that the FRA’s regulations have been held invalid for much of their brief history—hardly proves that prosecutors will not avail themselves of the FRA’s invitation in the future. If the majority really views the impact of FRA testing on privacy interests as minimal even if these tests generate criminal prosecutions, it should say so. If the prospect of prosecutions would lead the majority to reassess the validity of the testing program with prosecutions as part of the balance, it should say so, too, or condition its approval of that program on the nonrelease of test results to prosecutors. In ducking this important issue, the **1432 majority gravely diserves both the values served by the Fourth Amendment and the rights of those persons whom the FRA searches. Furthermore, the majority’s refusal to restrict the release of test results casts considerable doubt on the conceptual basis of its decision—that the “special need” of railway safety is one “beyond the 652 *652 normal need for law enforcement.” *Ante*, at 1414 (citations omitted).¹⁰

¹⁰ As a result of the majority’s extension of the regulatory search doctrine to searches of the person, individuals the FRA finds to have used drugs may face criminal prosecution, even if their impairment had nothing to do with causing an accident. The majority observes that evidence of criminal behavior unearthed during an otherwise valid regulatory search is not excludible unless the search is shown to be a “pretext” for obtaining evidence for a criminal trial, *ante*, at 1415, n. 5, citing *New York v. Burger*, 482 U.S. 691, 716–717, n. 27, 107 S.Ct. 2636, 2651, n. 27, 96 L.Ed.2d 601 (1987)—a defense the majority belittles but, mercifully, preserves for another day.

The majority also overlooks needlessly intrusive aspects of the testing process itself. Although the FRA requires the collection and testing of both blood and urine, the agency concedes that mandatory urine tests—unlike blood tests—do not measure current impairment and therefore cannot differentiate on-duty impairment from prior drug or alcohol use which has ceased to affect the user’s behavior. See 49 CFR § 219.309(2) (1987) (urine test may reveal use of drugs or alcohol as much as 60 days prior to sampling). Given that the FRA’s stated goal is to ascertain current impairment, and not to identify persons who have used substances in their spare time sufficiently in advance of their railroad duties to pose no risk of on-duty impairment, § 219.101(a), mandatory urine testing seems wholly excessive. At the very least, the FRA could limit its use of urinalysis to confirming findings of current impairment suggested by a person’s blood tests. The additional invasion caused by automatically testing urine as well as blood hardly ensures that privacy interests “will be invaded no more than is necessary.” *T.L.O.*, 469 U.S., at 343, 105 S.Ct., at 744.

The majority’s trivialization of the intrusions on worker privacy posed by the FRA’s testing program is matched at the other extreme by its blind acceptance of the Government’s assertion that testing will “dete[r] employees engaged in safety-sensitive tasks from using controlled substances or alcohol,” and “help railroads obtain invaluable information 653 *653 about the causes of major accidents.” *Ante*, at 1419–1420. With respect, first, to deterrence, it is simply implausible that testing employees *after* major accidents occur, 49 CFR § 219.201(a)(1) (1987), will appreciably discourage them from using drugs or alcohol. As Justice STEVENS observes in his concurring opinion:

“Most people—and I would think most railroad employees as well—do not go to work with the expectation that they may be involved in a major accident, particularly one causing such catastrophic results as loss of life or the release of hazardous material requiring an evacuation. Moreover, even if they are conscious of the possibilities that such an accident might occur and that alcohol or drug use might be a contributing factor, if the risk of serious personal injury does not deter their use of these substances, it seems highly unlikely that the additional threat of loss of employment would have any effect on their behavior.” *Ante*, at 1422.

Under the majority’s deterrence rationale, people who skip school or work to spend a sunny day at the zoo will not taunt the lions because their truancy or absenteeism might be discovered in the event they are mauled. It is, of course, the fear of the accident, not the fear of a postaccident revelation, that deters. The majority’s credulous acceptance of the FRA’s deterrence rationale is made all the more suspect by the agency’s failure to introduce, in an otherwise ample administrative record, *any* studies explaining or supporting its theory of accident deterrence.

The poverty of the majority’s deterrence rationale leaves the Government’s interest ****1433** in diagnosing the causes of major accidents as the sole remaining justification for the FRA’s testing program. I do not denigrate this interest, but it seems a slender thread from which to hang such an intrusive program, particularly given that the knowledge that one or more workers were impaired at the time of an accident falls far short of proving that substance abuse caused or exacerbated ***654** that accident. See 839 F.2d 575, 587 (CA9 1988). Some corroborative evidence is needed: witness or co-worker accounts of a worker’s misfeasance, or at least indications that the cause of the accident was within a worker’s area of responsibility. Such particularized facts are, of course, the very essence of the individualized suspicion requirement which the respondent railroad workers urge, and which the Court of Appeals found to “pos[e] no insuperable burden on the government.” *Id.*, at 588. Furthermore, reliance on the importance of diagnosing the causes of an accident as a critical basis for upholding the FRA’s testing plan is especially hard to square with our frequent admonition that the interest in ascertaining the causes of a criminal episode does not justify departure from the Fourth Amendment’s requirements. “[T]his Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime....” *Katz*, 389 U.S., at 356, 88 S.Ct., at 514. Nor should it here.

IV

In his first dissenting opinion as a Member of this Court, Oliver Wendell Holmes observed:

“Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.” *Northern Securities Co. v. United States*, 193 U.S. 197, 400–401, 24 S.Ct. 436, 468, 48 L.Ed. 679 (1904).

A majority of this Court, swept away by society’s obsession with stopping the scourge of illegal drugs, today succumbs to the popular pressures described by Justice Holmes. In upholding the FRA’s plan for blood and urine testing, the **655** ***655** majority bends time-honored and textually based principles of the Fourth Amendment—principles the Framers of the Bill of Rights designed to ensure that the Government has a strong and individualized justification when it seeks to invade an individual’s privacy. I believe the Framers would be appalled by the vision of mass governmental intrusions upon the integrity of the human body that the majority allows to become reality. The immediate victims of the majority’s constitutional timorousness will be those railroad workers whose bodily fluids the Government may now forcibly collect and analyze. But ultimately, today’s decision will reduce the privacy all citizens may enjoy, for, as Justice Holmes understood, principles of law, once bent, do not snap back easily. I dissent.

Nat’l Treasury Emps. v. Von Raab, **489 U.S. 656 (1989)**

Union and union president brought action against United States Customs Service to obtain injunction and to challenge constitutionality of drug-testing program that analyzed urine specimens of employees who applied for promotion to positions involving interdiction of illegal drugs, requiring them to carry firearms or handle classified materials. Customs Service moved to dismiss. The United States District Court for the Eastern District of Louisiana, Robert F. Collins, J., 649 F.Supp. 380, denied motion to dismiss and granted injunctive and declaratory relief. Customs Service appealed. The Court of Appeals for the Fifth Circuit, Alvin B. Rubin, Circuit Judge, 816 F.2d 170, vacated injunction, and certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) Custom Service’s drug-testing program was subject to reasonableness requirement of Fourth Amendment; (2) Customs Service did not need warrant to conduct drug-testing program; and (3) suspicionless drug-testing of employees applying for promotion to positions involving interdiction of illegal drugs or requiring them to carry firearms was reasonable under Fourth Amendment.

Affirmed in part and vacated in part and remanded.

Justice Marshall dissented and filed an opinion in which Justice Brennan joined.

Justice Scalia dissented and filed an opinion in which Justice Stevens joined.

**1385 *656 Syllabus*

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The United States Customs Service, which has as its primary enforcement mission the interdiction and seizure of illegal drugs smuggled into the country, has implemented a drug-screening program requiring urinalysis tests of Service employees seeking transfer or promotion to positions having a direct involvement in drug interdiction or requiring the incumbent to carry firearms or to handle “classified” material. Among other things, the program requires that an applicant be notified that his selection is contingent upon successful completion of drug screening, sets forth procedures for collection and analysis of the requisite samples and procedures designed both to ensure against adulteration or substitution of specimens and to limit the intrusion on employee privacy, and provides that test results may not be turned over to any other agency, including criminal prosecutors, without the employee’s written consent. Petitioners, a federal employees’ union and one of its officials, filed suit on behalf of Service employees seeking covered positions, alleging that the drug-testing program violated, *inter alia*, the Fourth Amendment. The District Court agreed and enjoined the program. The Court of Appeals vacated the injunction, **1386 holding that, although the program effects a search within the meaning of the Fourth Amendment, such searches are reasonable in light of their limited scope and the Service’s strong interest in detecting drug use among employees in covered positions.

Held:

1. Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment. Cf. *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602, 616–618, 109 S.Ct. 1402, 1412–1413, 103 L.Ed.2d 639 (1989). However, because the Service’s testing program is not designed to serve the ordinary needs of law enforcement—*i.e.*, test results may not be used in a criminal prosecution without the employee’s consent, and the purposes of the program are to deter drug use among those eligible for promotion to sensitive positions and to prevent the promotion of drug users to those positions—the public interest in the program must be balanced against *657 the individual’s privacy concerns implicated by the tests to determine whether a warrant, probable cause, or some level of individualized suspicion is required in this particular context. *Railway Labor Executives*, 489 U.S., at 619–620, 109 S.Ct., at 1413–1414. Pp. 1389–1391.

2. A warrant is not required by the balance of privacy and governmental interests in the context of this case. Such a requirement would serve only to divert valuable agency resources from the Service's primary mission, which would be compromised if warrants were necessary in connection with routine, yet sensitive, employment decisions. Furthermore, a warrant would provide little or no additional protection of personal privacy, since the Service's program defines narrowly and specifically the circumstances justifying testing and the permissible limits of such intrusions; affected employees know that they must be tested, are aware of the testing procedures that the Service must follow, and are not subject to the discretion of officials in the field; and there are no special facts for a neutral magistrate to evaluate, in that implementation of the testing process becomes automatic when an employee pursues a covered position. Pp. 1390–1391.

3. The Service's testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry firearms, is reasonable despite the absence of a requirement of probable cause or of some level of individualized suspicion. Pp. 1391–1396.

(a) In light of evidence demonstrating that there is a national crisis in law enforcement caused by the smuggling of illicit narcotics, the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeachable integrity and judgment. It also has a compelling interest in preventing the risk to the life of the citizenry posed by the potential use of deadly force by persons suffering from impaired perception and judgment. These governmental interests outweigh the privacy interests of those seeking promotion to such positions, who have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test by virtue of the special, and obvious, physical and ethical demands of the positions. Pp. 1392–1394.

(b) Petitioners' contention that the testing program is unreasonable because it is not based on a belief that testing will reveal any drug use by covered employees evinces an unduly narrow view of the context in which the program was implemented. Although it was not motivated by any perceived drug problem among Service employees, the program is nevertheless justified by the extraordinary safety and national security hazards that would attend the promotion of drug users to the sensitive positions in question. Moreover, the mere circumstance that all but a few of the ****1387** employees tested are innocent does not impugn the program's ***658** validity, since it is designed to prevent the substantial harm that could be caused by the promotion of drug users as much as it is designed to detect actual drug use. Pp. 1394–1395.

(c) Also unpersuasive is petitioners' contention that the program is not a sufficiently productive mechanism to justify its intrusion on Fourth Amendment interests because illegal drug users can easily avoid detection by temporary abstinence or by surreptitious adulteration of their urine specimens. Addicts may be unable to abstain even for a limited period or may be unaware of the "fade-away effect" of certain drugs. More importantly, since a particular employee's pattern of elimination for a given drug cannot be predicted with perfect accuracy and may extend for as long as 22 days, and since this information is not likely to be known or available to the employee in any event, he cannot reasonably expect to deceive the test by abstaining after the test date is assigned. Nor can he expect attempts at adulteration to succeed, in view of the precautions built into the program to ensure the integrity of each sample. P. 1396.

4. The record is inadequate for the purpose of determining whether the Service's testing of those who apply for promotion to positions where they would handle "classified" information is reasonable, since it is not clear whether persons occupying particular positions apparently subject to such testing are likely to gain access to sensitive information. On remand, the Court of Appeals should examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric and should, in assessing the reasonableness of requiring tests of those employees, consider pertinent information bearing upon their privacy expectations and the supervision to which they are already subject. Pp. 1396–1397.

816 F.2d 170 (CA5 1987), affirmed in part, vacated in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. ——. SCALIA, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. ——.

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Opinion

*659 Justice KENNEDY delivered the opinion of the Court.

We granted certiorari to decide whether it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions.

I

A

The United States Customs Service, a bureau of the Department of the Treasury, is the federal agency responsible for processing persons, carriers, cargo, and mail into the United States, collecting revenue from imports, and enforcing customs and related laws. See *United States Customs Service, Customs U.S.A., Fiscal Year 1985*, p. 4. An important responsibility of the Service is the interdiction and *660 seizure of contraband, including illegal drugs. *Ibid.* In 1987 alone, Customs agents seized drugs with a retail value of nearly \$9 billion. See *United States Customs Service, Customs U.S.A., Fiscal Year 1987*, p. 40. In the routine discharge of their duties, many Customs employees have direct contact with those who traffic in drugs for profit. Drug import operations, often directed by sophisticated criminal syndicates, *United States v. Mendenhall*, 446 U.S. 544, 561–562, 100 S.Ct. 1870, 1880–1881, 64 L.Ed.2d 497 (1980) (Powell, J., concurring), may be effected by violence or its threat. As a **1388 necessary response, many Customs operatives carry and use firearms in connection with their official duties. App. 109.

In December 1985, respondent, the Commissioner of Customs, established a Drug Screening Task Force to explore the possibility of implementing a drug-screening program within the Service. *Id.*, at 11. After extensive research and consultation with experts in the field, the task force concluded that “drug screening through urinalysis is technologically reliable, valid and accurate.” *Ibid.* Citing this conclusion, the Commissioner announced his intention to require drug tests of employees who applied for, or occupied, certain positions within the Service. *Id.*, at 10–11. The Commissioner stated his belief that “Customs is largely drug-free,” but noted also that “unfortunately no segment

of society is immune from the threat of illegal drug use.” *Id.*, at 10. Drug interdiction has become the agency’s primary enforcement mission, and the Commissioner stressed that “there is no room in the Customs Service for those who break the laws prohibiting the possession and use of illegal drugs.” *Ibid.*

In May 1986, the Commissioner announced implementation of the drug-testing program. Drug tests were made a condition of placement or employment for positions that meet one or more of three criteria. The first is direct involvement in drug interdiction or enforcement of related laws, an activity the Commissioner deemed fraught with obvious dangers to the mission of the agency and the lives of Customs *661 agents. *Id.*, at 17, 113. The second criterion is a requirement that the incumbent carry firearms, as the Commissioner concluded that “[p]ublic safety demands that employees who carry deadly arms and are prepared to make instant life or death decisions be drug free.” *Id.*, at 113. The third criterion is a requirement for the incumbent to handle “classified” material, which the Commissioner determined might fall into the hands of smugglers if accessible to employees who, by reason of their own illegal drug use, are susceptible to bribery or blackmail. *Id.*, at 114.

After an employee qualifies for a position covered by the Customs testing program, the Service advises him by letter that his final selection is contingent upon successful completion of drug screening. An independent contractor contacts the employee to fix the time and place for collecting the sample. On reporting for the test, the employee must produce photographic identification and remove any outer garments, such as a coat or a jacket, and personal belongings. The employee may produce the sample behind a partition, or in the privacy of a bathroom stall if he so chooses. To ensure against adulteration of the specimen, or substitution of a sample from another person, a monitor of the same sex as the employee remains close at hand to listen for the normal sounds of urination. Dye is added to the toilet water to prevent the employee from using the water to adulterate the sample.

Upon receiving the specimen, the monitor inspects it to ensure its proper temperature and color, places a tamper-proof custody seal over the container, and affixes an identification label indicating the date and the individual’s specimen number. The employee signs a chain-of-custody form, which is initialed by the monitor, and the urine sample is placed in a plastic bag, sealed, and submitted to a laboratory.¹

¹ After this case was decided by the Court of Appeals, 816 F.2d 170 (CA5 1987), the United States Department of Health and Human Services, in accordance with recently enacted legislation, Pub.L. 100–71, § 503, 101 Stat. 468–471, promulgated regulations (hereinafter HHS Regulations or HHS Reg.) governing certain federal employee drug-testing programs. 53 Fed.Reg. 11979 (1988). To the extent the HHS Regulations add to, or depart from, the procedures adopted as part of a federal drug-screening program covered by Pub.L. 100–71, the HHS Regulations control. Pub.L. 100–71, § 503(b)(2)(B), 101 Stat. 470. Both parties agree that the Customs Service’s drug-testing program must conform to the HHS Regulations. See Brief for Petitioners 6, n. 8; Brief for Respondent 4–5, and n. 4. We therefore consider the HHS Regulations to the extent they supplement or displace the Commissioner’s original directive. See *California Bankers Assn. v. Shultz*, 416 U.S. 21, 53, 94 S.Ct. 1494, 1513, 39 L.Ed.2d 812 (1974); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281–282, 89 S.Ct. 518, 525–526, 21 L.Ed.2d 474 (1969).

One respect in which the original Customs directive differs from the now-prevailing regime concerns the extent to which the employee may be required to disclose personal medical information. Under the Service’s original plan, each tested employee was asked to disclose, at the time the urine sample was collected, any medications taken within the last 30 days, and to explain any circumstances under which he may have been in legitimate contact with illegal substances within the last 30 days. Failure to provide this information at this time could result in the agency not considering the effect of medications or other licit contacts with drugs on a positive test result. Under the HHS Regulations, an employee need not provide information concerning medications when he produces the sample for testing. He may instead present such information only after he is notified that his specimen tested positive for illicit drugs, at which time the Medical Review Officer reviews all records made available by the employee to determine whether the positive indication could have been caused by lawful use of drugs. See HHS Reg. § 2.7, 53 Fed.Reg. 11985–11986 (1988).

*662 **1389 The laboratory tests the sample for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine. Two tests are used. An initial screening test uses the enzyme-multiplied-immunoassay technique (EMIT). Any specimen that is identified as positive on this initial test must then be confirmed using gas chromatography/mass spectrometry (GC/MS). Confirmed positive results are reported to a “Medical Review Officer,” “[a] licensed physician ... who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual’s positive test result together with his or her medical history and any other relevant biomedical information.” HHS Reg. § 1.2, *663 53 Fed.Reg. 11980 (1988); HHS Reg. § 2.4(g), 53 Fed.Reg., at 11983. After verifying the positive result, the Medical Review Officer transmits it to the agency.

Customs employees who test positive for drugs and who can offer no satisfactory explanation are subject to dismissal from the Service. Test results may not, however, be turned over to any other agency, including criminal prosecutors, without the employee's written consent.

B

Petitioners, a union of federal employees and a union official, commenced this suit in the United States District Court for the Eastern District of Louisiana on behalf of current Customs Service employees who seek covered positions. Petitioners alleged that the Custom Service drug-testing program violated, *inter alia*, the Fourth Amendment. The District Court agreed. 649 F.Supp. 380 (1986). The court acknowledged "the legitimate governmental interest in a drug-free work place and work force," but concluded that "the drug testing plan constitutes an overly intrusive policy of searches and seizures without probable cause or reasonable suspicion, in violation of legitimate expectations of privacy." *Id.*, at 387. The court enjoined the drug-testing program, and ordered the Customs Service not to require drug tests of any applicants for covered positions.

A divided panel of the United States Court of Appeals for the Fifth Circuit vacated the injunction. 816 F.2d 170 (1987). The court agreed with petitioners that the drug-screening program, by requiring an employee to produce a urine sample for chemical testing, effects a search within the meaning of the Fourth Amendment. The court held further that the searches required by the Commissioner's directive are reasonable under the Fourth Amendment. It first noted that "[t]he Service has attempted to minimize the intrusiveness of the search" by not requiring visual observation of the act of urination and by affording notice to the employee that *664 he will be tested. *Id.*, at 177. The court also considered it significant that the program limits discretion in determining which employees are to be tested, *ibid.*, and noted **1390 that the tests are an aspect of the employment relationship, *id.*, at 178.

The court further found that the Government has a strong interest in detecting drug use among employees who meet the criteria of the Customs program. It reasoned that drug use by covered employees casts substantial doubt on their ability to discharge their duties honestly and vigorously, undermining public confidence in the integrity of the Service and concomitantly impairing the Service's efforts to enforce the drug laws. *Ibid.* Illicit drug users, the court found, are susceptible to bribery and blackmail, may be tempted to divert for their own use portions of any drug shipments they interdict, and may, if required to carry firearms, "endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use." *Ibid.* "Considering the nature and responsibilities of the jobs for which applicants are being considered at Customs and the limited scope of the search," the court stated, "the exaction of consent as a condition of assignment to the new job is not unreasonable." *Id.*, at 179.

The dissenting judge concluded that the Customs program is not an effective method for achieving the Service's goals. He argued principally that an employee "given a five day notification of a test date need only abstain from drug use to prevent being identified as a user." *Id.*, at 184. He noted also that persons already employed in sensitive positions are not subject to the test. *Ibid.* Because he did not believe the Customs program can achieve its purposes, the dissenting judge found it unreasonable under the Fourth Amendment.

We granted certiorari. 485 U.S. 903, 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988). We now affirm so much of the judgment of the Court of Appeals as upheld the testing of employees directly involved in drug interdiction or required to carry firearms. We vacate the *665 judgment to the extent it upheld the testing of applicants for positions requiring the incumbent to handle classified materials, and remand for further proceedings.

II

^[1] ^[2] In *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616–618, 109 S.Ct. 1402, 1412–1413, 103 L.Ed.2d 639, decided today, we held that federal regulations requiring employees of private railroads to produce urine samples for chemical testing implicate the Fourth Amendment, as those tests invade reasonable expectations of privacy. Our

earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer, *O'Connor v. Ortega*, 480 U.S. 709, 717, 107 S.Ct. 1492, 1498, 94 L.Ed.2d 714 (1987) (plurality opinion); see *id.*, at 731, 107 S.Ct., at 1505 (SCALIA, J., concurring in judgment), and, in view of our holding in *Railway Labor Executives* that urine tests are searches, it follows that the Customs Service's drug-testing program must meet the reasonableness requirement of the Fourth Amendment.

^[3] While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, see, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987); *United States v. Karo*, 468 U.S. 705, 717, 104 S.Ct. 3296, 3304, 82 L.Ed.2d 530 (1984), our decision in *Railway Labor Executives* reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. *Ante*, at 1413–1416. See also *New Jersey v. T.L.O.*, 469 U.S. 325, 342, n. 8, 105 S.Ct. 733, 743, n. 8, 83 L.Ed.2d 720 (1985); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–561, 96 S.Ct. 3074, 3082–3085, 49 L.Ed.2d 1116 (1976). As we note in *Railway Labor Executives*, our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond ***1391** the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or ***666** some level of individualized suspicion in the particular context. *Ante*, at 1413–1414.

It is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent. The purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions. These substantial interests, no less than the Government's concern for safe rail transportation at issue in *Railway Labor Executives*, present a special need that may justify departure from the ordinary warrant and probable-cause requirements.

A

^[4] Petitioners do not contend that a warrant is required by the balance of privacy and governmental interests in this context, nor could any such contention withstand scrutiny. We have recognized before that requiring the Government to procure a warrant for every work-related intrusion “would conflict with ‘the common-sense realization that government offices could not function if every employment decision became a constitutional matter.’ ” *O'Connor v. Ortega*, *supra*, 480 U.S., at 722, 107 S.Ct., at 1500, quoting *Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 1688, 75 L.Ed.2d 708 (1983). See also 480 U.S., at 732, 107 S.Ct., at 1506 (SCALIA, J., concurring in judgment); *New Jersey v. T.L.O.*, *supra*, 469 U.S., at 340, 105 S.Ct., at 742 (noting that “[t]he warrant requirement ... is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools”). Even if Customs Service employees are more likely to be familiar with the procedures required to obtain a warrant than most other Government workers, requiring a warrant in this context would serve only to divert valuable agency resources from the Service's primary mission. ***667** The Customs Service has been entrusted with pressing responsibilities, and its mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions.

Furthermore, a warrant would provide little or nothing in the way of additional protection of personal privacy. A warrant serves primarily to advise the citizen that an intrusion is authorized by law and limited in its permissible scope and to interpose a neutral magistrate between the citizen and the law enforcement officer “engaged in the often competitive enterprise of ferreting out crime.” *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). But in the present context, “the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically ..., and doubtless are well known to covered employees.” *Ante*, at 1415. Under the Customs program, every employee who seeks a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the Service must follow in administering the test. A covered employee is simply not subject “to the discretion of the official in the field.” *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 532, 87 S.Ct. 1727, 1732, 18 L.Ed.2d 930 (1967). The process becomes automatic when the employee elects to apply for, and thereafter pursue, a covered position. Because the Service does not make a

discretionary determination to search based on a judgment that certain conditions are present, there are simply “no special facts for a neutral magistrate to evaluate.” *South Dakota v. Opperman*, 428 U.S. 364, 383, 96 S.Ct. 3092, 3104, 49 L.Ed.2d 1000 (1976) (Powell, J., concurring).

B

^{15]} Even where it is reasonable to dispense with the warrant requirement in the particular circumstances, a search ordinarily must be based on probable cause. *Ante*, at 1416. Our cases teach, however, that the probable-cause standard “ ‘is peculiarly related to criminal investigations.’ ” *Colorado v. Bertine*, 479 U.S. 367, 371, 107 S.Ct. 738, 741, 93 L.Ed.2d 739 (1987), quoting *South Dakota v. Opperman*, *supra*, 428 U.S., at 370, n. 5, 96 S.Ct., at 3097, n. 5. In particular, the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, *Colorado v. Bertine*, *supra*, 479 U.S., at 371, 107 S.Ct., at 741; see also *O’Connor v. Ortega*, 480 U.S., at 723, 107 S.Ct., at 1500–1501, especially where the Government seeks to *prevent* the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person. Cf. *Camara v. Municipal Court of San Francisco*, *supra*, 387 U.S., at 535–536, 87 S.Ct., at 1734–1735 (noting that building code inspections, unlike searches conducted pursuant to a criminal investigation, are designed “to prevent even the unintentional development of conditions which are hazardous to public health and safety”); *United States v. Martinez-Fuerte*, 428 U.S., at 557, 96 S.Ct., at 3082 (noting that requiring particularized suspicion before routine stops on major highways near the Mexican border “would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens”). Our precedents have settled that, in certain limited circumstances, the Government’s need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. *E.g.*, *ante*, at 1416–1417. We think the Government’s need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms.

The Customs Service is our Nation’s first line of defense against one of the greatest problems affecting the health and welfare of our population. We have adverted before to “the veritable national crisis in law enforcement caused by smuggling of illicit narcotics.” *United States v. Montoya de Hernandez*, 473 U.S. 531, 538, 105 S.Ct. 3304, 3309, 87 L.Ed.2d 381 (1985). See also *Florida v. Royer*, 460 U.S. 491, 513, 103 S.Ct. 1319, 1332, 75 L.Ed.2d 229 (BLACKMUN, J., dissenting). Our ***669** cases also reflect the traffickers’ seemingly inexhaustible repertoire of deceptive practices and elaborate schemes for importing narcotics, *e.g.*, *United States v. Montoya de Hernandez*, *supra*, 473 U.S., at 538–539, 105 S.Ct., at 3309–3310; *United States v. Ramsey*, 431 U.S. 606, 608–609, 97 S.Ct. 1972, 1974–1975, 52 L.Ed.2d 617 (1977). The record in this case confirms that, through the adroit selection of source locations, smuggling routes, and increasingly elaborate methods of concealment, drug traffickers have managed to bring into this country increasingly large quantities of illegal drugs. App. 111. The record also indicates, and it is well known, that drug smugglers do not hesitate to use violence to protect their lucrative trade and avoid apprehension. *Id.*, at 109.

Many of the Service’s employees are often exposed to this criminal element and to the controlled substances it seeks to smuggle into the country. *Ibid.* Cf. *United States v. Montoya de Hernandez*, *supra*, 473 U.S., at 543, 105 S.Ct., at 3311. The physical safety of these employees may be threatened, and many may be tempted not only by bribes from the traffickers with whom they deal, but also by their own ***1393** access to vast sources of valuable contraband seized and controlled by the Service. The Commissioner indicated below that “Customs [o]fficers have been shot, stabbed, run over, dragged by automobiles, and assaulted with blunt objects while performing their duties.” App. at 109–110. At least nine officers have died in the line of duty since 1974. He also noted that Customs officers have been the targets of bribery by drug smugglers on numerous occasions, and several have been removed from the Service for accepting bribes and for other integrity violations. *Id.*, at 114. See also United States Customs Service, Customs U.S.A., Fiscal Year 1987, p. 31 (reporting internal investigations that resulted in the arrest of 24 employees and 54 civilians); United States Customs Service, Customs U.S.A., Fiscal Year 1986, p. 32 (reporting that 334 criminal and serious integrity investigations were conducted during the fiscal year, resulting in the arrest of 37 employees and 17 civilians); United States Customs Service, Customs ***670** U.S.A., Fiscal Year 1985, p. 32 (reporting that 284 criminal

and serious integrity investigations were conducted during the 1985 fiscal year, resulting in the arrest of 15 employees and 51 civilians).

It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment. Indeed, the Government's interest here is at least as important as its interest in searching travelers entering the country. We have long held that travelers seeking to enter the country may be stopped and required to submit to a routine search without probable cause, or even founded suspicion, "because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll v. United States*, 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925). See also *United States v. Montoya de Hernandez*, *supra*, 473 U.S., at 538, 105 S.Ct., at 3308; *United States v. Ramsey*, *supra*, 431 U.S., at 617–619, 97 S.Ct., at 1979–1980. This national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics. A drug user's indifference to the Service's basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals. The public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.

The public interest likewise demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm, even if the incumbent is not engaged directly in the interdiction of drugs. Customs employees who may use deadly force plainly "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Ante*, at 1419. We agree with the Government *671 that the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force. Indeed, ensuring against the creation of this dangerous risk will itself further Fourth Amendment values, as the use of deadly force may violate the Fourth Amendment in certain circumstances. See *Tennessee v. Garner*, 471 U.S. 1, 7–12, 105 S.Ct. 1694, 1699–1701, 85 L.Ed.2d 1 (1985).

Against these valid public interests we must weigh the interference with individual liberty that results from requiring these classes of employees to undergo a urine test. The interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances. *Ante*, at 1418. We have recognized, however, that the "operational realities of the workplace" may **1394 render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts. See *O'Connor v. Ortega*, 480 U.S., at 717, 107 S.Ct., at 1497; *id.*, at 732, 107 S.Ct., at 1505 (SCALIA, J., concurring in judgment). While these operational realities will rarely affect an employee's expectations of privacy with respect to searches of his person, or of personal effects that the employee may bring to the workplace, *id.*, at 716, 725, 107 S.Ct., at 1497, 1501, it is plain that certain forms of public employment may diminish privacy expectations even with respect to such personal searches. Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. Similarly, those who join our military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions. Cf. *Snepp v. United States*, 444 U.S. 507, 509, n. 3, 100 S.Ct. 763, 765, n. 3, 62 L.Ed.2d 704 (1980); *Parker v. Levy*, 417 U.S. 733, 758, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974); *Committee for GI Rights v. *672 Callaway*, 171 U.S.App.D.C. 73, 84, 518 F.2d 466, 477 (1975).

We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. Cf. *In re Caruso v. Ward*, 72 N.Y.2d 432, 441, 534 N.Y.S.2d 142, 146–148, 530 N.E.2d 850, 854–855 (1988). While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.²

² The procedures prescribed by the Customs Service for the collection and analysis of the requisite samples do not carry the grave potential for “arbitrary and oppressive interference with the privacy and personal security of individuals,” *United States v. Martinez–Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976), that the Fourth Amendment was designed to prevent. Indeed, these procedures significantly minimize the program’s intrusion on privacy interests. Only employees who have been tentatively accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions. Employees are also notified in advance of the scheduled sample collection, thus reducing to a minimum any “unsettling show of authority,” *Delaware v. Prouse*, 440 U.S. 648, 657, 99 S.Ct. 1391, 1398, 59 L.Ed.2d 660 (1979), that may be associated with unexpected intrusions on privacy. Cf. *United States v. Martinez–Fuerte*, *supra*, 428 U.S., at 559, 96 S.Ct., at 3083 (noting that the intrusion on privacy occasioned by routine highway checkpoints is minimized by the fact that motorists “are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere”); *Wyman v. James*, 400 U.S. 309, 320–321, 91 S.Ct. 381, 387–388, 27 L.Ed.2d 408 (1971) (providing a welfare recipient with advance notice that she would be visited by a welfare caseworker minimized the intrusion on privacy occasioned by the visit). There is no direct observation of the act of urination, as the employee may provide a specimen in the privacy of a stall.

Further, urine samples may be examined only for the specified drugs. The use of samples to test for any other substances is prohibited. See HHS Reg. § 2.1(c), 53 Fed.Reg. 11980 (1988). And, as the Court of Appeals noted, the combination of EMIT and GC/MS tests required by the Service is highly accurate, assuming proper storage, handling, and measurement techniques. 816 F.2d, at 181. Finally, an employee need not disclose personal medical information to the Government unless his test result is positive, and even then any such information is reported to a licensed physician. Taken together, these procedures significantly minimize the intrusiveness of the Service’s drug-screening program.

***673 **1395** Without disparaging the importance of the governmental interests that support the suspicionless searches of these employees, petitioners nevertheless contend that the Service’s drug-testing program is unreasonable in two particulars. First, petitioners argue that the program is unjustified because it is not based on a belief that testing will reveal any drug use by covered employees. In pressing this argument, petitioners point out that the Service’s testing scheme was not implemented in response to any perceived drug problem among Customs employees, and that the program actually has not led to the discovery of a significant number of drug users. Brief for Petitioners 37, 44; Tr. of Oral Arg. 11–12, 20–21. Counsel for petitioners informed us at oral argument that no more than 5 employees out of 3,600 have tested positive for drugs. *Id.*, at 11. Second, petitioners contend that the Service’s scheme is not a “sufficiently productive mechanism to justify [its] intrusion upon Fourth Amendment interests,” *Delaware v. Prouse*, 440 U.S. 648, 658–659, 99 S.Ct. 1391, 1398–1399, 59 L.Ed.2d 660 (1979), because illegal drug users can avoid detection with ease by temporary abstinence or by surreptitious adulteration of their urine specimens. Brief for Petitioners 46–47. These contentions are unpersuasive.

***674** Petitioners’ first contention evinces an unduly narrow view of the context in which the Service’s testing program was implemented. Petitioners do not dispute, nor can there be doubt, that drug abuse is one of the most serious problems confronting our society today. There is little reason to believe that American workplaces are immune from this pervasive social problem, as is amply illustrated by our decision in *Railway Labor Executives*. See also *Masino v. United States*, 589 F.2d 1048, 1050, 218 Ct.Cl. 531 (1978) (describing marijuana use by two Customs inspectors). Detecting drug impairment on the part of employees can be a difficult task, especially where, as here, it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments. Indeed, the almost unique mission of the Service gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty, for such use creates risks of bribery and blackmail against which the Government is entitled to guard. In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service’s policy of deterring drug users from seeking such promotions cannot be deemed unreasonable.

The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program’s validity. The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, see *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), and of motorists who are stopped at the checkpoints we approved in *United States v. Martinez–Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). The Service’s program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect those employees who use drugs. Where, as here, the possible harm against which the Government seeks to guard is ***675** substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government’s goal.³

³ The point is well illustrated also by the Federal Government’s practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive. Applying our precedents dealing with administrative searches, see, e.g., *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), the lower courts that have considered the question have consistently concluded that such searches are reasonable under the Fourth Amendment. As Judge Friendly explained in a leading case upholding such searches:

“When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.” *United States v. Edwards*, 498 F.2d 496, 500 (CA2 1974) (emphasis in original).

See also *United States v. Skipwith*, 482 F.2d 1272, 1275–1276 (CA5 1973); *United States v. Davis*, 482 F.2d 893, 907–912 (CA9 1973). It is true, as counsel for petitioners pointed out at oral argument, that these air piracy precautions were adopted in response to an observable national and international hijacking crisis. Tr. of Oral Arg. 13. Yet we would not suppose that, if the validity of these searches be conceded, the Government would be precluded from conducting them absent a demonstration of danger as to any particular airport or airline. It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.

Nor would we think, in view of the obvious deterrent purpose of these searches, that the validity of the Government’s airport screening program necessarily turns on whether significant numbers of putative air pirates are actually discovered by the searches conducted under the program. In the 15 years the program has been in effect, more than 9.5 *billion* persons have been screened, and over 10 *billion* pieces of luggage have been inspected. See Federal Aviation Administration, Semiannual Report to Congress on the Effectiveness of The Civil Aviation Program (Nov.1988) (Exhibit 6). By far the overwhelming majority of those persons who have been searched, like Customs employees who have been tested under the Service’s drug-screening scheme, have proved entirely innocent—only 42,000 firearms have been detected during the same period. *Ibid.* When the Government’s interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success. See *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979).

***676 **1396** We think petitioners’ second argument—that the Service’s testing program is ineffective because employees may attempt to deceive the test by a brief abstention before the test date, or by adulterating their urine specimens—overstates the case. As the Court of Appeals noted, addicts may be unable to abstain even for a limited period of time, or may be unaware of the “fade-away effect” of certain drugs. 816 F.2d, at 180. More importantly, the avoidance techniques suggested by petitioners are fraught with uncertainty and risks for those employees who venture to attempt them. A particular employee’s pattern of elimination for a given drug cannot be predicted with perfect accuracy, and, in any event, this information is not likely to be known or available to the employee. Petitioners’ own expert indicated below that the time it takes for particular drugs to become undetectable in urine can vary widely depending on the individual, and may extend for as long as 22 days. App. 66. See also *ante*, at 1420 (noting Court of Appeals’ reliance on certain academic literature that indicates that the testing of urine can discover drug use “for ... weeks after the ingestion of the drug’ ”). Thus, contrary to petitioners’ suggestion, no employee reasonably can expect to deceive the test by the simple expedient of abstaining after the test date is assigned. Nor can he expect attempts at adulteration to succeed, in view of the precautions taken by the sample collector to ensure the integrity of the sample. In all the circumstances, we are persuaded that the program bears a close and substantial relation to the Service’s goal of deterring drug users from seeking promotion to sensitive positions.⁴

⁴ Indeed, petitioners’ objection is based on those features of the Service’s program—the provision of advance notice and the failure of the sample collector to observe directly the act of urination—that contribute significantly to diminish the program’s intrusion on privacy. See *supra*, at 1394, n. 2. Thus, under petitioners’ view, “the testing program would be more likely to be constitutional if it were more pervasive and more invasive of privacy.” 816 F.2d, at 180.

677** In sum, we believe the Government has demonstrated that its compelling interests in safeguarding our borders and the *1397** public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm. We hold that the testing of these employees is reasonable under the Fourth Amendment.

C

^{16]} We are unable, on the present record, to assess the reasonableness of the Government's testing program insofar as it covers employees who are required "to handle classified material." App. 17. We readily agree that the Government has a compelling interest in protecting truly sensitive information from those who, "under compulsion of circumstances or for other reasons, ... might compromise [such] information." *Department of Navy v. Egan*, 484 U.S. 518, 528, 108 S.Ct. 818, 824, 98 L.Ed.2d 918 (1988). See also *United States v. Robel*, 389 U.S. 258, 267, 88 S.Ct. 419, 425, 19 L.Ed.2d 508 (1967) ("We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests.... The Government can deny access to its secrets to those who would use such information to harm the Nation"). We also agree that employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test under the Service's screening program, especially if the positions covered under this category require background investigations, medical examinations, or other intrusions that may be expected to diminish their expectations of privacy in respect of a urinalysis test. Cf. *Department of Navy v. Egan*, *supra*, 484 U.S., at 528, 108 S.Ct., at 824 (noting that the Executive Branch generally subjects those desiring *678 a security clearance to "a background investigation that varies according to the degree of adverse effect the applicant could have on the national security").

It is not clear, however, whether the category defined by the Service's testing directive encompasses only those Customs employees likely to gain access to sensitive information. Employees who are tested under the Service's scheme include those holding such diverse positions as "Accountant," "Accounting Technician," "Animal Caretaker," "Attorney (All)," "Baggage Clerk," "Co-op Student (All)," "Electric Equipment Repairer," "Mail Clerk/Assistant," and "Messenger." App. 42-43. We assume these positions were selected for coverage under the Service's testing program by reason of the incumbent's access to "classified" information, as it is not clear that they would fall under either of the two categories we have already considered. Yet it is not evident that those occupying these positions are likely to gain access to sensitive information, and this apparent discrepancy raises in our minds the question whether the Service has defined this category of employees more broadly than is necessary to meet the purposes of the Commissioner's directive.

We cannot resolve this ambiguity on the basis of the record before us, and we think it is appropriate to remand the case to the Court of Appeals for such proceedings as may be necessary to clarify the scope of this category of employees subject to testing. Upon remand the Court of Appeals should examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric. In assessing the reasonableness of requiring tests of these employees, the court should also consider pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which these employees are already subject.

III

Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug *679 use, the collection and subsequent chemical analysis of such samples are searches **1398 that must meet the reasonableness requirement of the Fourth Amendment. Because the testing program adopted by the Customs Service is not designed to serve the ordinary needs of law enforcement, we have balanced the public interest in the Service's testing program against the privacy concerns implicated by the tests, without reference to our usual presumption in favor of the procedures specified in the Warrant Clause, to assess whether the tests required by Customs are reasonable.

We hold that the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable. The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions. We do not decide whether testing those who apply for promotion to positions where they would handle "classified" information is reasonable because we find the record inadequate for

this purpose.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

For the reasons stated in my dissenting opinion in *Skinner v. Railway Labor Executives' Assn.*, 489 U.S., at 635, 109 S.Ct., at 1423, I also dissent from the Court's decision in this case. Here, as in *Skinner*, the Court's abandonment of the Fourth Amendment's express requirement that searches of the person rest on *680 probable cause is unprincipled and unjustifiable. But even if I believed that balancing analysis was appropriate under the Fourth Amendment, I would still dissent from today's judgment for the reasons stated by Justice SCALIA in his dissenting opinion, *post*, p. 1398, and for the reasons noted by the dissenting judge below relating to the inadequate tailoring of the Customs Service's drug-testing plan. See 816 F.2d 170, 182–184 (CA5 1987) (Hill, J.).

Justice SCALIA, with whom Justice STEVENS joins, dissenting.

The issue in this case is not whether Customs Service employees can constitutionally be denied promotion, or even dismissed, for a single instance of unlawful drug use, at home or at work. They assuredly can. The issue here is what steps can constitutionally be taken to *detect* such drug use. The Government asserts it can demand that employees perform “an excretory function traditionally shielded by great privacy,” *Skinner v. Railway Labor Executives' Assn.*, 489 U.S., at 626, 109 S.Ct., at 1418, while “a monitor of the same sex ... remains close at hand to listen for the normal sounds,” *ante*, at 1388, and that the excretion thus produced be turned over to the Government for chemical analysis. The Court agrees that this constitutes a search for purposes of the Fourth Amendment—and I think it obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity.

Until today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment. See *Bell v. Wolfish*, 441 U.S. 520, 558–560, 99 S.Ct. 1861, 1884–1885, 60 L.Ed.2d 447 (1979). Today, in *Skinner*, we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court's opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection **1399 between such use and grave harm, rendered the search a reasonable means of protecting society. *681 I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” While there are some absolutes in Fourth Amendment law, as soon as those have been left behind and the question comes down to whether a particular search has been “reasonable,” the answer depends largely upon the social necessity that prompts the search. Thus, in upholding the administrative search of a student's purse in a school, we began with the observation (documented by an agency report to Congress) that “[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.” *New Jersey v. T.L.O.*, 469 U.S. 325, 339, 105 S.Ct. 733, 741, 83 L.Ed.2d 720 (1985). When we approved fixed checkpoints near the Mexican border to stop and search cars for illegal aliens, we observed at the outset that “the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country,” and that “[i]nterdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems.” *United States v. Martinez-Fuerte*, 428 U.S. 543, 551–552, 96 S.Ct. 3074, 3080, 49 L.Ed.2d 1116 (1976). And the substantive analysis of our opinion today in *Skinner* begins, “[t]he problem of alcohol use on American railroads is as old as the industry itself,” and goes on to cite statistics concerning that problem and the accidents it causes, including a 1979 study finding that “23% of the operating personnel were ‘problem drinkers.’ ” *Skinner*, 489 U.S., at 606, and 607, n.

1, 109 S.Ct., at 1407, and 1407, n. 1.

The Court's opinion in the present case, however, will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees. *682 Instead, there are assurances that "[t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population," *ante*, at 1392; that "[m]any of the Service's employees are often exposed to [drug smugglers] and to the controlled substances [they seek] to smuggle into the country," *ante*, at 1392; that "Customs officers have been the targets of bribery by drug smugglers on numerous occasions, and several have been removed from the Service for accepting bribes and other integrity violations," *ibid.*; that "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment," *ante*, at —; that the "national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics," *ante*, at 1393; and that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force," *ibid.* To paraphrase Churchill, all this contains much that is obviously true, and much that is relevant; unfortunately, what is obviously true is not relevant, and what is relevant is not obviously true. The only pertinent points, it seems to me, are supported by nothing but speculation, and not very plausible speculation at that. It is not apparent to me that a Customs Service employee who uses drugs is significantly more likely to be bribed by a drug smuggler, any more than a Customs Service employee who wears diamonds is significantly more likely to be bribed by a diamond smuggler—unless, perhaps, the addiction to drugs is so severe, and requires **1400 so much money to maintain, that it would be detectable even without benefit of a urine test. Nor is it apparent to me that Customs officers who use drugs will be appreciably less "sympathetic" to their drug-interdiction mission, any more than police officers who exceed the speed limit in their private cars are appreciably less *683 sympathetic to their mission of enforcing the traffic laws. (The only difference is that the Customs officer's individual efforts, if they are irreplaceable, can theoretically affect the availability of his own drug supply—a prospect so remote as to be an absurd basis of motivation.) Nor, finally, is it apparent to me that urine tests will be even marginally more effective in preventing gun-carrying agents from risking "impaired perception and judgment" than is their current knowledge that, if impaired, they may be shot dead in unequal combat with unimpaired smugglers—unless, again, their addiction is so severe that no urine test is needed for detection.

What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of *even a single instance* in which any of the speculated horrors actually occurred: an instance, that is, in which the cause of bribe-taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use. Although the Court points out that several employees have in the past been removed from the Service for accepting bribes and other integrity violations, and that at least nine officers have died in the line of duty since 1974, *ante*, at 1392, there is no indication whatever that these incidents were related to drug use by Service employees. Perhaps concrete evidence of the severity of a problem is unnecessary when it is so well known that courts can almost take judicial notice of it; but that is surely not the case here. The Commissioner of Customs himself has stated that he "believe[s] that Customs is largely drug-free," that "[t]he extent of illegal drug use by Customs employees was not the reason for establishing this program," and that he "hope[s] and expect[s] to receive reports of very few positive findings through drug screening." App. 10, 15. The test results have fulfilled those hopes and expectations. According to the Service's counsel, out of 3,600 employees *684 tested, no more than 5 tested positive for drugs. See *ante*, at 1394.

The Court's response to this lack of evidence is that "[t]here is little reason to believe that American workplaces are immune from [the] pervasive social problem" of drug abuse. *Ibid.* Perhaps such a generalization would suffice if the workplace at issue could produce such catastrophic social harm that no risk whatever is tolerable—the secured areas of a nuclear power plant, for example, see *Rushton v. Nebraska Public Power District*, 844 F.2d 562 (CA8 1988). But if such a generalization suffices to justify demeaning bodily searches, without particularized suspicion, to guard against the bribing or blackmailing of a law enforcement agent, or the careless use of a firearm, then the Fourth Amendment has become frail protection indeed. In *Skinner*, *Bell*, *T.L.O.*, and *Martinez-Fuerte*, we took pains to establish the existence of special need for the search or seizure—a need based not upon the existence of a "pervasive social problem" combined with speculation as to the effect of that problem in the field at issue, but rather upon well-known or well-demonstrated evils *in that field*, with well-known or well-demonstrated consequences. In *Skinner*, for example, we pointed to a long history of alcohol abuse in the railroad industry, and noted that in an 8-year period 45 train accidents and incidents had occurred because of alcohol-and drug-impaired railroad employees, killing 34 people, injuring 66, and causing more than \$28 million in property damage. *Ante*, at 1408. In the present case, by contrast, not

only is the Customs Service thought to be “largely drug-free,” but the connection between whatever drug use may exist and serious ****1401** social harm is entirely speculative. Except for the fact that the search of a person is much more intrusive than the stop of a car, the present case resembles *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), where we held that the Fourth Amendment prohibited random stops to check drivers’ licenses and motor vehicle registrations. The contribution of this practice to highway ***685** safety, we concluded, was “marginal at best” since the number of licensed drivers that must be stopped in order to find one unlicensed one “will be large indeed.” *Id.*, at 660, 99 S.Ct., at 1399.

Today’s decision would be wrong, but at least of more limited effect, if its approval of drug testing were confined to that category of employees assigned specifically to drug interdiction duties. Relatively few public employees fit that description. But in extending approval of drug testing to that category consisting of employees who carry firearms, the Court exposes vast numbers of public employees to this needless indignity. Logically, of course, if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs, may endanger others—automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards. A similarly broad scope attaches to the Court’s approval of drug testing for those with access to “sensitive information.”¹ Since this category is not limited to ***686** Service employees with drug interdiction duties, nor to “sensitive information” specifically relating to drug traffic, today’s holding apparently approves drug testing for all federal employees with security clearances—or, indeed, for all federal employees with valuable confidential information to impart. Since drug use is not a particular problem in the Customs Service, employees throughout the Government are no less likely to violate the public trust by taking bribes to feed their drug habit, or by yielding to blackmail. Moreover, there is no reason why this super-protection against harms arising from drug use must be limited to public employees; a law requiring similar testing of private citizens who use dangerous instruments such as guns or cars, or who have access to classified information, would also be constitutional.

¹ The Court apparently approves application of the urine tests to personnel receiving access to “sensitive information.” *Ante*, at 1396. Since, however, it is unsure whether “classified material” is “sensitive information,” it remands with instructions that the Court of Appeals “examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric.” *Ante*, at 1397. I am not sure what these instructions mean. Surely the person who classifies information *always* considers it “sensitive” in some sense—and the Court does not indicate what particular sort of sensitivity is crucial. Moreover, it seems to me most unlikely that “the criteria used by the Service in determining what materials are classified” are any different from those prescribed by the President in his Executive Order on the subject, see Exec. Order No. 12356, 3 CFR 166 (1982 Comp.)—and if there is a difference it is probably unlawful, see § 5.4(b)(2), *id.*, at 177. In any case, whatever idiosyncratic standards for classification the Customs Service might have would seem to be irrelevant, inasmuch as the rule at issue here is not limited to material classified *by the Customs Service*, but includes (and may well apply principally to) material classified elsewhere in the Government—for example, in the Federal Bureau of Investigation, the Drug Enforcement Administration, or the State Department—and conveyed to the Service. See App. 24–25.

There is only one apparent basis that sets the testing at issue here apart from all these other situations—but it is not a basis upon which the Court is willing to rely. I do not believe for a minute that the driving force behind these drug-testing rules was any of the feeble justifications put forward by counsel here and accepted by the Court. The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Customs Service employees announcing the program: “Implementation of the drug screening program would set an important example in our country’s struggle with this most serious threat to our national health and security.” App. 12. ****1402** Or as respondent’s brief to this Court asserted: “[I]f a law enforcement agency and its employees do not take the law seriously, neither will the public on which the agency’s effectiveness depends.” Brief for Respondent 36. What better way to show that the Government is serious about its “war on drugs” than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but it will show to the world that the ***687** Service is “clean,” and—most important of all—will demonstrate the determination of the Government to eliminate this scourge of our society! I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.

There is irony in the Government’s citation, in support of its position, of Justice Brandeis’ statement in *Olmstead v. United States*, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1928) that “[f]or good or for ill, [our Government]

teaches the whole people by its example.” Brief for Respondent 36. Brandeis was there *dissenting* from the Court’s admission of evidence obtained through an unlawful Government wiretap. He was not praising the Government’s example of vigor and enthusiasm in combatting crime, but condemning its example that “the end justifies the means,” 277 U.S., at 485, 48 S.Ct., at 575. An even more apt quotation from that famous Brandeis dissent would have been the following:

“[I]t is ... immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” *Id.*, at 479, 48 S.Ct., at 572.

Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

***Town of Stratford v. Am. Fed'n of State, Cnty. & Mun. Empls.,
Council 15, Local 407,
315 Conn. 49 (2014)***

Synopsis

Background: Union filed a grievance on police officer's behalf, alleging that the town violated the parties' collective bargaining agreement by terminating officer without just cause. Arbitration panel sustained the grievance, and town filed an application to vacate the arbitration award. The Superior Court, Judicial District of Fairfield, Radcliffe, J., denied the town's application to vacate arbitration award, and town sought review. The Appellate Court, Mihalakos, J., 140 Conn.App. 587, 60 A.3d 288, reversed and remanded. Union appealed.

[Holding:] The Supreme Court, Rogers, C.J., held that officer's dishonesty with independent medical examiner was not so egregious as to require nothing less than officer's termination.

Reversed and remanded.

Palmer, J., dissented and filed opinion in which Espinosa, J., joined.

Attorneys and Law Firms

****149** Eric R. Brown, Waterbury, for the appellant (defendant).

Christopher J. Smedick, with whom, on the brief, was James Cresswell, for the appellee (plaintiff).

ROGERS, C.J., and PALMER, ZARELLA, EVELEIGH and ESPINOSA, Js.

Opinion

ROGERS, C.J.

50** The dispositive issue in this certified appeal is whether an arbitration award reinstating a police officer, as opposed to the mandated dismissal of the officer, violated a clearly discernible public policy ***51** against intentional dishonesty by police officers in connection with their employment. The plaintiff, the town of Stratford, filed an application to vacate an award from an arbitration proceeding initiated by the defendant, American Federation of State, County and Municipal Employees, Council 15, Local 407, that reinstated the grievant, Justin Loschiavo, to his employment as a police officer with the Stratford Police Department after he was terminated for lying in connection with his employment. The trial court rendered judgment denying the plaintiff's application and, on appeal, the Appellate Court reversed that judgment and concluded that the arbitration award violated a clear public policy *150** against intentional dishonesty by police officers in connection with their employment. *Stratford v. AFSCME, Council 15, Local 407*, 140 Conn.App. 587, 597, 60 A.3d 288 (2013). This court granted the defendant's petition for certification to appeal on the following issue: "Did the Appellate Court properly determine that the arbitration award in this matter reinstating [Loschiavo] violated a clearly discernible public policy against intentional dishonesty by police officers in connection with their employment which mandated dismissal of [Loschiavo]?" *Stratford v. AFSCME, Council 15, Local 407*, 308 Conn. 922, 923, 94 A.3d 639 (2013). We conclude that while there is a public policy against intentional dishonesty by police officers in connection with their employment, the arbitration award in the present case did not violate public policy. Accordingly, we reverse the judgment of the Appellate Court.

The arbitration decision sets forth the following undisputed facts relevant to our resolution of this appeal. Loschiavo

started working as a probationary police officer for the plaintiff in 2006. He suffers from latent epilepsy, and the plaintiff required that as a condition to his hiring, Loschiavo must remain seizure free throughout his probationary period. He satisfied this *52 requirement and was apparently seizure free until June 6, 2009, when he suffered a seizure while operating a police car and consequently struck two parked cars. Loschiavo's physician, Philip Micalizzi, cleared him to return to light duty in August, 2009, at which point the plaintiff referred Loschiavo to a neurologist, Samuel L. Bridgers, for an independent medical examination to determine "what conditions might allow [Loschiavo] to return to employment while eliminating or minimizing any potential risks with potentially fatal consequences." Although Bridgers determined that Loschiavo was capable to return to work full-time, he restricted this clearance to require Loschiavo to call out sick whenever he felt symptoms of an oncoming seizure.

Upon reviewing Bridgers' report, the plaintiff's human resources director found two discrepancies between that report and the medical report from Micalizzi, Loschiavo's physician. Specifically, Loschiavo failed to inform Bridgers about two seizures he suffered in 2005 and 2008; he further failed to disclose that he had been using or abusing alcohol. Bridgers thereafter reviewed Loschiavo's full medical record and determined that the seizures had been related to alcohol use. He reported that he was unsure whether Loschiavo "can be trusted to avoid activities that might increase his susceptibility to having seizures, particularly alcohol use." Bridgers determined, however, that Loschiavo presented no greater risk after these seizures than he did at the time of his initial hiring, and again cleared him to return to duty.

In light of Bridgers' second report, the plaintiff charged Loschiavo with violating police department policy by lying during the independent medical examination. On March 30, 2010, the plaintiff held a hearing at which Loschiavo was represented by the defendant and counsel. Following the hearing, the plaintiff terminated Loschiavo's employment on the ground that he *53 violated police department policy by lying during the independent medical examination. Following Loschiavo's termination, the defendant filed a grievance on his behalf alleging that his termination was without just cause and in violation of the parties' collective bargaining agreement.

A three member arbitration panel conducted a hearing and thereafter determined that Loschiavo's termination was "excessive" for two reasons. First, Micalizzi and Bridgers both returned Loschiavo **151 to his full duties without restrictions and, second, the plaintiff knew of Loschiavo's condition when he was hired and did not raise any issue of Loschiavo's work performance. The arbitration panel concluded that "[a] police officer's lying about his physical and mental condition to doctors that could return ... [him] to work is [a very serious violation, but] understandable because [he] wants [his] job back." On December 8, 2010, the panel ordered that the plaintiff reinstate Loschiavo "without [back pay] but no loss [of] seniority." The panel also "recognize[d] that the [plaintiff] is well within its rights to have [Loschiavo] examined by a medical doctor, from time to time, to make sure that his condition is stable and that he is not using alcohol." Thus, Loschiavo's total reprimand for the violation was a suspension of nine months without back pay, from his March, 2010 termination to the December, 2010 reinstatement, and his possible subjection to future medical examinations.

The plaintiff filed an application to vacate the arbitration award on the ground that the award encouraged police officer dishonesty and thereby violated Connecticut's clear public policy against lying by law enforcement personnel. The trial court rejected the plaintiff's argument based on the court's limited standard of review over arbitration decisions and the lack of clear authority requiring a police officer to be terminated for this type of misconduct.

*54 The plaintiff appealed from the judgment of the trial court to the Appellate Court. The Appellate Court concluded that the arbitration award violated a well-defined public policy against the intentional dishonesty of a police officer in the course of his or her duties and, accordingly, reversed the trial court's judgment and remanded the case to that court with direction to grant the plaintiff's application to vacate the award. *Stratford v. AFSCME, Council 15, Local 407*, supra, 140 Conn.App. at 596-97, 60 A.3d 288. This certified appeal followed.

On appeal, the defendant argues that there is no dominant, well-defined public policy against police officer dishonesty during an independent medical exam. The defendant claims that termination is required only when the specific type of a police officer's misconduct or dishonesty is prohibited by statute, and that mandating termination for all degrees of dishonesty would be unnecessary, costly, and a threat to public safety. Given the absence of an articulated public policy prohibiting this type of police officer dishonesty, the defendant argues that the arbitration panel's decision should be upheld.

In response, the plaintiff argues that case law establishes a clear, well-defined, and dominant public policy against police officer dishonesty in connection with official duties. The plaintiff concedes that not every lie told by a police officer that related to his job would require termination. Rather, it argues that “a police officer who intentionally lies regarding the status [of] his condition to return to work, despite the risk that his condition could pose to the public, violates ... public policy, and that an arbitral award mandating the reinstatement of a police officer who has lied in such a fashion violates the concomitant policy that an *55 employer should not be required to retain that police officer.”¹

¹ The plaintiff specified that although the intentional lie in the present case mandated termination, other intentional lies about the status of a police officer’s condition to return to work would not. For example, the plaintiff acknowledged that a police officer’s intentional lie that he was very sick, told so that he would be excused from work, would not be so egregious as to require termination, even though the officer would be lying about his ability to perform on that day.

****152** ^[1] We conclude that there is a public policy against intentional police officer dishonesty in connection with official duties because integrity and trustworthiness are integral to performing these duties. We also conclude, however, that under the facts in the present case, the arbitration panel’s decision to punish Loschiavo with a nine month suspension without back pay and with the possibility of being subjected to future medical examinations did not violate this public policy.

^[2] ^[3] ^[4] ^[5] We begin our analysis with the applicable standard of review. “[W]e favor arbitration as a means of settling private disputes, [thus] we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution.” (Internal quotation marks omitted.) *State v. AFSCME, Council 4, Local 391*, 309 Conn. 519, 526, 69 A.3d 927 (2013). We will, however, submit to higher scrutiny an arbitration award that “is claimed to be in contravention of public policy.” (Internal quotation marks omitted.) *Id.*; see General Statutes § 52–418(a) (“any judge ... shall make an order vacating the award if it finds ... [4] ... the arbitrators have exceeded their powers”). “[P]arties cannot expect an arbitration award approving conduct which is ... contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them.... When a challenge to the arbitrator’s authority is made *56 on public policy grounds, however, *the court is not concerned with the correctness of the arbitrator’s decision but with the lawfulness of enforcing the award.*” (Emphasis in original; internal quotation marks omitted.) *State v. AFSCME, Council 4, Local 391*, *supra*, at 527, 69 A.3d 927.

^[6] Thus, when “a party challenges a consensual arbitral award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does in fact violate public policy.” (Internal quotation marks omitted.) *Id.* As this court maintained in *AFSCME, Council 4, Local 391*, “we defer to the arbitrator’s interpretation of the agreements regarding the scope of the [contract] provision.... We conclude only that as a reviewing court, we must determine, pursuant to our plenary authority and giving appropriate deference to the arbitrator’s factual conclusions, whether the contract provision in question violates those policies.” (Emphasis omitted.) *Id.*, at 528, 69 A.3d 927. Accordingly, the sole issue before the court is whether the arbitration award of nine months without back pay and subjection to possible future medical examinations violates public policy.

^[7] This court employs a two-pronged analysis to determine whether an arbitration award should be vacated for violating public policy. First, the court must determine “whether an explicit, well-defined and dominant public policy can be identified. If so, the court then decides if the arbitrator’s award violated the public policy.” (Internal quotation marks omitted.) *Id.*, at 529, 69 A.3d 927.

^[8] Thus, under the first prong, we begin by determining whether there is an explicit, well-defined and dominant public policy against intentional dishonesty of police officers in connection with their employment. We look to statutes, administrative decisions, and case law to determine the existence of public policy. *57 ****153** *MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 273 Conn. 634, 657, 872 A.2d 423, cert. denied sub nom. *Vertrue, Inc. v. MedValUSA Health Programs, Inc.*, 546 U.S. 960, 126 S.Ct. 479, 163 L.Ed.2d 363 (2005). Although we determine that our statutes contain no explicit, well-defined public policy against intentional police officer dishonesty,² we conclude that there is undisputedly a common public interest in the integrity and trustworthiness of local police forces.³ The public expects police *58 officers to be credible and honest in their law enforcement duties. Accordingly, we

conclude that there is a public policy against the employment of law enforcement personnel who have engaged in intentional dishonesty that directly pertains to their qualification and ability to perform official duties.

² We discern from our statutes no public policy against intentional police officer dishonesty unless the dishonesty constitutes a crime, either by a false written statement under oath or a statement pursuant to a form bearing notice that contains punishable false statements. The plaintiff claims that one statute, General Statutes § 54–86c, reflects our legislature’s intent to require police officers to be honest. Section 54–86c (a) provides in relevant part that “the [state] ... shall disclose any exculpatory information or material which [it] may have with respect to the defendant whether or not a request has been made therefor....” See also *Brady v. Maryland*, 373 U.S. 83, 87–88, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Practice Book § 40–11.

The defendant contends that the only Connecticut statute governing police officer dishonesty is General Statutes § 7–294d, which targets specific lies that, unlike Loschiavo’s, rise to the level of criminal conduct or fraud. Under § 7–294d, the Police Officer Standards and Training Council (council) may refuse to renew, cancel or revoke a police officer’s certification. The grounds for revoking certification do not explicitly include dishonesty, but are limited to false statements under General Statutes § 53a–157b (a), which provides that “[a] person is guilty of false statement in the second degree when he intentionally makes a false written statement under oath or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable, which he does not believe to be true and which statement is intended to mislead a public servant in the performance of his official function.” See General Statutes § 7–294d (c)(2)(I) (referencing § 53a–157b). As the dishonesty in the present case did not rise to the level of a false statement under § 53a–157b, § 7–294d does not apply here.

³ At least one Superior Court decision has concluded that there is a clear public policy against intentional police dishonesty that directly pertains to police officers’ official duties. In *Bloomfield v. United Electrical Radio & Machine Workers of America/Connecticut Independent Police Union, Local No. 14*, 50 Conn.Supp. 180, 189, 916 A.2d 882 (2006), rev’d on other grounds, 285 Conn. 278, 939 A.2d 561 (2008), the trial court vacated an arbitration award that reinstated a police officer after he was dishonest in a police report and during an internal affairs investigation. The trial court determined that “there is a clear public policy in Connecticut, based upon [General Statutes] § 54–86c and the common law ... that it is against public policy for a police officer to lie.” *Id.*, at 188, 916 A.2d 882.

A second case, *International Brotherhood of Police Officers, Local No. 328 v. Windsor*, 40 Conn.Supp. 145, 483 A.2d 626 (1984), discussed a public policy supporting police officer truthfulness. There, the trial court considered an arbitration award that upheld a police officer’s suspension for insubordination after he was ordered to lie about his involvement in an arrest warrant but insisted on being truthful. *Id.*, at 146, 483 A.2d 626. The trial court reasoned that “[t]he honesty of police officers is central to our criminal justice system.” *Id.*, at 148, 483 A.2d 626. It found that the arbitration award violated clear public policy because it contradicted General Statutes § 53a–157b and because “[i]n signing search and arrest warrants, judges depend completely on the truthfulness of the police officers’ affidavits supporting them ... [and] fundamental rights rest on the accuracy of police records and a falsehood in the arrest record could imperil the prosecutor’s case.” *Id.*

^[9] ^[10] Having concluded that there is a public policy against intentional police officer dishonesty in connection with his or ****154** her employment, we must consider the specific facts and circumstances of the present case in order to determine whether the arbitration award reinstating Loschiavo’s employment violated that public policy. “In other words, we must determine whether [the] public policy *required* the grievant’s dismissal.” (Emphasis added.) *State v. AFSCME, Council 4, Local 391*, supra, 309 Conn. at 531, 69 A.3d 927. In making this determination, “we are mindful that the fact that an employee’s misconduct implicates public policy does not require the arbitrator to defer to the employer’s chosen form of discipline for such misconduct.” *Id.*, at 532, 69 A.3d 927. Indeed, “an arbitrator reasonably may consider circumstances such as the length of employment, previous instances of [misconduct] by the employee, and the circumstances and severity of the misconduct under review in determining the likelihood of future misconduct and whether discipline less severe than termination would constitute a ***59** sufficient punishment and deterrent.” *State v. New England Health Care Employees Union, District 1199, AFL–CIO*, 271 Conn. 127, 138–39, 855 A.2d 964 (2004). Finally, this court has recognized that, although “the arbitrator’s decision must draw its essence from the agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*” (Emphasis altered; internal quotation marks omitted.) *State v. AFSCME, Council 4, Local 391*, supra, 309 Conn. at 532, 69 A.3d 927 quoting *United Paperworkers International Union, AFL–CIO v. Misco, Inc.*, 484 U.S. 29, 41, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

^[11] Thus, we must consider whether Loschiavo’s dishonesty was “so egregious that it requires nothing less than the termination of [his] employment so as not to violate public policy....” (Internal quotation marks omitted.) *State v. AFSCME, Council 4, Local 391*, supra, 309 Conn. at 531, 69 A.3d 927. We conclude that it was not. Loschiavo’s

conduct, although serious, did not compromise his qualifications or ability to perform his official duties as a police officer, because Micalizzi, his physician, and Bridgers, his neurologist, were both aware of his dishonesty and yet still cleared him to return to duty. Indeed, Bridgers ultimately determined that, even with knowledge of the information that Loschiavo withheld, Loschiavo “ ‘presents no more of a risk now than he did since the time of his initial hiring.’ ” Loschiavo did not lie under oath and his dishonesty was not disruptive or repeated; he was not dishonest before his fellow police officers or while performing his official duties. He was not warned about the repercussions of his misconduct so he was not incorrigible, and the punishment that he received was severe.⁴

⁴ We note that the record does not reflect whether Loschiavo’s reinstatement as a police officer could include responsibilities other than those in which he would be expected to testify as a witness in a criminal trial. We believe, however, that the dissent overstates the ramifications that might occur should Loschiavo be called to testify. Although the state must disclose evidence affecting a witness’ credibility; see footnote 2 of this opinion; this type of incriminating information can be introduced only for impeachment purposes as to witness credibility on cross-examination. “[T]he only way to prove misconduct of a witness for impeachment purposes is through examination of the witness.... The party examining the witness must accept the witness’ answers about a particular act of misconduct and may not use extrinsic evidence to contradict the witness’ answers.” (Citation omitted.) *Weaver v. McKnight*, 313 Conn. 393, 427, 97 A.3d 920 (2014).

60** By way of comparison, we look to our recent decision in *155** *State v. AFSCME, Council 4, Local 391*, supra, 309 Conn. at 541–42, 69 A.3d 927 where we determined that an award of anything short of termination did violate public policy. There, the grievant, who was a correction officer employed by the Department of Correction, knowingly and repeatedly violated the “well-defined and dominant public policy against workplace sexual harassment as established by General Statutes § 46a–60 (a),” despite recurring complaints. *Id.*, at 525, 69 A.3d 927. The grievant engaged in a pattern of behavior that occurred in the presence of other employees and inmates, which “perpetuate [d] a hostile, intimidating and offensive work environment....” (Internal quotation marks omitted.) *Id.*, at 541, 69 A.3d 927. Thus, in that case, this court concluded that the grievant’s termination was required because his behavior, unlike Loschiavo’s behavior in the present case, was “knowing, egregious, incorrigible and disruptive....” *Id.*, at 542, 69 A.3d 927.

Moreover, although Loschiavo was allowed to return to work, it was only after a period of nine months without back pay and with the condition that he could be subject to future medical examinations. When the plaintiff and the collective bargaining agreement do not proscribe the specific disciplinary action for a grievous misconduct,⁵ it is certainly within the arbitration panel’s ***61** discretion to consider the fact that termination is not always required. In addition, the parties collectively bargained to submit the question of just cause for termination to arbitration, and thus expected the arbitration panel to consider the grievant’s overall record in fashioning its award.

⁵ Section 2.1 of the plaintiff’s police department policy, as set forth in the arbitration award, provides in relevant part that “[a]n officer must avoid any conduct which might compromise the integrity of the [d]epartment or fellow officers, or him/herself.” See *Stratford v. AFSCME, Council 15, Local 407*, supra, 140 Conn.App. at 589 n. 2, 60 A.3d 288.

For the foregoing reasons, we conclude that, although there is a public policy against intentional police officer dishonesty in connection with the officer’s employment, Loschiavo’s lies were not so egregious that the arbitration panel’s award of nine months suspension without back pay and with the possibility of being subjected to future medical examinations violated that public policy.⁶ Requiring termination under the facts of the present case would unnecessarily expand the “stringent and narrow confines of [the] exception” to confirming an arbitration award and “swallow the rule” granting deference to arbitration awards.⁷ (Internal quotation ***62** marks ****156** omitted.) *State v. New England Health Care Employees Union, District 1199, AFL–CIO*, supra, 271 Conn. at 136, 855 A.2d 964.

⁶ While we agree with the dissent that the first prong of our two-prong test is met insofar as there is a public policy against police officer dishonesty, we disagree with the dissent’s analysis of the second prong because it does not seem to take into account the policy of deference to arbitration awards in reaching its conclusion. Given that we also consider the strong policy of deference to arbitration; see *State v. AFSCME, Council 4, Local 391*, supra, 309 Conn. at 526, 69 A.3d 927; we conclude in the present case that deference to the decision of the three member arbitration panel is appropriate because the sanction of nine months without pay and future medical examinations is a sufficiently severe penalty that it does not violate public policy.

⁷ Courts in other states have similarly declined to vacate arbitration awards that reinstated police officers for dishonesty. See, e.g., *State v. Public Safety Employees Assn.*, 257 P.3d 151, 153, 166 (Alaska 2011) (arbitration award reinstating police officer who lied about violating motorcycle safety class rule against “horseplay” was not contrary to explicit, well-defined public policy); *Washington County Police Officers’ Assn. v. Washington County*, 335 Or. 198, 200, 63 P.3d 1167 (2003) (arbitration award reinstating police officer who lied about using illegal narcotic was not contrary to explicit, well-defined public policy); *Kitsap County Deputy Sheriff’s Guild v. Kitsap County*, 167 Wash.2d 428, 432–33, 440, 219 P.3d 675 (2009) (arbitration decision to reinstate deputy sheriff who was terminated for twenty-nine documented incidents of misconduct, including untruthfulness, did not violate explicit, well-defined, and dominant public policy).

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the trial court.

In this opinion ZARELLA and EVELEIGH, Js., concurred.

PALMER, J., with whom ESPINOSA, J., joins, dissenting.

The majority acknowledges, as it must, that there is a well-defined and dominant public policy against intentional dishonesty by police officers in connection with their employment. The majority nevertheless concludes, contrary to the unanimous opinion of the Appellate Court, that the arbitration award reinstating Justin Loschiavo as a police officer with the plaintiff, the town of Stratford (town), despite his concededly intentional and serious lies made in the course of his employment, did not violate public policy. Because I believe that the majority’s conclusion seriously undermines the strong public interest in ensuring that the law enforcement officers of this state conduct themselves with honesty and integrity, I respectfully dissent.

The relevant facts are undisputed and straightforward. Loschiavo was hired by the town as a probationary police officer in 2006. At the time, he had a history of epilepsy but his condition was controlled by medication. On June 6, 2009, as a result of an epileptic seizure, Loschiavo lost control of his police cruiser and struck two parked cars. Loschiavo was ordered not to drive for six months by his personal physician, Philip Micalizzi. Micalizzi then cleared Loschiavo for light duty work, to commence on August 17, 2009, subject to the condition that he not engage in any activity that might cause severe injury if he were to lose consciousness. On *63 December 29, 2009, Micalizzi returned Loschiavo to full duty status without restriction. Micalizzi also indicated, however, that he could not guarantee that Loschiavo would not have another seizure, and that the town would have to determine what restrictions, if any, to place on Loschiavo in connection with the performance of his official duties.

Thereafter, the town referred Loschiavo to a neurologist, Samuel L. Bridgers, for an independent medical examination to determine whether Loschiavo could safely return to work and, if so, under what conditions. After examining Loschiavo and reviewing his medical history, Bridgers submitted a report to the town’s human resources director, Ronald Ing, in which Bridgers expressed the opinion that Loschiavo was capable of returning to work as a full-time police officer subject only to the restriction that he be allowed to call in sick whenever he felt the warning signs of an impending seizure. Bridgers also stated, however, that there were no guarantees that Loschiavo would not suffer seizures in the future.

In the course of reviewing Bridger’s report, Ing noticed several discrepancies between the medical records provided by Micalizzi and the medical history that Loschiavo had provided to Bridgers. In light of these inconsistencies, it was apparent to Ing that Loschiavo did not disclose to Bridgers, first, that he had experienced two other seizures since 2004, and, second, that he had used or abused alcohol, which may well have precipitated those seizures. **157 In this regard, it also was apparent to Ing that Loschiavo had removed certain notes from Micalizzi’s medical file before Loschiavo turned that file over to Bridgers. Ing therefore provided Bridgers with a complete set of the medical records from Micalizzi’s file detailing Loschiavo’s history.

***64** After reviewing those records, Bridgers reexamined Loschiavo and reported his findings. Bridgers observed that Loschiavo had acknowledged to Micalizzi for the first time in June, 2009, that he had a problem with alcohol and that his seizures were related to his alcohol abuse. Loschiavo also told Micalizzi that he was enrolled in an alcohol treatment program. In light of these revelations, Bridgers indicated that he did not know whether Loschiavo could be “trusted to avoid activities” that would increase his likelihood of suffering seizures, in particular, his use or abuse of alcohol. Although expressing the view that people with epilepsy probably should not be employed as police officers, Bridgers stated that Loschiavo likely posed no greater risk at that time than he did when he was hired in 2006.

The town charged Loschiavo with lying during the independent medical examination in violation of police department policy concerning integrity, conduct unbecoming an officer, and attention to duty.¹ Shortly thereafter, the town held a hearing to afford Loschiavo the opportunity to respond to that charge. At the conclusion ***65** of the hearing, the hearing officer found that Loschiavo had violated police department policy by lying in connection with the independent medical examination, and he recommended Loschiavo’s termination. Loschiavo’s employment was terminated that same day.

¹ These provisions of police department policy as set forth in the arbitration award provide in relevant part: *“Integrity*
“The public demands that the integrity of its law enforcement officers be above reproach.... An officer must avoid any conduct which might compromise the integrity of the [d]epartment or fellow officers, or him/ herself.
“Conduct Unbecoming an Officer
“A police officer is the most conspicuous representative of government. To the majority of people, police officers are a symbol of stability and authority upon which they can rely.... The conduct of a police officer has possible ramifications, which may reflect on the [d]epartment.... [E]mployees must avoid conduct, which might impair the reputation or efficiency of the [d]epartment.
“Attention to Duty
“As most police work is performed without close supervision, responsibility for proper performance of duty lies with the officer.... An officer has the responsibility for the safety of the community ... and discharges that responsibility by faithful and diligent performance of duty. Anything less violates the trust placed in him/her by the people....”

Following his termination, and in accordance with the collective bargaining agreement between the town and the defendant union, American Federation of State, County and Municipal Employees, Council 15, Local 407 (union), the union filed a grievance on Loschiavo’s behalf claiming that his termination was without just cause and in violation of the parties’ agreement. The matter was referred to an arbitration panel which, following a hearing, issued a written decision that states in relevant part as follows: “The first thing that we note is that the violation that [Loschiavo] was accused of committing is a very serious one for a police officer who is charged with upholding the law. The public does expect that the conduct of their law enforcement officials be above that of their neighbors and fellow citizens. A police officer’s lying about his physical and mental condition to doctors that could return (or prevent) him/her to work is understandable because he/she wants his/her job back. However, it is very dangerous for ****158** the citizens and public at large should that police officer suffer a seizure that could cause injury or death to the officer and/or to the citizens of that community.

“We also note, however, that once [Loschiavo’s] true conditions were known and considered by both doctors Micalizzi and Bridgers, they returned [Loschiavo] to his full duties without restrictions. The only reservation was that of ... Bridgers, who felt that [Loschiavo] should be allowed to call out sick if he felt a seizure coming on when waking up. He stated that [Loschiavo] knew the signs of an upcoming seizure and could predict it and should be allowed to call out sick when [he] felt the signs coming on.

***66** “We further note that the [t]own knowingly hired [Loschiavo] recognizing his potential limitations, regarding his epileptic seizures, and that he completed his probationary period and went on to perform well until the seizure of June 6, 2009. There was no evidence presented by the [t]own about his job performance and so we infer that his job performance was at least satisfactory. We therefore find that the termination of [Loschiavo] was excessive and so we hereby order that he be returned to work, without [back pay] but with no loss to seniority.... [In addition] the [t]own is well within its rights to have [Loschiavo] examined by a medical doctor, from time to time, to make sure that his condition is stable and that he is not using alcohol. Accordingly, based on the above, the unanimous [p]anel sustains the grievance.” The panel’s award imposed a total effective sanction on Loschiavo for his misconduct of nine months suspension, without pay.

The town filed an application to vacate the arbitration award with the Superior Court claiming, inter alia, that the award violated the clearly defined and important public policy against intentional dishonesty by officers in the course of their employment. The court rendered judgment denying the town's application, concluding that the award suspending Loschiavo without pay for nine months and returning him to active duty did not contravene that policy.² The town appealed from the judgment of the trial court to the Appellate Court, renewing the public policy claim that it had raised in the trial court. The Appellate Court agreed with the town, reversed the judgment of the trial court and remanded the case to that court with direction to grant the town's application to vacate the arbitration award. *67 *Stratford v. AFSCME, Council 15, Local 407*, 140 Conn.App. 587, 597, 60 A.3d 288 (2013). This court granted the union's petition for certification, limited to the issue of whether the Appellate Court correctly concluded that the panel's award must be vacated as violative of public policy.

² In its memorandum of decision, the trial court observed that the union had conceded that Loschiavo lied to Bridgers with respect to his prior seizures and alcohol use or abuse. The union also acknowledged that Loschiavo's conduct in doing so violated police department policy.

As the majority has explained, our review of the unrestricted arbitral submission in the present case is limited: the award of the panel is entitled to deference, and therefore must be sustained, unless enforcing the award would be contrary to public policy. E.g., *State v. AFSCME, Council 4, Local 391*, 309 Conn. 519, 526–27, 69 A.3d 927 (2013). This narrow exception to the finality of an arbitration award “is premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can **159 expect a court to enforce such a contract...” (Internal quotation marks omitted.) *State v. New England Health Care Employees Union*, 271 Conn. 127, 135, 855 A.2d 964 (2004). In making that determination, we employ a two step analysis: we first must decide whether the award implicates an explicit, well-defined and dominant public policy and, if it does, we also must decide whether the award itself violates that public policy. *State v. AFSCME, Council 4, Local 391*, supra, at 529, 69 A.3d 927. The question, then, is not whether the underlying improper conduct—here, Loschiavo's intentional dishonesty in connection with the independent medical examination—violates public policy, which it most certainly does. Nor are we concerned with the correctness of the award under the collective bargaining agreement. See *id.*, at 532–33, 69 A.3d 927. We must determine, rather, whether the panel's award suspending Loschiavo for nine months without pay violates the public policy against intentional dishonesty by a police officer because only termination of employment is adequate to vindicate that *68 policy. *Id.*, at 531, 69 A.3d 927. Finally, although we give appropriate deference to the factual findings of the panel, we exercise plenary review over the purely legal question of whether, in light of those facts, the arbitration award must yield to overriding public policy considerations. *Id.*, at 528, 69 A.3d 927.

It is inarguable, as the majority states, that there is a “common public interest in the integrity and trustworthiness of local police forces. The public expects police officers to be credible and honest in their law enforcement duties.” (Footnote omitted.) Consequently, as the majority also recognizes, “there is a public policy against the employment of law enforcement personnel who have engaged in intentional dishonesty that directly pertains to their qualification and ability to perform official duties.” I fully agree with this unremarkable proposition.

We therefore must consider the second part of the test, namely, whether the award reinstating Loschiavo, following an unpaid suspension of nine months, violates this policy. For the reasons set forth subsequently in this dissenting opinion, and in contrast to the majority, I agree with the Appellate Court that it does violate public policy because, in the present case, nothing short of termination is sufficient to vindicate the public's overriding interest in ensuring that police officers conduct themselves with honesty and integrity in matters relating to their employment.³

³ The majority states that in reaching this conclusion, I have failed to take into account the policy favoring arbitration as a means of dispute resolution. See, e.g., *State v. AFSCME, Council 4, Local 391*, supra, 309 Conn. at 526, 69 A.3d 927. On the contrary, I am fully cognizant of that policy, which is reflected in the deference that we ordinarily give arbitration awards. As the majority acknowledges, however, this deference must give way when such an award violates a dominant and well established public policy. This is such a case.

The role of the police in our society is a unique one due to the broad authority and enormous discretion *69 vested in

them by the public. The very nature of their work, which includes the power to detain, search, and arrest, demands that they be granted such authority and discretion, for without it, they could not be expected to discharge their duty as guardians of the safety and security of the community. With that great power, however, comes the responsibility to act in a manner that is faithful to the great trust placed in them by the community. “[A police officer] is directly, immediately, and entirely responsible to the city or [s]tate which is his employer. ****160** He owes his entire loyalty to it.... He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer.” *Gardner v. Broderick*, 392 U.S. 273, 277–78, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968). As this court has recognized, because of the distinctive character of that special public trust, the “qualities of truthfulness, honesty and integrity ... are particularly essential” for a police officer. (Citation omitted.) *Wilber v. Walsh*, 147 Conn. 317, 320, 160 A.2d 755 (1960). Indeed, “[f]ew institutions depend as heavily on integrity and credibility for the effective performance of their duties as do police departments.” *Local 346, International Brotherhood of Police Officers v. Labor Relations Commission*, 391 Mass. 429, 439, 462 N.E.2d 96 (1984).

For these reasons, and because, as the police department rules aptly recognize, police officers are routinely called upon to perform their duties without close or immediate supervision; see footnote 1 of this dissenting opinion; we hold them to the highest standard of integrity and trustworthiness, higher even than other public employees.⁴ “[T]here are certain forms of employment ***70** which carry a position of trust so peculiar to the office and so beyond that imposed by all public service that conduct consistent with this special trust is an obligation of the employment.... Police officers fall into such a category; in order to perform their jobs, they voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens, must comport themselves in accordance with the laws that they are sworn to enforce *and* behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel.” (Citation omitted; emphasis in original; internal quotation marks omitted.) *Springfield v. Civil Service Commission*, 469 Mass. 370, 379, 14 N.E.3d 241 (2014). As former Chief Justice Margaret H. Marshall of the Supreme Judicial Court of Massachusetts has noted, “[t]here is a difference in kind, well recognized in our jurisprudence, between police officers, who have the authority to command citizens, take them into custody, and to use physical force against them, and other public officials who do not possess such awesome powers. We hold police officers to a higher standard of conduct than other public employees ... fully confident that, in most cases, they will meet that standard.... [But it] is the recognition of the potential for abuse of power that has caused our society, and law enforcement leadership, to insist that citizens have the right to demand the most of those who hold such awesome powers.” (Citations ***71** omitted; footnote omitted.) *Commonwealth ****161** v. Hyde*, 434 Mass. 594, 613, 750 N.E.2d 963 (2001) (Marshall, C.J., dissenting). It is abundantly clear that the honesty and integrity of those officers is essential to our system of justice; e.g., *International Brotherhood of Police Officers v. Windsor*, 40 Conn.Supp. 145, 148, 483 A.2d 626 (1984); because “the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them.” (Internal quotation marks omitted.) *Pasadena Police Officers Assn. v. Pasadena*, 51 Cal.3d 564, 572, 797 P.2d 608, 273 Cal.Rptr. 584 (1990).

⁴ See, e.g., *One Three Five, Inc. v. Pittsburgh*, 951 F.Supp.2d 788, 814 (W.D.Pa.2013) (“Because police are vital to protecting the public’s safety and are granted the power to make arrests and use necessary force to carry out that duty, they must be held to a higher standard of conduct than other [municipal] employees.... [P]olice officers are held to a higher standard of conduct than other citizens, including other public employees.” [Citation omitted; internal quotation marks omitted.]); *In re Phillips*, 117 N.J. 567, 576–77, 569 A.2d 807 (1990) (“The obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official: [A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public.... Nor can a police officer complain that he or she is being held to an unfairly high standard of conduct. Rather, it is one of the obligations he undertakes upon voluntary entry into the public service.” [Citation omitted; internal quotation marks omitted.]).

In the present case, the arbitration panel itself characterized Loschiavo’s intentional lies about his “physical and mental condition” as “very serious ... for a police officer who is charged with upholding the law.” The panel further acknowledged that those lies were potentially “very dangerous” because they were calculated to deceive the town about the true nature and extent of his seizure disorder and alcohol use or abuse. In so doing, the panel explained, Loschiavo created a grave risk of an accident or event “that could cause injury or death to [Loschiavo] and/or to the citizens of [his] community.” The seriousness of Loschiavo’s lies from the perspective of the panel itself is reflected

in the fact that the panel imposed a sanction on Loschiavo of a nine month suspension from duty without pay.

As an official in whom the community has placed vast discretion and great trust and confidence, the public was entitled to expect that Loschiavo, like his fellow officers, would consistently demonstrate a high level of trustworthiness and personal integrity when acting in his capacity as an officer. Loschiavo's violation of that trust and confidence, by lying in connection with the independent medical examination, was indeed "very serious," as the panel observed, because those lies bore *72 directly on his ability to return to work and to safely perform his duties as a police officer. Short of a violation of the criminal law, it is hard to conceive of misconduct by a police officer that is more serious. Simply stated, when Loschiavo placed his own perceived self-interest over the safety of the community by lying about his fitness to serve, he demonstrated that he is not fit to serve. As this court has stated in a related context, the panel, in reinstating Loschiavo, "minimize [d] society's overriding interest in preventing conduct such as that at issue in this case from occurring"; (internal quotation marks omitted) *State v. AFSCME, Council 4, Local 387, AFL-CIO*, 252 Conn. 467, 477, 747 A.2d 480 (2000); and sent a message that that conduct can be tolerated. *Id.*

The majority offers several reasons to support its conclusion that the award in the present case did not violate the clear and dominant public policy against intentional dishonesty by police officers in connection with their employment. These reasons are: Loschiavo did not lie under oath; his dishonesty was not "disruptive or repeated"; he was not dishonest "before his fellow police officers or while performing his official duties"; he had not previously been "warned about the repercussions of his misconduct so he was not incorrigible"; the punishment he received was "severe"; and his "conduct, although serious, did not compromise his qualifications or ability to perform his official duties as a police officer" because both Micalizzi and Bridgers cleared him to return to duty. I disagree that any one or more of these considerations justify a sanction less severe than termination.

First, the fact that Loschiavo did not lie under oath detracts little from the seriousness **162 of his lies because his dishonesty is directly related to his ability to safely perform the duties of a police officer. Of course, if Loschiavo *had* lied under oath that alone would be sufficient cause to vacate an award reinstating him to *73 service because perjury by a police officer requires termination under any standard. Merely because Loschiavo's lies were not perjurious, however, says little or nothing about whether he should be permitted to return to his duties. Rather, the nature and gravity of those lies is the paramount consideration in determining whether termination is warranted, and, as the majority concedes, the lies were extremely serious. In fact, his misconduct included withholding or altering medical reports that documented his seizure history and his history of alcohol use or abuse, conduct that is tantamount to tampering with evidence and obstruction of justice.

With respect to the majority's assertion that the lies were not repeated, it is true that Loschiavo's dishonesty related to but one event, his examination by Bridgers. But just as one act of perjury by a police officer would be grounds for termination, so, too, can lies like those in the present case support that ultimate sanction. Consequently, the number of times Loschiavo lied is far less important than the severity of his lies. This is not a case, moreover, in which Loschiavo, after lying to Bridgers, decided to tell the truth before getting caught; only because of Ing's attention to detail was he able to discern that Loschiavo had lied about his seizure history and alcohol use and abuse. Although I am not entirely clear as to what the majority means when it states that Loschiavo's lies were not "disruptive," his lies resulted in an investigation into Loschiavo's conduct pertaining to the independent medical examination; a second examination of Loschiavo by Bridgers; a second report by Bridgers; a hearing before a hearing officer followed by Loschiavo's termination by the town; a grievance by the union challenging that action by the town; a hearing before the arbitration panel; an application filed with the Superior Court to vacate the panel's award; an appeal to the Appellate Court; and now this certified *74 appeal. In addition, as I explain more fully hereinafter, Loschiavo's misconduct will require the state to disclose his lies and his nine month suspension without pay in any criminal case in which he serves as a witness in his capacity as a police officer, and he will be subject to cross-examination about his dishonesty. Loschiavo's lies were disruptive by any measure.

The fact that he was "not dishonest before his fellow police officers" means nothing with respect to the seriousness of his misconduct. There is no doubt that every officer in his department is well aware of Loschiavo's misconduct. More importantly, the fact that that misconduct occurred outside the presence of other officers is irrelevant to the public policy analysis. If it were relevant, an officer who lied about an event that only he witnessed—a circumstance that would make it more difficult to establish that the officer was lying—would be entitled to leniency because he was "not dishonest before his fellow police officers...." Such an absurd result cannot be countenanced.

With respect to the majority's assertion that Loschiavo did not lie while performing his official duties, I do not share the majority's cramped view of a police officer's duties. When, as here, a police officer undergoes an examination conducted for the purpose of ascertaining his fitness to serve, his obligation to cooperate with that examination is no less a responsibility than directing traffic or completing a report.

The majority also places weight on the fact that Loschiavo had not been "warned ****163** about the repercussions of his misconduct so he was not incorrigible...." Implicit in this argument is the suggestion that Loschiavo could not have been expected to know that what he did was wrong, and that such conduct might well carry a severe sanction. I am unwilling to accept this premise: no law enforcement officer could have ***75** any doubt as to the seriousness and potential repercussions of lying in connection with an independent medical examination about highly material matters directly related to his or her fitness. Of course, only time will tell if Loschiavo is an "incorrigible" liar. But in view of the seriousness of the lies for which he was caught, I see no reason why the town should have to wait and see if Loschiavo is an inveterate or habitual liar; it is enough that he has demonstrated a willingness to lie about an exceedingly important job related matter when he believed that it served his purpose to do so. Wholly aside from whether he will repeat this conduct in the future, his credibility has been compromised irretrievably.

Although it is true, as the majority also asserts, that the sanction Loschiavo received from the arbitration panel was severe, the severity of the sanction only underscores the seriousness of his lies. More to the point, however, the question is not whether the sanction imposed by the panel is severe; the question, rather, is whether the sanction is adequate to vindicate the public's overriding interest in maintaining an honest and trustworthy police department.

The majority's remaining assertion—that termination is not necessary because Loschiavo's conduct does not undermine his ability to perform his duties as a police officer because he ultimately was cleared for work despite his dishonesty—is completely off the mark in view of the fact that Loschiavo will be subject to impeachment for his dishonesty whenever he testifies. "The law in Connecticut on impeaching a witness' credibility provides that a witness may be cross-examined about specific acts of misconduct that relate to his or her veracity. See Conn.Code Evid. § 6–6(b)(1) ('[a] witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness')...." (Citations ***76** omitted.) *State v. Annulli*, 309 Conn. 482, 492, 71 A.3d 530 (2013); see also *State v. Chance*, 236 Conn. 31, 60, 671 A.2d 323 (1996) (right of cross-examination generally includes right to question witness about prior false statements). Indeed, under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny, in a criminal case, principles of due process require the state to provide the defendant with evidence of which it is or should be aware that is favorable to the defendant and material either to guilt or to punishment. "The United States Supreme Court also has recognized that '[t]he jury's estimate of the truthfulness and reliability of a ... witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.' *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Accordingly, the *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence; e.g., *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 154–55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); which, broadly defined, is evidence 'having the potential to alter the jury's assessment of the credibility of a significant prosecution witness.' ... *United States v. Rivas*, 377 F.3d 195, 199 (2d Cir.2004)." *Adams v. Commissioner of Correction*, 309 Conn. 359, 369–70, 71 A.3d 512 (2013).

The majority essentially ignores these principles even though they are highly relevant ****164** to the present case. It is undisputed both that Loschiavo's lies were very serious because they related directly to his mental and physical fitness to serve as a police officer, and that the severity of the sanctions imposed on him for his misconduct, first by the town and then by the arbitration panel, reflect the gravity of that misconduct. It also is inarguable that testifying in court and attesting to affidavits ***77** in support of search and arrest warrants are among the most important duties of a police officer. Given the nature of Loschiavo's lies, whenever he testifies, the state will be required to make the defendant aware of his dishonesty, and defense counsel will be able to impeach Loschiavo with his deceitful conduct. No doubt there will be criminal prosecutions in which Loschiavo's credibility is critical to the state's case, and in those cases especially, the ability of defense counsel to successfully attack his veracity by use of his lies may well make a difference in the outcome of the case.⁵ In forcing the town to reinstate Loschiavo despite this fact, the majority achieves a result that neither the state nor the people it represents should be required to tolerate.⁶

⁵ Although acknowledging that Loschiavo will be subject to impeachment for his lies whenever he testifies, the majority simply does

not address this problem, asserting only that I have “overstat[ed] the ramifications that might occur should Loschiavo be called to testify.” See footnote 4 of the majority opinion. I am unable to discern why the majority believes that I have overstated this concern because the majority has elected not to provide an explanation.

I also note that the majority states that “the record does not reflect whether Loschiavo’s reinstatement as a police officer could include responsibilities other than those in which he would be expected to testify as a witness....” See footnote 4 of the majority opinion. I am unsure what point the majority seeks to make in speculating about what the record does not reflect. If, however, the majority is merely suggesting that some of Loschiavo’s responsibilities as a police officer will not require him to testify, I fully agree. The problem, however, is that Loschiavo’s duties as a sworn law enforcement officer *will* require that he be available to serve as a witness on a regular basis.

⁶ The union argues that “mandating termination of every police officer who has been dishonest, regardless of degree or circumstance, would result in the unnecessary terminations of some police officers, placing the public safety in jeopardy, and running up huge costs to taxpayers.” Of course, I do not suggest that a police officer must be terminated any time that he is found to have been untruthful in the course of his employment. Although dishonesty by a police officer is never to be condoned, some lies may be so minor or inconsequential that loss of employment simply is not necessary to vindicate the public policy against police dishonesty. For example, in *State v. Public Safety Employees Assn.*, 257 P.3d 151, 152–53 (Alaska 2011), the Alaska Supreme Court concluded that an arbitral award reinstating a state trooper did not violate public policy even though the trooper had lied about a minor matter involving the inappropriate way in which he had operated a motorcycle during a motorcycle certification program conducted out of state. When asked if he knew who in the program had engaged in such horseplay while operating a motorcycle, the trooper initially denied having any such knowledge, but later admitted that he himself was the individual involved. *Id.*, at 153. Although the trooper initially was permitted to return to work, he subsequently was terminated for his conduct in that matter and for other complaints of misconduct, but an arbitrator ordered that he be reinstated; *id.*, at 153–54; and the Alaska Supreme Court ultimately affirmed that award. *Id.*, at 166. In so doing, the court observed that the trooper had engaged in “minor acts of dishonesty ... not directly related to [his duty] to the public”; *id.*, at 162; and emphasized that its decision would have been different if the trooper’s conduct had been more culpable. *Id.* Of course, the serious lies that are the subject of the present case bear no resemblance to the lie, subsequently self-corrected, made by the trooper in *Public Safety Employees Assn.*

The union also contends that only lies by a police officer that rise to the level of a crime, in particular, tampering with or fabricating physical evidence in violation of General Statutes § 53a–155, perjury in violation of General Statutes § 53a–156, and false statement in the second degree in violation of General Statutes § 53a–157b, are sufficiently serious to justify reversing an arbitration award reinstating the officer following his or her termination from employment. This view is far too solicitous of dishonesty by the police. There simply is no reason why a police officer’s lies or dishonest conduct must be criminal to warrant the conclusion that reinstatement would violate the strong public policy against police dishonesty, and I do not read the majority opinion as endorsing the position advocated by the union.

78** In sum, the town had no choice but to terminate Loschiavo’s employment as a police *165** officer because his intentional and serious dishonesty has grievously compromised his credibility and integrity, and he has been rendered unfit to serve as a sworn officer. His reinstatement as a member of the police department following his attempt to deceive the town about his fitness to serve is incompatible both with the department’s need to ensure that its officers “are of the highest moral and ethical character possible”; *O’Hartigan v. Dept. of Personnel*, 118 Wash.2d 111, 124, 821 P.2d 44 (1991); and with the town’s “right to demand for itself, and the obligation to secure for its citizens, law enforcement personnel whose conduct is above and beyond ***79** reproach.” (Internal quotation marks omitted.) *Turnley v. Vernon*, 194 Vt. 42, 51, 71 A.3d 1246 (2013). The result dictated by the majority not only subverts these weighty interests, it devalues the role of the police in our society. Indeed, in failing to recognize that intentional and serious dishonesty by the police is so detrimental to the community and so damaging to our justice system that it requires the strongest possible response, the majority disserves both the police and the public. Because the town should not be forced to retain an officer whose dishonesty and lack of integrity make it impossible for him to discharge his duties effectively and with the confidence of the public, I respectfully dissent.

Cox v. Onondaga Cnty. Sheriff's Dep't, 760 F.3d 139 (2d Cir. 2014)

Synopsis

Background: Sheriff's deputies, who were white, brought action against county and county executives alleging retaliation for their complaints of racial harassment to Equal Opportunity Employment Commission (EEOC), in violation of Title VII. The United States District Court for the Northern District of New York, Norman A. Mordue, J., 2012 WL 1069053, entered summary judgment in defendants' favor, and deputies appealed.

Holdings: The Court of Appeals, Winter, Circuit Judge, held that:

[¹] investigation of deputies' complaints was not retaliatory;

[²] sergeant's statement that deputies might be brought up on charges of having filed false statements of racial harassment was not pretext for retaliation; and

[³] district judge was not required to recuse himself.

Affirmed.

Attorneys and Law Firms

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Carol L. Rhinehart, Onondaga County Department of Law, Syracuse, N.Y., for Defendants–Appellees Onondaga County Sheriff's Department, Kevin E. Walsh, O'Dell Willis, Onondaga County, Nicholas Pirro, and Joannie Mahoney. Laura L. Spring, Sugarman Law Firm, LLP, Syracuse, N.Y., for Defendant–Appellee John Woloszyn.

Before: WINTER, CHIN, and DRONEY, Circuit Judges.

Opinion

WINTER, Circuit Judge:

Onondaga County Sheriff's Department ("Department") Deputies Steven Cox, Thomas Bingham, Edward Kalin, Michael McCarty, and Robert Scott Feldman appeal from Judge Mordue's granting of summary judgment dismissing their complaint. That complaint asserted retaliation for their complaints of racial harassment to the Equal Opportunity Employment Commission ("EEOC"), in violation of Title VII, 42 U.S.C. § 2000e–3.

We hold that the Department's initiation and conduct of an investigation into: (i) the white appellants' claims of racial harassment alleged to have been generated by an African American officer, and (ii) a complaint against appellants for filing false reports with the EEOC of such harassment, were not adverse employment actions. We also hold that threats by the Department to charge appellants with making a false report to the EEOC established a *prima facie* case of illegal retaliation but that the Department has shown a non-retaliatory purpose, and appellants have presented no evidence of pretext.

BACKGROUND

On review of a grant of summary judgment dismissing a complaint, we view the record in the light most favorable to appellants. *Gallo v. Prudential Resid. Servs., Ltd.*, 22 F.3d 1219, 1223 (2d Cir.1994).

The present dispute began when appellants Cox, McCarty, Feldman, and Bingham, as well as a lieutenant, non-appellant Jim Raus, shaved their heads to demonstrate solidarity with appellant Kalin, a cancer patient who lost his hair as a result of chemotherapy treatments. All were employed as “transport/custody officers” in the Onondaga County Sheriff’s Department. On August 26, 2005, appellants and Raus filed what is known as a “blue form” complaint, initiating an internal departmental procedure, alleging racial harassment. A blue form complaint usually results only in an informal investigation and not in a full investigation by the Department’s internal investigation arm, the Professional Standards Unit (“PSU”).

In the blue form complaint, the deputies and lieutenant stated that they had been the victims of rumors, based on their shaved heads, that they were “skinheads”—i.e. members of a white-supremacist group. The complaint alleged that “rumors and the talk in the Custody Division [was then] that [the deputies and Lieutenant Raus were] members of a skin head organization.”

It also stated that “this vicious labeling of [the deputies and lieutenant] was apparently started by a[n] African American Deputy, who work[ed] with [them] in the Transport Unit.” Specifically, the blue form complaint alleged that an African American Deputy, O’Dell Willis, had approached Cox and questioned him about why his head was shaven. It further alleged that shortly thereafter, other, unnamed African American Deputies approached Cox, Feldman, and McCarty and questioned them about their shaved heads. None of the inquiries, whether by Willis or by the unnamed deputies, was alleged to have been accusatory or confrontational. *142 Finally, the complaint alleged the complainants’ belief that the rumors had made the workplace “racially hostile and unsafe” and in addition, “put [their] families, wives and children in danger.” It appears from developments described *infra* that while Department employees had asked about why appellants’ heads were shaved and perhaps mentioned the existence of the rumors, the accusatory harassment was by inmates.

The Department’s Assistant Chief Wasilewski instructed former Captain Woloszyn to investigate the complainants’ allegations. Woloszyn’s investigation concluded with a report dated October 21, 2005, that found no evidence of harassment. According to Woloszyn’s report, certain deputies had inquired, but not in a hostile way, why the deputies had shaved their heads. According to Woloszyn’s report, none of the appellants had heard Department members directly accuse them of being skinheads. Rather, they had heard only from others that such comments had been made. However, after being interviewed by Woloszyn, Lieutenant Raus withdrew as a complainant because he “was not approached by anyone and did not feel harassed but was misled [by Cox] into believing” that harassing conduct had occurred.

The Woloszyn report settled little. The subsequent PSU investigation, discussed *infra*, revealed that while Woloszyn’s conclusions about the lack of first-hand testimony about accusatory behavior was correct so far as it went, he may not have actually interviewed appellants McCarty or Bingham, or several other deputies, whom he claimed to have interviewed. Nevertheless, with the assistance of then-Union president Deputy Dan Mathews and a union attorney, the five appellants filed individual racial harassment complaints with the EEOC between September 29 and October 12, 2005.

Appellants’ EEOC complaints, which were under oath, differed materially from their blue form complaint. Instead of alleging, as they did in the blue form complaint, a non-hostile encounter in which Willis simply asked Cox why his head was shaven, Cox and McCarty stated to the EEOC that an unnamed African American Deputy had accused them of being skinheads in a face to face confrontation. On this record, the reference to an African American Deputy has to be understood to be Willis. Willis is the only African American Deputy mentioned by name in the blue form complaint, which strongly implies—all but expressly states—that Willis is the source of the allegedly harassing rumors. The PSU investigation, described *infra*, collected testimony that Willis was believed by all to be the source. The complaint in the present matter named Willis as a defendant and directly alleged that the hostile environment was “fanned by the actions of Defendant Willis.” On this record, the reference to an unnamed African American Deputy would have been understood, then and now, to mean Willis. Finally, statements by Cox, McCarty and Feldman indicated prior, hostile, but unrelated, encounters with Willis. Nothing in appellants’ brief claims that anyone but Willis was believed to be

the source of the alleged harassment.

Feldman and Bingham also complained that they had heard from other deputies that they had been referred to as skinheads and called racist by African American Deputies. Kalin's complaint stated that he had been confronted with the existence of rumors that he was a skinhead. Every appellant complained that the Department had acted upon similar complaints of harassment by African American Deputies but failed to act upon theirs.

On October 26, 2005, the Department filed a response with the EEOC, signed by *143 Assistant Chief Wasilewski. The response stated that Wasilewski could find no merit to the harassment alleged in either the blue form or the EEOC complaint filed by appellants. It also stated that "the employer has made every effort to determine if any harassment has occurred in this incident. In furtherance of that end, I have submitted this entire package to the Onondaga County Sheriff's Office Professional Standards Unit, our internal investigation arm, for their review, recommendation, and interdiction." The submission to the PSU was pursuant to a written Onondaga policy that harassment complaints were to be investigated by the PSU at the Department Chief's direction.

On December 12, 2005, the EEOC dismissed all appellants' complaints and issued a notice to appellants of their right to sue within 90 days. However, appellants never pursued the harassment claim further.

The PSU continued with its investigation. When it commenced, it had before it: (i) the original blue form complaint; (ii) the individual EEOC complaints; (iii) Lieutenant Raus's written withdrawal of his blue form complaint; (iv) the October 21, 2005 report of Captain Woloszyn; and (v) the October 26, 2005 statement to the EEOC. Also before the PSU was a misconduct allegation by Assistant Chief Wasilewski that he forwarded to the PSU on November 11, 2005. He alleged that Cox, McCarty, Feldman, Bingham, Kalin, and Lieutenant Raus violated Departmental regulations by filing false reports.¹ This allegation was presumably based on the inconsistent factual claims asserted in the blue form complaint and EEOC filings. Wasilewski's misconduct complaint also accused Woloszyn of false statements, presumably for claiming non-existent interviews in his report.

¹ The misconduct complaint was based on Sections 2.8 and 4.3 of the Department's policy and procedures. Section 2.8 provides, "[m]embers shall refrain from actions or conduct while on duty which may discredit a member or the Sheriff's Office." Section 4.3 provides, "[m]embers shall not make or submit a report or document, which contains information known by the member to be inaccurate, false or improper ... nor influence another person to do so."

The PSU thus had before it a variety of issues: (i) whether appellants had been racially harassed because of rumors started by Willis that they were skinheads; (ii) whether appellants' complaints of racial harassment generated by Willis were knowingly false; and (iii) whether Woloszyn had made a false report regarding his investigation into (i).

The issues were yet more complicated. The misconduct complaint in (ii), if upheld, would support an inference that several white officers had engaged in a coordinated effort to harass Willis, who had earlier prevailed in a Title VII lawsuit against the Department alleging a hostile work environment and retaliation. *See Willis v. Onondaga County Sheriff's Department*, No. 5:04-cv-00828 (GTS-GHL), Dkt. No. 67-68, 77. The existence of racial tension in the Department at pertinent times is evident from the record, as is the belief of appellants that their grievances were treated less sympathetically than those of African American officers, particularly Willis.

In that context, Sergeant Smith began the PSU investigation. Smith interviewed the appellants individually, in the presence of a union representative. None of them, including McCarty and Cox, claimed to have been called a skinhead to their face by another deputy. Appellants, and most of the other officers in the Department who were interviewed, reported the existence, even persistent existence, of rumors *144 that appellants were skinheads. However, none had heard any officer make such an allegation, albeit several officers made non-hostile inquiries as to why appellants had shaved their heads. Some officers also testified to the existence of rumors that Willis had started the rumors. In his interview with Sergeant Smith, which took place about two weeks after appellants' interviews, Willis flatly denied that he had said anything to suggest the deputies were skinheads and stated that the whole affair put undue stress on him in his work.

During the individual interviews of appellants, each was informed that disciplinary action against them was being considered based on the falsity of the EEOC filings. In addition to being questioned on how the skinhead rumors had

started and the inconsistencies in some of their allegations, appellants were each questioned about the Woloszyn investigation.

Two reports resulted from the PSU investigation. The first, dated January 26, 2006, summarized former Captain Woloszyn's failure to thoroughly investigate the original blue form complaint as well as his submission of a false and misleading report to Assistant Chief Wasilewski in violation of Sections 2.8 and 4.3 of the Department's policies and procedures. *See* Note 1, *supra*.

The second, dated January 31, 2006, summarized the circumstances found to involve a violation of Department policies and procedures in the filing of a false EEOC report by Cox and McCarty. This was based on Cox and McCarty's conceded lack of first-hand knowledge of harassment or confrontational behavior by Willis, even though each alleged a face-to-face confrontation with Willis in the EEOC complaint.

However, Sheriff Walsh, the head of the Department, decided not to take any official action against Cox and McCarty. Former Captain Woloszyn was demoted. Between appellants' interviews and Sheriff Walsh's decision not to pursue charges against them, Cox and Matthews, the then-acting Union President, unsuccessfully attempted to obtain a copy of the PSU report upon the conclusion of the investigation.

On February 16, 2006, appellants filed a second round of EEOC complaints, this time alleging that the PSU investigation and threats of false reports charges were illegal retaliation for their harassment complaints. The EEOC found evidence of retaliation, finding the department's decision to investigate and consider disciplinary action against appellants for making false allegations in an EEOC complaint to have been discriminatory. It noted that such actions might "have [had] a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process or other employment discrimination proceedings."

Appellants were issued notices of their right to sue and timely filed the present action on April 9, 2008. They alleged, in pertinent part, that they were victims of a hostile work environment and unlawful retaliation by the various appellees in violation of Title VII and N.Y. Exec. Law § 296. Appellants also alleged violations of 42 U.S.C. §§ 1981, 1983, 1985, and 1988; the Fourteenth Amendment; and Article 1, Section 11, of the New York State Constitution. Judge McCurn dismissed the claims asserted under 42 U.S.C. § 1981 and the Title VII hostile work environment claims *sua sponte*. *Cox v. Onondaga Cnty. Sheriff's Dep't*, No. 5:08-cv-387 (NPM), 2009 WL 910046, 2009 U.S. Dist. LEXIS 28101 (N.D.N.Y. Apr. 2, 2009). The remaining claims were later dismissed on a grant of summary judgment by Judge Mordue, who held that there was no evidence of a requisite adverse employment action. *Cox v. Onondaga Cnty. Sheriff's *145 Dep't*, No. 5:08-cv-387 (NAM), 2012 WL 1069053, 2012 U.S. Dist. LEXIS 43913 (N.D.N.Y. Mar. 29, 2012).

Appellants have appealed the dismissal only of the retaliation claim. They also claim that Judge Mordue should have recused himself because of a prior relationship with Sheriff Walsh.

DISCUSSION

We review an appeal from a grant of summary judgment *de novo*. *See, e.g., Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir.2003). Summary judgment is appropriate only where there are no issues of material fact and the movant is entitled to judgment as a matter of law. *Id.* We may, however, affirm on any ground with support in the record. *McElwee v. County of Orange*, 700 F.3d 635, 640 (2d Cir.2012).

^[1] In order to show a *prima facie* case of retaliation in response to a motion for summary judgment, a plaintiff must submit sufficient admissible evidence to allow a trier of fact to find: (i) conduct by the plaintiff that is protected activity under Title VII; (ii) of which the employer was aware; (iii) followed by an adverse employment action of a nature that would deter a reasonable employee from making or supporting a discrimination claim; (iv) that was causally connected to the protected activity. *Kessler v. Westchester Cnty. Dep't of Soc. Servs.*, 461 F.3d 199, 205–06 (2d Cir.2006).²

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The statutory provision reads in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.
42 U.S.C. § 2000e-3(a).

Once an employee establishes a *prima facie* case, the burden shifts to the employer to put forth evidence of a non-retaliatory rationale. *See Holt v. KMI-Continental*, 95 F.3d 123, 130 (2d Cir.1996). Once the employer has done so, the employee may prevail by demonstrating that the stated rationale is mere pretext. *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173, 179-80 (2d Cir.2005). The employee at all times bears the burden of persuasion to show a retaliatory motive. *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir.1993). The district court held that appellants had failed to establish a *prima facie* case because they had suffered no adverse employment action.

Appellants argue that several aspects of the PSU investigation amount to the requisite adverse employment actions: (i) the investigation was conducted by the PSU instead of within the Department in contrast to other investigations of allegations of harassment or hostile work environment that were handled internally; (ii) the PSU's interview of Deputy Willis was less confrontational than their own; (iii) the PSU interviews were more preoccupied with the failings of Captain Woloszyn's investigation and the authorship of appellants' paperwork and filings than with the substance of their allegations; and (iv) appellants' request for a copy of the PSU report was denied on the grounds that disciplinary action was pending. We deal separately, *infra*, with the portion of appellants' retaliation claim resulting from the fact that they were informed during the investigation that they could be brought up on criminal and administrative charges based on their false complaint to the EEOC.

[2] As noted, adverse employment actions are those that "well might ... dissuade[] a reasonable worker from making or supporting a charge of discrimination." *146 *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) (internal quotations and citations omitted). However, "[c]ontext matters," and so "the significance of any given act of retaliation will often depend upon the particular circumstances." *Id.* at 69, 126 S.Ct. 2405.

a) *The PSU Investigation*

[3] An employer's investigation of an EEOC complaint alleging racial harassment without more—that is, without additional particularized facts evidencing a retaliatory intent and resulting in, or amounting to, adverse job consequences for the complainant—cannot sustain a valid retaliation complaint.

While the relevant statutory provisions do not require an employer's investigation, as was the case in *Malik v. Carrier Corp.*, 202 F.3d 97, 105-06 (2d Cir.2000) (federal law required investigation into workplace sexual harassment; failure to do so was basis for employer liability), they clearly contemplate that employers facing charges before the EEOC will fully inform themselves of all relevant circumstances. After a complaint has been filed, "in writing under oath or affirmation," the Commission must give notice to the employer within 10 days. 42 U.S.C. § 2000e-5(b). Then the Commission investigates. After the EEOC has determined that there is reasonable cause to believe that a complaint is true, the respondent (the employer) generally will be asked to submit a position statement with supporting documentation. 29 C.F.R. § 1614.108. Occasionally, the Commission will conduct a fact-finding conference in order to investigate, which can include a meeting intended to determine what facts are disputed and undisputed. "Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue." 29 C.F.R. § 1614.108(b). Then the Commission engages in "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The respondent has 30 days to reach a "conciliation agreement" with the Commission in order to remedy the discrimination. 42 U.S.C. § 2000e-5(f)(1).

These provisions clearly contemplate that employers must be allowed to inform themselves of all facts relevant to an EEOC complaint. Employers have a right to answer an EEOC complaint and are asked not only to engage in conciliation but also are sometimes asked to present their view of the facts. If employers are at risk of liability from conducting a non-overreaching internal investigation, meaningful conciliation and fact conferences are not possible.

Moreover, we cannot blind ourselves to the fact that an employer's failure to conduct an investigation when faced even with an internal complaint, much less a charge to the EEOC, might be viewed as evidence of an indifference to racial discrimination, if not acquiescence in it. Indeed, we can say with confidence that the law must give breathing room for such investigations to be carried out. *See Malik*, 202 F.3d at 106–07 (law must take care not to “reduce [employers’] incentives to take reasonable corrective action,” so “employer[s]’ conduct of an investigation and determination of its scope must be viewed *ex ante* ”); *United States v. N.Y. Transit Auth.*, 97 F.3d 672, 677–78 (2d Cir.1996) (granting employers leeway in how to investigate and defend against EEOC proceedings); *cf. Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 568–70 (2d Cir.2011) (fact-finding investigations that do not themselves qualify as disciplinary action but could lead to disciplinary action, where engaged in with good reason, do not constitute *147 adverse employment actions under *White*).

Therefore, employees who complain of racial discrimination, whether internally and/or through an EEOC complaint, may not claim retaliation simply because the employer undertakes a factfinding investigation.

Having said that, we quickly add that an employer's investigation may constitute a cognizable retaliatory action if carried out so as to result in a hostile work environment, constructive discharge, or other employment consequences of a negative nature, or if conducted in such an egregious manner as to “dissuade a reasonable worker from making or supporting a charge of discrimination.” *See White*, 548 U.S. at 57, 126 S.Ct. 2405; *see also Velikonja v. Gonzales*, 466 F.3d 122, 124 (D.C.Cir.2006) (an investigation that is lengthy in nature, prohibits promotions during its pendency, and by its very nature places a “cloud over [one’s] career” qualifies as an adverse employment action under *White*). *Compare Rhodes v. Napolitano*, 656 F.Supp.2d 174, 185–86 (D.D.C.2009) (noting that length and scope of an investigation into unrelated misconduct could satisfy the *White* standard), *with Tepperwien*, 663 F.3d at 568–70 (fact-finding investigations engaged in with good reason that could but do not necessarily lead to disciplinary action constitute trivial harms or “petty and minor annoyances” that would not unduly dissuade a reasonable employee from seeking redress under Title VII).

^[4] Apart from the threat of disciplinary proceedings, dealt with separately *infra*, none of the circumstances relied upon by appellants, whether viewed individually or collectively, are sufficient to allow a finder of fact to find illegal retaliatory acts in the conduct of the PSU investigation.

First, appellants claim that their “blue form” complaint about racial harassment was the only such complaint to have been investigated by the PSU. However, the circumstances fully justified the investigation by the PSU. Woloszyn's failures ensured that any further attempt to handle these matters informally would be viewed with great skepticism. Indeed, appellants have not claimed that any similar matter—allegations of harassment followed by a defective investigation—had been handled informally.

Critically, moreover, the written policy of the Onondaga Sheriff's Department authorized PSU investigation of harassment complaints at the direction of the Chief. Unlike the circumstances in *Stern v. Columbia University*, therefore, the PSU investigation was not conducted by a body established in an *ad hoc* fashion to look into this matter only. 131 F.3d 305, 309 (2d Cir.1997). Even if appellants' complaint of racial harassment was the first to result in a PSU investigation, therefore, no trier of fact could find that it was prompted by a retaliatory motive or constituted a hostile work environment, constructive discharge, or deterrent to seeking relief from the EEOC.

Second, appellants rely upon the fact that Deputy Willis was treated less confrontationally during his PSU interview. However, Willis's interview occurred after the interviews of appellants revealed that, contrary to appellants' EEOC claim, no appellant (or anyone else) ever saw or heard Willis make any remarks about appellants being skinheads. Even assuming that the questioning of appellants and Willis was of a different character and the difference might be deemed cognizable retaliation, which we do not decide, there were sound reasons not to be confrontational with Willis.

Third, appellants' arguments regarding the nature and subject of the questioning during their respective interviews is frivolous. As noted, the PSU had before it a number of issues, all of which resulted *148 from appellants' claims of racial harassment. The questioning complained of related to these matters and was clearly legitimate.

Finally, also frivolous is appellants' argument that their request for a copy of the PSU report was denied at the time it was made. Indeed, appellants identify no cognizable harm from that denial.

b) *The Threats of False Report Charges Against Appellants*

As noted, during the PSU investigation, Sergeant Smith informed appellants that they might be brought up on charges as a result of having filed false statements. When, a month later, appellants later inquired as to the status of the charges, they were told that charges were “pending.”

We deal with the threat of false reports charges separately because it raises important issues as to the breadth of legally cognizable claims of retaliation for the filing of charges with the EEOC. Obviously, such a threat would often—even usually—be a deterrent to reasonable employees making or supporting discrimination claims.

The statutory language, *see* Note 2, *supra*, is quite broad but falls well short of suggesting that an absolute privilege immunizes knowingly false EEOC charges. Certainly, such conduct might support criminal charges under 18 U.S.C. §§ 1621 (perjury) and 1505 (obstruction of agency proceedings).

However, the fact that false charges before the EEOC are not permitted does not necessarily lead to the conclusion that the employers targeted by such charges are entitled to respond with disciplinary action against the filing employee. Some circuits, *see, e.g., Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir.1969), have concluded that employers have no authority to “unilaterally” police abuses of the EEOC process. *Id.* at 1005. Others take the view that, “Title VII was designed to protect the rights of employees who in good faith protest the discrimination they believe they have suffered” and not to “arm employees with a tactical coercive weapon under which employees can make baseless claims simply to advance their own retaliatory motives and strategies.” *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890–91 (7th Cir.2004) (internal quotations omitted); *see also Richey v. City of Independence*, 540 F.3d 779, 784–86 (8th Cir.2008) (where documentary evidence results in a conclusion that an employee has violated non-discriminatory company policy, even if the violations occurred in the context of a workplace harassment investigation, resulting adverse employment actions are not retaliatory).

One district court in this circuit has seemingly held that such threats are *per se* illegal retaliation. *See Proulx v. Citibank, N.A.*, 681 F.Supp. 199, 200–01 (S.D.N.Y.1988), *aff’d without opinion*, 862 F.2d 304 (2d Cir.1988).³ However, this court has applied a “good faith” requirement for protected activity in retaliation cases like the present one. *See Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir.1998), *abrogated in part on other grounds by Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (“Quinn need not establish that she successfully described in that complaint conduct amounting to a violation of Title VII. She need only demonstrate that she had a good faith, reasonable belief that the underlying challenged actions of the employer violated the law.” (internal quotations and citations omitted)).

³ We note that while *Proulx* was affirmed by this court as to the quantum of damages, the liability finding was not appealed. *See Proulx v. Citibank, N.A.*, 709 F.Supp. 396, 397 (S.D.N.Y.1989).

***149** In reviewing the facts of these various cases, we find no inconsistencies in their results when the ordinary *McDonnell Douglas* burden-shifting regime, which governs retaliation cases, *Terry*, 336 F.3d at 141, is applied. Once the plaintiff has proffered sufficient evidence that a threat of discipline triggered by a claim of discrimination was made, a *prima facie* case of retaliation will usually have been established.

^[5] We therefore believe it fairly obvious that a *prima facie* case has been established in the present matter. As noted, the burden of producing evidence of a non-retaliatory reason for the threat of discipline shifts to the Department, with the burden of showing pretext falling on plaintiffs, who bear the ultimate burden of showing illegal retaliation. It may well be that retaliation cases based on such threats are generally strong and the employers’ rebuttals generally non-existent or weak. However, the facts of the present case may be a tad unusual, but they are sufficient to support summary judgment for the appellees.

Sergeant Smith’s statements about charges for making a false report being possible were completely reasonable in light of the record. Appellants, who had initiated the entire matter, had given materially inconsistent statements regarding Willis’s behavior. These ranged from describing Willis as (understandably) asking why they had shaved

their heads to stating that Willis had confronted them with accusations of being skinheads. The latter accusation was, on the record before us, false, and seemingly intentionally so. A misconduct complaint based on these false accusations had been filed by Assistant Chief Wasilewski and was referred to the PSU. Informing appellants of the possible results of the investigation was in fact fair to them.⁴

⁴ No due process claim has been asserted by appellants, who were, in any event, not charged.

Moreover, the false statements were intended by the officers who made them, who were white, to establish a claim of racial harassment by an African American officer. In the context of racial tension within the Department, false charges against Willis could be viewed by a reasonable observer as themselves racial harassment of Willis. Indeed, Willis's deposition testimony indicated that he felt harassed by the accusations, and the PSU report noted that he felt "undue stress" at work as a result.

⁶ Employers are under an independent duty to investigate and curb racial harassment by lower level employees of which they are aware. *See Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir.2009). This is because the primary purpose of Title VII "is not to provide redress but to avoid harm." *Faragher v. City of Boca Raton*, 524 U.S. 775, 806, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). It would therefore be anomalous to conclude that an employer is not allowed to investigate, with a view to discipline, false complaints of harassment that themselves might be viewed as intended as racial harassment. Otherwise, employers might have to choose between liability for retaliating against one group of employees or liability to another group for not preventing the first group from harassment of the second with false claims.⁵

⁵ Smith did not threaten that the charges would be brought unless the EEOC charge was dropped so that the matter could be closed rather than investigated. *Compare Lore v. City of Syracuse*, 583 F.Supp.2d 345, 367 (N.D.N.Y.2008) (statement that one will forego criminal and administrative charges if an EEOC complaint is dropped qualifies as an adverse employment action).

***150** Our decision is supported by another fact. Law enforcement officials are required to file reports accurately. The Department, therefore, has a greater interest in disciplining officers who do not take that obligation seriously than do most employers. The importance of this policy is underlined by the fact that a generally applicable, non-discriminatory, written policy for dealing with false reporting exists in the Department. Moreover, a law enforcement officer who has filed a false charge under oath with a governmental agency may well be cross-examined about that false filing when a witness in an unrelated case where the officer's credibility is in issue. *See Fed.R.Evid.* 608(b).

In contrast, appellants have presented no evidence that the warning about disciplinary action was intended to retaliate for any reason other than the apparent falsity of their EEOC charges and the complex circumstances those false charges created. As noted, they have the ultimate burden of proof on that issue. Therefore, even if appellants have established a *prima facie* case on their retaliation claim based on the threat of false reports charges, the Department has presented evidence that defeats that claim as a matter of law.

c) Recusal

⁷ ⁸ Title 28 U.S.C. § 455(a) requires a judge to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." Under the statute, recusal is required in specific contexts not relevant here as provided for in Section 455(b) and also wherever, "an objective, disinterested observer fully informed of the underlying facts, would entertain significant doubt that justice would be done absent recusal." *United States v. Yousef*, 327 F.3d 56, 169 (2d Cir.2003) (internal quotations and alterations omitted). The pertinent trigger for recusal is the "appearance of partiality," *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 128–30 (2d Cir.2003), and a denial of a motion to recuse is reviewed for abuse of discretion. *Id.* at 126.

⁹ Appellants argue that the fact that Judge Mordue recused himself from matters involving Sheriff Walsh in 2007 and 2009, *see Leader v. Onondaga County*, No. 09–cv–0493 (NAM/DEP), 2009 U.S. Dist. LEXIS 39296 (N.D.N.Y.2009), citing a long relationship between the two, compels the conclusion that Judge Mordue should have recused himself

from this litigation. We disagree.

While at one time there may have been a close relationship between Sheriff Walsh and Judge Mordue, it is undisputed that Judge Mordue, at the time of the instant litigation, had not seen or spoken to Walsh since March 2005. This fact, absent other details about the relationship, negates any inference of partiality. *See Independent Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 945 (2d Cir.1998) (passage of time negates inference of partiality).

d) *Unsealing the Record*

Much of this opinion refers at critical points to parts of the record that have been sealed. Because of the importance of the sealed material to our disposition of this matter, we order that the entire record on appeal be unsealed. *See Joy v. North*, 692 F.2d 880, 893 (2d Cir.1982) (“[D]ocuments used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.”); *accord Stern*, 131 F.3d at 307 (same).

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

State v. Conn. Emps. Union Ind., 322 Conn. 713 (2016)

Synopsis

Background: Employer filed application to vacate arbitration award reinstating state employee and imposing period of suspension without pay rather than terminating employee, who had smoked marijuana in the workplace. The Superior Court, Judicial District of Hartford, Robaina, J., 2014 WL 5572251, vacated award. Union appealed.

[Holding:] The Supreme Court, Rogers, C.J., held that arbitrator did not violate public policy by reinstating employee.

Reversed and remanded.

Espinosa, J., concurred in judgment and filed opinion.

Attorneys and Law Firms

****1124** Barbara J. Collins, Hartford, for the appellant (named defendant).

****1125** Gregory T. D'Auria, solicitor general, with whom were Thomas P. Clifford III, assistant attorney general, and, on the brief, George C. Jepsen, attorney general, and Philip M. Schulz, assistant attorney general, for the appellee (plaintiff).

ROGERS, C.J., and PALMER, ZARELLA, EVELEIGH, McDONALD, ESPINOSA and ROBINSON, Js.*

* This appeal was originally scheduled to be argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson. Although Justice Eveleigh was not present at oral argument, he read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

Opinion

ROGERS, C.J.

***715** This case presents the question of whether the public policy of Connecticut demands no less than termination of employment as the only appropriate disciplinary response when a state employee is caught smoking marijuana during his working hours. The defendant,¹ Connecticut Employees Union Independent, ***716** appeals² from the judgment of the trial court rendered following the court's denial of the defendant's motion to confirm an arbitration award that reinstated Gregory Linhoff, a union member (grievant), to his employment at the University of Connecticut Health Center (health center). The court denied the defendant's motion to confirm and granted a motion to vacate the award filed by the plaintiff, the state of Connecticut, after concluding that the award, which imposed a number of sanctions and conditions short of termination, violated public policy. We disagree that the arbitrator's award, which imposed an unpaid suspension, last chance status and random drug testing, clearly violated an explicit, well-defined and dominant public policy and, therefore, reverse the judgment of the trial court.

¹ Gregory Linhoff, the grievant in the underlying proceedings, also was named as a defendant in the trial court. For purposes of convenience, we refer herein to Connecticut Employees Union Independent as the defendant and to Linhoff as the grievant.

² The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

The following facts and procedural history are relevant to this appeal. At the time of the incident in question, the grievant had been employed by the state for approximately fifteen years and had not been subject to any previous discipline. His performance evaluations had ranged from “satisfactory” to “excellent.” On March 7, 2012, while working, as he had for the previous eleven years, the 4 p.m. to midnight shift as a “skilled maintainer”³ at the health center, he was caught smoking marijuana.

³ The state Department of Administrative Services class specification for a skilled maintainer, which was part of the record before the arbitrator, indicates generally that a person employed in that position may perform tasks in the areas of building and equipment maintenance, grounds care, or trades work. The grievant’s specific job duties are not clear from the record, and the arbitrator made no findings in that regard.

Specifically, at about 5:50 p.m., a health center police officer observed the grievant and a coworker sitting in a state van parked in a secluded area of the health center campus, after the officer was apprised of a confidential ***717** informant’s report that the grievant and his coworker were suspected of using marijuana at work. As the officer approached the van, he observed the grievant sitting in the passenger seat with the door open, smoking from a glass pipe. When the officer asked the grievant what he was doing, he initially responded that he was “just fucking ****1126** off,” but then acknowledged that he was smoking marijuana. He also surrendered two bags of marijuana that he had in his possession, which together weighed about three quarters of one ounce. The grievant was arrested and provided a statement to police in which he identified the individual from whom he had purchased the marijuana. The criminal charges against the grievant subsequently were dismissed.

On June 22, 2012, as a result of the foregoing incident, the plaintiff terminated the grievant’s employment. In a letter of termination sent to the grievant, Karen Duffy Wallace, the plaintiff’s director of labor relations, explained that the grievant had violated the health center’s rules of conduct,⁴ alcohol abuse and drug-free workplace policy,⁵ and smoke-free workplace policy, and that the incident was considered to be serious. Wallace noted further the unsupervised nature of the grievant’s position and the fact that he had access to all areas of the health center, and she opined that the grievant no longer could be trusted to perform his duties in an acceptable manner.

⁴ The health center’s rules of conduct prohibit in relevant part “[u]nlawfully ... possessing, using or being under the influence of ... drugs or controlled substances when on the job or subject to duty....”

⁵ The health center’s alcohol abuse and drug-free workplace policy provides in relevant part that “the unlawful possession, use or distribution of illicit drugs and/or alcohol will not be tolerated.”

The defendant contested the grievant’s termination and, on December 19, 2013, pursuant to a grievance procedure provision in the parties’ collective bargaining agreement, an arbitration hearing was held to determine ***718** the issues of whether: (1) the dismissal of the grievant was for just cause; and (2) if not, what should be the remedy, consistent with the agreement. Wallace testified at the hearing, explaining that, when she decided to terminate the grievant’s employment, she took into account the nature of the violation and the fact that the grievant was smoking marijuana in a state vehicle on state property, during the earlier part of his work shift. She explained further that a person in the grievant’s position had keys and access to most of the health center campus, including the day care center, research laboratories and the hospital. In Wallace’s view, a person such as the grievant could not be trusted to work independently on the evening shift.

The grievant testified in his defense. He explained, with some detail, how he had brought his marijuana to work inadvertently, and how, when he and his coworker were presented with about ten minutes of time “to kill” between working assignments, they decided to park in the secluded area where the police officer had discovered them.

According to the grievant, when he realized that a glass pipe in his possession was “smelly,” he decided to smoke the residue in the pipe to eliminate the odor, and at that point was caught by the officer.

The grievant explained further that he recently had experienced stressful life events, namely, a cancer scare and marital problems, leading to anxiety from which he sought relief by smoking marijuana. He claimed that he had not smoked marijuana at work prior to the incident in question. The grievant testified that, following the incident, he went to an employee assistance program and sought treatment, which he regarded as successful. He testified further that, a few days prior to the incident, he had had his first therapy appointment at the Connecticut Anxiety and Depression Treatment Center. At that appointment, he was diagnosed with *719 anxiety and depression, and scheduled **1127 another appointment with a psychiatrist to address his conditions.

The arbitrator concluded that the plaintiff had met its burden of establishing that the grievant had engaged in misconduct, namely, possessing and smoking marijuana while at work. Moreover, in the arbitrator’s view, the grievant’s explanations as to why he had marijuana at work, and why he had decided to smoke from his pipe, were disingenuous. Contrary to the grievant’s testimony, the arbitrator opined, the grievant deliberately had taken the marijuana to work so that he could smoke it when the occasion arose.

The arbitrator concluded, however, that under the circumstances, termination of the grievant’s employment did not correspond with the notion of just cause. He cited the plaintiff’s rules, including its drug-free workplace policy, which permitted termination for violations but did not mandate it, as well as the grievant’s previous, positive work record and the nature of the offense. The arbitrator also reasoned that the grievant’s pursuit of therapy for anxiety and depression, prior to the incident, evidenced some level of self-awareness, and that the reality of his dismissal, his ineligibility for unemployment benefits and the subsequent arbitration proceedings had impressed upon him the seriousness of his offense. In the arbitrator’s view, although the grievant’s job duties raised some safety and security issues, the grievant “did not engage in such a breach of trust or show such lack of character that his return to the workplace would create a danger to persons or property nor [did his actions] prohibit his return to work as a satisfactory and productive employee.” Citing the principle of progressive discipline as a vital component of just cause that provides a path to rehabilitation under appropriate circumstances, the arbitrator concluded that termination was unwarranted. In short, the arbitrator rejected the plaintiff’s contention that complete *720 termination of the grievant’s employment was the only appropriate penalty for his misconduct.

The arbitrator, nevertheless, imposed a significant penalty for the grievant’s substantial misconduct. The grievant was suspended for a period of six months, without pay, to run from the effective date of his earlier removal from the payroll.⁶ The arbitrator ordered additionally that the grievant, upon his return to work, be subject to random drug and alcohol testing for a one year period, at the plaintiff’s discretion, and that the grievant “should consider his return to work to be in a ‘last chance’ context so that any future violation of the [plaintiff’s] policies that were applicable in [the arbitration] proceeding would warrant his immediate dismissal.”

⁶ Because more than six months already had passed, the arbitrator further ordered the grievant to be returned to work immediately and made whole for all back pay accruing after the conclusion of the suspension period, less any income earned or unemployment compensation received, and subject to the usual and customary payroll deductions.

Thereafter, the plaintiff filed an application to vacate the arbitrator’s award, and the defendant filed a cross application to confirm that award. See General Statutes §§ 52–417 and 52–418. In its application to vacate, the plaintiff contended, inter alia, that the arbitrator’s award violated public policy due to the serious nature of the grievant’s misconduct. The defendant disputed that contention. In an October 6, 2014 memorandum of decision, the trial court agreed that there was a well-defined public policy against the use of marijuana and, furthermore, that the arbitrator’s award violated that policy. Specifically, the court reasoned, the grievant purposefully had used marijuana at work, raising safety and security concerns, and to reinstate him under those circumstances would **1128 send an improper message that personal stress somehow excused his misconduct.⁷ The *721 court granted the plaintiff’s application to vacate the award and denied the defendant’s application to confirm the award. This appeal followed.

⁷ The trial court rejected additional challenges that the plaintiff had raised to the arbitrator’s award.

^[1] ^[2] We begin with the well established standard of review. “Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution.... Furthermore, in applying this general rule of deference to an arbitrator’s award, [e]very reasonable presumption and intendment will be made in favor of the [arbitral] award and of the arbitrators’ acts and proceedings.” (Citation omitted; internal quotation marks omitted.) *State v. New England Health Care Employees Union, District 1199, AFL–CIO*, 271 Conn. 127, 134, 855 A.2d 964 (2004).

^[3] ^[4] We have recognized, however, that an arbitration award should be vacated when, inter alia, it violates clear public policy. *Id.* When a challenge to a consensual arbitration award “raises a legitimate and colorable claim of violation of public policy, the question of whether the award violates public policy requires de novo judicial review.”⁸ (Internal quotation marks omitted.) *Id.*, at 135, 855 A.2d 964.

⁸ We emphasize, however, that our de novo review is limited to the question of whether the arbitrator’s decision to suspend the grievant as opposed to terminating his employment is itself contrary to an established public policy. In a case involving an unrestricted submission, when we conduct de novo review in response to a claim of a public policy violation, we do *not* review either the arbitrator’s construction of the agreement, to determine whether that construction is correct, or the arbitrator’s factual findings, to determine whether those findings have sufficient evidentiary support. See *HH East Parcel, LLC v. Handy & Harman, Inc.*, 287 Conn. 189, 199, 947 A.2d 916 (2008) (“[w]e ... do not substitute our own reading of the contract terms for that of the arbitrator, but intervene only to the extent that *those terms, as interpreted*, violate a clearly established public policy” [emphasis in original; internal quotation marks omitted]); *id.*, at 200, 947 A.2d 916 (“a reviewing court is bound by the arbitrator’s factual findings in reviewing a claim that an award rendered in a consensual arbitration violates this state’s public policy”).

^[5] ^[6] ^[7] ^[8] ***722** “The public policy exception applies only when the award is clearly illegal or clearly violative of a strong public policy.... A challenge that an award is in contravention of public policy is premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them.... When a challenge to the arbitrator’s authority is made on public policy grounds, however, the court is not concerned with the correctness of the arbitrator’s decision but with the lawfulness of enforcing the award.... Accordingly, the public policy exception to arbitral authority should be narrowly construed and [a] court’s refusal to enforce an arbitrator’s interpretation of [collective bargaining agreements] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.” (Citations omitted; internal quotation marks omitted.) *Id.*, at 135–36, 855 A.2d 964.

^[9] ^[10] ^[11] “The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated.” (Internal quotation ****1129** marks omitted.) *Id.*, at 136, 855 A.2d 964. “[G]iven the narrow scope of the public policy limitation on arbitral authority,” the trial court’s order vacating the arbitrator’s award should be upheld only if the plaintiff “demonstrates that the ... award clearly violate[d] an established public policy mandate.” (Internal quotation marks omitted.) *Id.* As we repeatedly have emphasized, “implicit in the stringent and narrow confines of this exception to the rule of deference to arbitrators’ determinations, is the notion that the exception must not be interpreted so broadly as to swallow the rule.”⁹ (Internal quotation marks omitted.) *Id.*

⁹ The public policy exception to the general rule of extreme deference to arbitral awards is intended to be an “exceedingly narrow” one. *Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 438, 747 A.2d 1017 (2000). By advocating for changes to our recent, well considered arbitration jurisprudence that would render the exception more broadly applicable, the concurring justice fails to fully appreciate that its very limited scope is entirely purposeful, and for good reason, namely, to preserve the efficacy of an efficient and economical private dispute resolution mechanism for which the parties freely have bargained. In short, we do not share the concurrence’s view that the slim chances of reversal under the public policy exception are evidence of an improper, unintended consequence of our existing standards of review.

^[12] ***723** Consistent with the foregoing law, the sole issue before us is whether the arbitrator’s award reinstating the grievant to employment after a lengthy unpaid suspension, with various conditions, violates public policy. This court

employs a two-pronged analysis to determine whether an arbitration award should be vacated for violating public policy. “First, the court determines whether an explicit, well-defined and dominant public policy can be identified. If so, the court then decides if the arbitrator’s award violated the public policy.” (Internal quotation marks omitted.) *Id.*, at 137, 855 A.2d 964.

^[13] Looking to our statutory, regulatory and decisional law, we conclude that there exists an explicit, well-defined and dominant public policy against the possession and recreational use of marijuana in the workplace. It is true that, at least in certain circumstances, the criminal sanctions attendant to personal marijuana use recently have been lessened. Nevertheless, pursuant to Connecticut’s statutes and regulations, marijuana remains a schedule II controlled substance; see General Statutes § 21a–243 (c); Regs., Conn. State Agencies § 21a–243–8 (g); and, therefore, possession of it by unauthorized persons is disallowed. Possession of relatively small amounts of marijuana by an unauthorized person subjects that person to a fine and confiscation of the marijuana and, after more than two convictions, mandatory referral to a drug education program at the offender’s *724 expense. See General Statutes § 21a–279a.¹⁰ Possession of larger amounts of marijuana by an unauthorized person exposes that person **1130 to more significant fines, potential imprisonment and, for more than four ounces or a second offense, a felony conviction. See General Statutes § 21a–279.¹¹ Additionally, pursuant to the regulations of the Department of Administrative Services, the use of illegal drugs while on duty is a type of misconduct for which a classified state employee may be reprimanded, suspended or dismissed. See Regs., Conn. State Agencies § 5–240–1a (c). Finally, the Appellate Court, in an appeal raising the same general issue as the present appeal, previously has held that Connecticut “has a well-defined public policy against the use of marijuana.” *Enfield v. AFSCME, Council 4, Local 1029*, 100 Conn.App. 470, 476, 918 A.2d 934, cert. denied, 282 Conn. 924, 925 A.2d 1105 (2007). In light of the foregoing authorities, we conclude that the statutory, regulatory and decisional law of Connecticut *725 evinces an explicit and well-defined public policy against the recreational use of marijuana, particularly in the workplace.

¹⁰ General Statutes § 21a–279a provides in relevant part: “(a) Any person who possesses or has under his control less than one-half ounce of a cannabis-type substance ... shall (1) for a first offense, be fined one hundred fifty dollars, and (2) for a subsequent offense, be fined not less than two hundred dollars or more than five hundred dollars.

“(b) The law enforcement officer issuing a complaint for a violation of subsection (a) of this section shall seize the cannabis-type substance and cause such substance to be destroyed as contraband in accordance with law.

“(c) Any person who, at separate times, has twice entered a plea of nolo contendere to, or been found guilty after trial of, a violation of subsection (a) of this section shall, upon a subsequent plea of nolo contendere to, or finding of guilty of, a violation of said subsection, be referred for participation in a drug education program at such person’s own expense.”

¹¹ General Statutes § 21a–279 provides in relevant part: “(b) Any person who possesses or has under his control ... four ounces or more of a cannabis-type substance ... for a first offense, shall be guilty of a class D felony, and for a subsequent offense shall be guilty of a class C felony.

“(c) Any person ... who possesses or has under his control one-half ounce or more but less than four ounces of a cannabis-type substance ... (1) for a first offense, may be fined not more than one thousand dollars or be imprisoned not more than one year, or be both fined and imprisoned; and (2) for a subsequent offense, shall be guilty of a class D felony....”

^[14] ^[15] ^[16] We turn next to the question of whether, under the facts and circumstances of this case, the arbitrator’s award reinstating the grievant with conditions, after a period of suspension without pay, violated this public policy. “In other words, we must determine whether [the] public policy [that is implicated] *required* the grievant’s dismissal.... In making this determination, we are mindful that the fact that an employee’s misconduct implicates public policy does not require the arbitrator to defer to the employer’s chosen form of discipline for such misconduct.” (Citation omitted; emphasis in original; internal quotation marks omitted.) *Stratford v. AFSCME, Council 15, Local 407*, 315 Conn. 49, 58, 105 A.3d 148 (2014). The party seeking to vacate an award reinstating a terminated employee bears the burden of proving that “nothing less than the termination of [the grievant’s] employment” will suffice given the public policy at issue. (Internal quotation marks omitted.) *Id.*, at 59, 105 A.3d 148.

We recently issued a comprehensive opinion “to clarify the factors a reviewing court should consider when evaluating a claim that an arbitration award reinstating a terminated employee violates public policy, and, by extension, the types

of factual findings an arbitrator may make in order to assist a reviewing court in considering such a challenge.” *Burr Road Operating Co. II, LLC v. New England Health Care Employees Union, District 1199*, 316 Conn. 618, 633, 114 A.3d 144 (2015). We held that, when determining whether termination of employment is required to vindicate the public policy at issue, a court should focus on four principal factors (*Burr Road* factors): “(1) any guidance offered by the relevant statutes, regulations, and other embodiments of the public policy at issue; (2) whether the employment *726 at issue implicates public safety or the public trust; (3) the relative egregiousness of the grievant’s conduct; and (4) whether the grievant is incorrigible.”¹² *Id.*, at 634, 114 A.3d 144.

¹² Although the arbitrator’s decision in the present matter was issued prior to our decision in *Burr Road Operating Co. II, LLC*, it touches upon many, but not all, of the factors and subfactors identified in that decision, as hereinafter discussed. We note that, to the extent the arbitrator failed to make factual findings pertinent to the analysis in that case, we are not free to supplement the record with factual findings of our own. See footnote 8 of this opinion. Consequently, our discussion of the *Burr Road* factors, in places, necessarily will be limited.

The trial court, when deciding the parties’ motions to vacate or confirm, similarly did not have the benefit of our decision in *Burr Road Operating Co. II, LLC*, and, therefore, understandably did not apply the framework established by that decision. Notably, we intended in *Burr Road Operating Co. II, LLC*, to bring clarity to an existing body of jurisprudence that was confusing and, to some degree, internally inconsistent. See *Burr Road Operating Co. II, LLC v. New England Health Care Employees Union, District 1199*, supra, 316 Conn. at 632–33, 114 A.3d 144.

****1131** ^[17] ^[18] “The first [*Burr Road*] factor requires us to consider whether the relevant statutes, regulations, and other manifestations of the public policy at issue themselves recommend or require termination of employment as the sole acceptable remedy for a violation thereof... Put differently, we ask whether the offense committed by the employee involves the sort of conduct the law deems to be inexpiable, or that would expose the employer to substantial liability if it were to reoccur... Whether sources of public policy themselves mandate termination is a question of law subject to plenary review.” (Citations omitted.) *Id.*, at 634–35, 114 A.3d 144.

The regulations governing state employment are most pertinent here. As we previously have stated, the use of illegal drugs in the workplace explicitly is identified as misconduct warranting discipline. See Regs., Conn. State Agencies § 5–240–1a (c)(10). Notably, however, the regulations do not require the dismissal of an employee for such misconduct. Although that sanction *727 is available; see *id.*, at § 5–240–5a (a); the employer also is authorized to respond with a lesser sanction such as a reprimand; see *id.*, at § 5–240–2a; or a suspension with reduced or no pay. See *id.*, at § 5–240–3a (a) and (b). The state’s drug-free workplace policy mirrors the regulations, providing that “[a]ny employee violating this policy [by unlawfully possessing or using a controlled substance in the workplace] will be subject to discipline, *up to and including* termination.”¹³ (Emphasis added.) The policy also notes “Connecticut’s existing three-pronged strategy of education, treatment and enforcement to combat substance abuse,” and encourages employees with substance abuse problems to participate in an employee assistance program or a rehabilitation program.

¹³ Similarly, the health center’s rules of conduct permit “disciplinary action *up to and including* dismissal”; (emphasis added); for an employee’s use or possession of drugs or controlled substances when on the job. Its alcohol abuse and drug-free workplace policy also permits “disciplinary action *up to and including* termination”; (emphasis added); for an employee’s unlawful possession or use of illicit drugs.

The state’s drug-free workplace policy explicitly references the federal Drug-Free Workplace Act of 1988 (federal act), 41 U.S.C. § 8101 et seq., which requires any state agency that receives federal funding to certify that it will maintain a drug-free workplace. The current incarnation of that federal act provides that, when an employee of a federal grant recipient is convicted under a criminal drug statute for a violation in the workplace, the grantee shall either: “(1) take appropriate personnel action against the employee, up to and including termination; or (2) require the employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for those purposes by a [f]ederal, [s]tate, or local health, law enforcement, or other appropriate agency.” 41 U.S.C. § 8104; see ****1132** also 41 U.S.C. § 8103(a)(1)(F). Citing an identical provision in the federal act applicable to federal contractors; see ***728** 41 U.S.C. § 8102(a)(1)(F); the United States Court of Appeals for the Second Circuit has held that an arbitral award that reinstated an employee of a Connecticut skilled nursing facility after a seven month unpaid suspension, following his arrest in the workplace for possession of marijuana with intent to distribute, did not violate the public

policy evidenced by, inter alia, the federal act. *Saint Mary Home, Inc. v. Service Employees International Union, District 1199*, 116 F.3d 41, 46 (2d Cir.1997). Thus, the federal act, like the state policy that draws from it, does not require termination for drug related misconduct in the workplace, but rather, allows for the options of a lesser sanction or a rehabilitative approach.¹⁴

¹⁴ In the present case, as we previously have mentioned, the charges against the grievant ultimately were dismissed. As to employees, like the grievant, who engage in workplace drug use that does not result in a conviction, the federal act does not prescribe any sanction at all. See generally 41 U.S.C. § 8103(a)(1)(F).

^[19] In sum, the relevant sources of public policy do not support the conclusion that such policy is offended by discipline short of termination for a state employee's use of marijuana in the workplace. Rather, they provide for an array of responses and explicitly support efforts at rehabilitation, thereby rejecting the notion that the perpetrator of the misconduct necessarily is incapable of atonement.

^[20] ^[21] The second *Burr Road* factor "is whether the nature of the employment at issue implicates public safety or the public trust.... Nationally, in the vast majority of cases in which courts have vacated for public policy reasons arbitration awards reinstating terminated employees, the grievant has been a public sector employee,¹⁵ primarily working in fields such as law enforcement, education, transportation, and health care, in other words, fields that cater to vulnerable populations or help ensure the public safety.... This reflects the fact that the threat to public policy involved in reinstating a terminated employee is magnified when the offending employee provides an essential public service, and especially when he is employed by, represents, and, ultimately, is answerable to the people." (Citations omitted; footnote added.) *Burr Road Operating Co. II, LLC v. New England Health Care Employees Union, District 1199*, supra, 316 Conn. at 635–36, 114 A.3d 144. The second *Burr Road* factor "hinges on general questions of law and policy and is, therefore, subject to plenary judicial review." *Id.*, at 637, 114 A.3d 144.

¹⁵ Similarly, "[i]n Connecticut, in every case wherein this court has concluded that an arbitration award reinstating a terminated employee offended public policy, the grievant was a state or municipal employee." *Burr Road Operating Co. II, LLC v. New England Health Care Employees Union, District 1199*, supra, 316 Conn. at 637, 114 A.3d 144.

Pertinent to this factor, the plaintiff had argued before the arbitrator that the grievant, due to his misconduct, no longer could be trusted to perform his unsupervised responsibilities as a skilled maintainer, such as changing heating, ventilation and air conditioning filters on a hospital roof, in an acceptable manner. It noted that the grievant had access to all areas of the health center campus, including a day care center, research laboratories and the hospital, and that he had use of a state vehicle to traverse the campus if it became necessary. In ordering reinstatement of the grievant, the arbitrator acknowledged that, given the grievant's duties and his work locations, his marijuana use raised valid safety and security concerns, but nevertheless concluded "that [the] [g]rievant did not engage in such a breach of ****1133** trust or show such lack of character that his return to the workplace would create a danger to persons or property nor prohibit his return to work as a satisfactory and productive employee."

We conclude that this factor weighs in favor of a determination that reinstatement of the grievant to his position as a skilled maintainer does not violate public policy. The grievant is a state employee, and thus ***730** answerable to the public for his paycheck, but there is no indication that performance of his job duties substantially implicates public safety. Compare, e.g., *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 358, 367 (3d Cir.1993) (affirming vacatur of award reinstating ship helmsman who tested positive for marijuana after his oil tanker ran aground in Mississippi River, emphasizing "the potentially disastrous effects of a major oil spill on the environment" and "[t]he magnitude of possible harm to the public"); *Delta Air Lines, Inc. v. Air Line Pilots Assn. International*, 861 F.2d 665, 674–75 (11th Cir.1988) (affirming vacatur of award reinstating pilot who had flown commercial aircraft while intoxicated, thereby "endanger[ing] the lives of his passengers and crew"), cert. denied, 493 U.S. 871, 110 S.Ct. 201, 107 L.Ed.2d 154 (1989); *Amalgamated Meat Cutters & Butcher Workmen of North America AFL-CIO, Local Union 540 v. Great Western Food Co.*, 712 F.2d 122, 123–24 (5th Cir.) (vacating award reinstating driver who overturned eighteen-wheel rig on highway after drinking on duty, observing that "[a] driver who imbibes the spirits endangers not only his own life, but the health and safety of all other drivers"), rehearing denied, 717 F.2d 1399 (1983). Moreover, although hospital patients are a vulnerable population, there is no finding by the arbitrator, or even any

allegation by the plaintiff, that the grievant's maintenance duties involved contact with patients or the medical equipment used in their diagnoses or treatment. Similarly, the plaintiff has not argued, nor did the arbitrator find, that the grievant's ability to access the campus day care center during his evening work shift placed him near children or that his ability to access research laboratories created any danger to the public. Compare, e.g., *State v. AFSCME, Council 4, Local 2663, AFL-CIO*, 59 Conn.App. 793, 804–806, 758 A.2d 387 (affirming vacatur, on public policy grounds, of award reinstating *731 driver of children committed to custody of Department of Children and Families after his convictions for possession of marijuana and cocaine with intent to sell), cert. denied, 255 Conn. 905, 762 A.2d 910 (2000); *Cleveland Board of Education v. International Brotherhood of Firemen & Oilers Local 701*, 120 Ohio App.3d 63, 75–76, 696 N.E.2d 658 (1997) (affirming vacatur, on public policy grounds, of award reinstating school bus mechanic who tested positive for cocaine use).¹⁶

¹⁶ Notably, even in cases involving drug or alcohol use by employees in safety sensitive positions, or by employees who interact with vulnerable populations, courts do not invariably hold that awards reinstating their employment violate public policy. Rather, in many instances, after considering the applicable sources of public policy and all of the surrounding facts and circumstances, they conclude that lesser sanctions are an acceptable form of discipline. See, e.g., *Doe v. Central Arkansas Transit*, 50 Ark.App. 132, 135–36, 138–39, 900 S.W.2d 582 (1995) (reinstatement of public bus driver who tested positive for cocaine did not violate public policy); *Dept. of Central Management Services v. Ndoca*, 399 Ill.App.3d 308, 309, 312–13, 339 Ill.Dec. 397, 926 N.E.2d 872 (2010) (reinstatement of bridge mechanic who tested positive for marijuana did not violate public policy); *Amalgamated Transit Union, Division 1300 v. Mass Transit Administration*, 305 Md. 380, 390, 504 A.2d 1132 (1986) (reinstatement of bus driver who drove bus with odor of alcohol on breath did not violate public policy); *Lansing Community College v. Lansing Community College Chapter of the Michigan Assn. for Higher Education*, 161 Mich.App. 321, 323–24, 328, 409 N.W.2d 823 (1987) (reinstatement of community college professor who smoked marijuana with students during class time did not violate public policy), reaffirmed after remand, 171 Mich.App. 172, 429 N.W.2d 619 (1988), appeal denied, 432 Mich. 882 (1989); *Shenendehowa Central School District Board of Education v. Civil Service Employees Assn., Local 1000, AFSCME, AFL-CIO, Local 864*, 20 N.Y.3d 1026, 1027–28, 984 N.E.2d 923, 960 N.Y.S.2d 725 (2013) (reinstatement of school bus driver who tested positive for marijuana did not violate public policy); *Washington County Police Officers' Assn. v. Washington County*, 335 Or. 198, 200–201, 63 P.3d 1167 (2003) (reinstatement of deputy sheriff who transported prisoners, following positive drug test and admitted daily drug usage, did not violate public policy).

****1134** The arbitrator explicitly found that the nature of the grievant's misconduct was not of such a nature that his return to work would endanger persons or property. When referencing the grievant's job duties in connection with this finding, in recognition that the plaintiff's *732 safety concerns were valid, the arbitrator cited to an exhibit in the record, namely, the Department of Administrative Services class specification for the grievant's position. Generally speaking, that exhibit indicates that the grievant, as a skilled maintainer, potentially is required to operate, and make minor or emergency repairs to, equipment and vehicles associated with the performance of grounds care, building maintenance and skilled trades work. While it is possible to envision a hazard that could befall a person performing such duties if he were to make a miscalculation due to the influence of marijuana, our research compels us to conclude that positions such as the grievant's are not the kind of general public oriented, "safety sensitive" positions typically associated with a public policy mandate that absolutely bars reinstatement following an instance of drug use. Cf. *First National Supermarkets, Inc. v. Retail, Wholesale & Chain Store Food Employees Union Local 338*, 118 F.3d 892, 893, 898 (2d Cir.1997) (reinstatement of supermarket manager who reported to work under influence of alcohol and prescription drugs did not violate public policy); *Container Corp. of America v. United Paperworkers International Union, Local 208*, Docket No. CV-93-35773 (SVW), 1994 WL 803270, *1, 3 (C.D.Cal. March 31, 1994) (reinstatement of employee at manufacturing facility who used marijuana and drank alcohol at facility did not violate public policy); *Big Three Industries, Inc. v. ILWU, Local 142*, Docket Nos. 86-0281 and 86-0289, 1987 WL 109087, *3-4 (D.Haw. February 4, 1987) (reinstatement of employees of industrial and medical gas supplier who were caught smoking marijuana and inhaling nitrous oxide on company property did not violate public policy, even though "safety concerns [were] implicated"); *Premium Building Products Co. v. United Steelworkers of America, AFL-CIO-CIC*, 616 F.Supp. 512, 513, 516 (N.D. Ohio 1985) (reinstatement of worker at manufacturing facility who *733 was discovered smoking marijuana in tool and dye room did not violate public policy), aff'd, 798 F.2d 1415 (6th Cir.1986).

Regarding public policy, "there is a[n] [obvious] difference between an employee endangering only himself or herself ... and ... an employee endangering members of the general public." (Citation omitted.) *Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union, Local 627*, Docket No. C930423, 1994 WL 525543, *5 (Ohio App. September 28, 1994); see also *Super Tire Engineering Co. v. Teamsters Local Union No. 676*, 721 F.2d 121, 122 and 125 n. 6 (3d Cir.1983) (reinstatement of spot repairer at tire company who consumed alcoholic beverages on job site did not violate public policy because, inter alia, "[t]here was no ****1135** evidence that [he] pose[d] a threat to fellow

workers or society”), cert. denied, 469 U.S. 817, 105 S.Ct. 83, 83 L.Ed.2d 31 (1984). In light of the foregoing authorities, we conclude that the second *Burr Road* factor does not weigh in favor of a conclusion that the arbitrator’s award violates public policy.

^[22] ^[23] The third *Burr Road* factor “is the relative ‘egregiousness’ of the grievant’s offense.... This factor encompasses myriad considerations, including, but not limited to: (1) the severity of the harms imposed and risks created by the grievant’s conduct; (2) whether that conduct strikes at the core or falls on the periphery of the relevant public policy; (3) the intent of the grievant with respect to the offending conduct and the public policy at issue; (4) whether reinstating the grievant would send an unacceptable message to the public or to other employees regarding the conduct in question; (5) the potential impact of the grievant’s conduct on customers/clients and other nonparties to the employment contract; (6) whether the misconduct occurred during the performance of official duties; and (7) whether the award reinstating the employee is founded *734 on the arbitrator’s determination that mitigating circumstances, or other policy considerations, counterbalance the public policy at issue.... This factor presents a mixed question of law and fact. We take as our starting point the factual findings of the arbitrator, which are not subject to judicial review.... We defer as well to the arbitrator’s ultimate determination whether termination was a just or appropriate punishment for the conduct at issue.” (Citations omitted.) *Burr Road Operating Co. II, LLC v. New England Health Care Employees Union, District 1199*, supra, 316 Conn. at 637–38, 114 A.3d 144. “[F]or purposes of the public policy analysis, [however] our determination of whether the conduct in question was so egregious that any punishment short of termination would offend public policy is not restricted to those findings,” because they may be case specific. *Id.*, at 638, 114 A.3d 144. “Judicial review, by contrast, necessarily transcends the interests of the parties to the contract, and extends to the protection of other stakeholders and the public at large, who may be adversely impacted by the decision to reinstate the employee,” and therefore requires a broader scope. *Id.*, at 639, 114 A.3d 144. “Accordingly, we review de novo the question whether the remedy fashioned by the arbitrator is sufficient to vindicate the public policies at issue.” *Id.*

The grievant’s misconduct was significant. He was caught smoking marijuana during his working hours, near the beginning of his shift, and the arbitrator found that he had brought the marijuana to work purposely with the intention of smoking it there. Accordingly, the misconduct clearly falls within the public policy against illicit drug use in the workplace. Fortunately, however, the grievant’s misconduct did not result in any harm to persons or property. Moreover, given the nature of the grievant’s employment, the misconduct mainly created risks to his own safety, and not to that of vulnerable health center clients or other third parties. The arbitrator *735 found that the substantial consequences flowing from the incident had had a sobering impact on the grievant. The grievant’s colleagues, considering those consequences, should be dissuaded from repeating the grievant’s error. The arbitrator concluded that termination of the grievant’s employment was unwarranted, but nevertheless imposed a severe punishment on the grievant, relying, in part, on mitigating circumstances, such as his positive work record, and competing policy aims, such as progressive discipline and the promotion of rehabilitation.

****1136** Weighing all of the foregoing subfactors, we conclude that the third *Burr Road* factor essentially is neutral. Needless to say, the misconduct at issue was completely unacceptable, and we do not condone it. Nevertheless, its egregiousness was tempered, at least to some degree, by the countervailing considerations we previously have identified as relevant. Notably, many of the decisions that we have cited herein have upheld the reinstatement of employees following drug or alcohol related misconduct, even though that misconduct was purposeful, occurred in the workplace and, in some instances, was substantially more egregious than that of the grievant. See, e.g., *First National Supermarkets, Inc. v. Retail, Wholesale & Chain Store Food Employees Union Local 338*, supra, 118 F.3d at 893–94 (supermarket manager reported to work under influence of alcohol and prescription drugs, could not perform his duties, behaved “in manner unbecoming a manager,” shouted profanities, procrastinated, had trouble opening safe, at one point “blacked out,” then drove car on sidewalk and displayed gun to coworker [internal quotation marks omitted]); *Saint Mary Home, Inc. v. Service Employees International Union, District 1199*, supra, 116 F.3d at 42 (grievant possessed three quarters of one ounce of marijuana and drug paraphernalia while working at nursing home, discovered when he was arrested *736 for physical altercation resulting in injury to fellow employee); *Container Corp. of America v. United Paperworkers International Union, Local 208*, supra, 1994 WL 803270, *1 (manufacturing facility employee used marijuana and drank alcohol on plant premises during working hours); *Big Three Industries, Inc. v. ILWU, Local 142*, supra, 1987 WL 109087, *1 (employees of industrial and medical gas supplier smoked marijuana and inhaled nitrous oxide on company property); *Super Tire Engineering Co. v. Teamsters Local Union No. 676*, supra, 721 F.2d at 122 (spot repairer at tire company consumed alcoholic beverages at nearby inn during work breaks); *Premium Building Products Co. v. United Steelworkers of America*, supra, 616 F.Supp. at

513 (worker at manufacturing facility was observed smoking marijuana in tool and dye room and denied doing so even after testing of confiscated substance proved offense); *Lansing Community College v. Lansing Community College Chapter of the Michigan Assn. for Higher Education*, 161 Mich.App. 321, 323–24, 409 N.W.2d 823 (1987) (community college professor held “class” at his condominium where he smoked marijuana with students), reaffirmed after remand, 171 Mich.App. 172, 429 N.W.2d 619 (1988), appeal denied, 432 Mich. 882 (1989).

[24] [25] [26] The fourth *Burr Road* factor “is whether the grievant is so ‘incurable’ as to require termination.... Put differently, in light of the grievant’s full employment history, is there a substantial risk that, should a court uphold the arbitration award of reinstatement, this particular employee will reengage in the offending conduct? ... Here, relevant considerations include whether, on the one hand, the grievant has committed similar offenses in the past and has disregarded an employer’s prior warnings or clear policy statements; or, on the other hand, whether the grievant: (1) has generally performed his work in a competent and professional *737 manner; (2) has demonstrated a willingness to change and an amenability to discipline; (3) has exhibited remorse and attempted to make restitution for past offenses; and (4) is likely to benefit from additional training and guidance.... We also consider whether the penalty imposed by the arbitrator is severe enough to deter future infractions by the grievant or others.... Because these considerations are largely fact based and **1137 case specific, a reviewing court must defer to an arbitrator’s assessment—whether express or implied—that a particular employee is unlikely to reoffend if reinstated.... Absent an express finding by the arbitrator, which would be unreviewable, a court will deem an employee incurable only when the likelihood of recidivism is plain from the face of the record.” (Citations omitted.) *Burr Road Operating Co. II, LLC v. New England Health Care Employees Union, District 1199*, supra, 316 Conn. at 639–40, 114 A.3d 144.

As to this factor, in arriving at the award ordering reinstatement, the arbitrator observed that the grievant had been employed by the plaintiff for fifteen years, with no prior disciplinary incidents, and had received favorable performance evaluations. The arbitrator also considered that the grievant had sought therapy for anxiety and depression prior to the incident in question, which indicated some propensity for self-awareness. Additionally, the arbitrator reasoned, “the [employee assistance program] counseling, the loss of his job, his disqualification for unemployment benefits, and the reality of this termination proceeding have impressed upon [the] [g]rievant that, notwithstanding what the status of marijuana use might be in some jurisdictions, that in Connecticut the use and possession of marijuana at the work site falls within the range of terminable offenses.” In short, the arbitrator concluded that the grievant took his offense seriously, and that he was amenable to rehabilitation.

*738 The arbitrator again acknowledged that the grievant’s misconduct was substantial and warranted a significant penalty, namely, an unpaid suspension of six months duration. The arbitrator ordered further that upon the grievant’s return to work, he would be subject to random drug and alcohol testing for one year, and that he should consider himself to be operating in a “last chance” context such that any future violation of the applicable policies would result in his immediate dismissal.

After consideration of the foregoing findings and all of the various components of the arbitrator’s award, we conclude that the fourth *Burr Road* factor weighs against a conclusion that reinstatement of the grievant violates public policy. By the arbitrator’s estimation, the grievant’s personal qualities and overall record indicate that he is a good candidate for a second chance. Moreover, the discipline the arbitrator imposed was appropriately severe, and sends a message to others who might consider committing similar misconduct that painful consequences will result. The award provides a disincentive for the grievant to reoffend, and it makes clear that, should he be foolish enough to do so, he will be seeking new employment. See *Stratford v. AFSCME, Council 15, Local 407*, supra, 315 Conn. at 53, 59, 105 A.3d 148 (reinstatement after nine month suspension without pay, with condition of future medical examinations, was “severe” punishment); see also *Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108, 109, 114, 742 N.E.2d 630 (2001) (upholding arbitration award that reinstated, after unpaid suspension, bus mechanic who had tested positive for marijuana, but imposed conditions including rehabilitation program, unannounced drug testing and last chance provision; terms of award “were reasonable in that they imposed punishment and provided safeguards to prevent recidivism”). Given the *739 serious discipline imposed by the arbitrator’s award, we disagree with the plaintiff’s contention that the award communicates to other state employees that there are no consequences for engaging in misconduct similar to the grievant’s.¹⁷ See *Eastern **1138 Associated Coal Corp. v. United Mine Workers of America, District 17*, 531 U.S. 57, 60–61, 65, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000) (award reinstating truck driver who twice tested positive for marijuana, after unpaid suspension and with conditions of participation in substance abuse program, continued random drug testing and last chance provision, did not contravene public policy and did “not condone [his] conduct or ignore the risk to public safety that [that conduct

posed],” but rather, “punishe[d]” him).

¹⁷ Minimizing the significance of a six month unpaid suspension and questioning whether it sends a strong enough message to other employees who might offend similarly; see concurring opinion p. (opining that those reading this decision will feel free to “kick back and light up a joint during their down time at work”); ignores the indisputable fact that millions of American families are living paycheck to paycheck, such that the loss of six months income would be nothing short of devastating. See, e.g., Board of Governors of the Federal Reserve System, Report on the Economic Well-Being of U.S. Households in 2015 (May, 2016) p. 22 (nearly one third of Americans could not cover their expenses during three month financial disruption, such as loss of job, by accessing savings or borrowing; 46 percent could not come up with \$400 for unexpected emergency without borrowing or selling something).

In closing, we emphasize that public policy based, judicial second-guessing of arbitral awards reinstating employees is very uncommon and is reserved for extraordinary circumstances, even when drug or alcohol related violations are at issue. Our general deference to an experienced arbitrator’s determinations regarding just cause and the appropriate remedy is vital to preserve the effectiveness of an important and efficient forum for the resolution of employment disputes. If an employer wishes to preserve the right to discharge employees guilty of misconduct such as that at issue *740 in this case, thereby removing the matter from an arbitrator’s purview, it remains free to negotiate for the inclusion of an appropriate provision in the collective bargaining agreement that would achieve that result.

The judgment is reversed and the case is remanded to the trial court with direction to grant the defendant’s motion to confirm the arbitration award reinstating the grievant’s employment and to deny the plaintiff’s motion to vacate that arbitration award.

In this opinion PALMER, ZARELLA, EVELEIGH, McDONALD and ROBINSON, Js., concurred.

ESPINOSA, J., concurring.

In today’s decision, this court concludes that an arbitrator’s award that effectively precludes an employer from terminating an employee who was abusing drugs on the job does not violate public policy. Because this result is legally required by this court’s recent decision in *Burr Road Operating Co. II, LLC v. New England Health Care Employees Union, District 1199*, 316 Conn. 618, 114 A.3d 144 (2015) (*Burr Road*), the principle of stare decisis compels me—reluctantly—to concur in the judgment reversing the trial court’s denial of the application filed by the named defendant, Connecticut Employees Union Independent, to confirm the arbitrator’s award to reinstate the grievant, Gregory Linhoff. I write separately to emphasize that, although *Burr Road* made significant progress in synthesizing and clarifying our jurisprudence in this area of the law, it is my belief that—as the plainly outrageous outcome in the present case demonstrates—we should consider modifying the analysis set forth in *Burr Road* in order to provide for a more flexible approach when reviewing whether an arbitration award contravenes public policy. In particular, I believe that our analysis should afford a more prominent role to the message that **1139 an *741 award sends to the public at large concerning the public policies at issue. As the present case has provided this court with the opportunity to apply the *Burr Road* factors to a new factual scenario, I am now convinced that the net effect of our decision in *Burr Road* is to take the already narrow confines of our review of arbitration awards that are claimed to violate public policy and further narrow it to the point where this court will simply rubber stamp those awards without any meaningful review on our part.

I begin with a review of our decision in *Burr Road* and how we used that decision as a vehicle to clarify our case law in this area. In *Burr Road*, we considered whether an arbitrator’s award reducing the penalty received by the grievant, a certified nursing assistant, from termination of employment to a one month unpaid suspension for failing to promptly report suspected patient abuse, violated the state’s public policy in favor of protecting vulnerable persons residing in nursing homes. Id., at 620, 114 A.3d 144. The particulars of the grievant’s case in *Burr Road* were less egregious than the facts of the present case. After overhearing a conversation between two coworkers, the grievant became suspicious that a patient may have been physically mistreated by a staff member at the nursing home where the grievant was employed. Id., at 622–23, 114 A.3d 144. The grievant did not officially report the suspected abuse, however, until

several days later when she had the opportunity to speak with the patient who confirmed the grievant's suspicions that a staff member had behaved in a "rough" manner and had spoken "gruffly" while assisting the patient. *Id.*, at 623, 114 A.3d 144. Following an internal investigation, the grievant was terminated for her failure to timely report the suspected misconduct—a penalty significantly more severe than that received by the employees actually involved in the misconduct. *Id.*, at 624–25, 114 A.3d 144. The grievant contested her termination and an arbitrator ultimately *742 issued an award reinstating the grievant and determining that she had been terminated without just cause. *Id.*, at 627, 114 A.3d 144.

Prior to addressing the substantive claim in *Burr Road*, however, we took the opportunity to review our prior decisions in which employers had challenged arbitration awards reinstating terminated employees on the basis that the awards violated a clear public policy. *Id.*, at 632, 114 A.3d 144. Of our previous decisions, we noted that our outcomes were evenly split as to whether the award at issue in the case violated public policy and further observed this was "an area of the law in which consensus has proved elusive" due to the numerous concurring and dissenting opinions filed in those previous decisions. *Id.*, at 632–33, 114 A.3d 144; see *Stratford v. AFSCME, Council 15, Local 407*, 315 Conn. 49, 105 A.3d 148 (2014); *State v. AFSCME, Council 4, Local 391*, 309 Conn. 519, 69 A.3d 927 (2013); *State v. New England Health Care Employees Union, District 1199, AFL-CIO*, 271 Conn. 127, 855 A.2d 964 (2004); *South Windsor v. South Windsor Police Union Local 1480, Council 15, AFSCME, AFL-CIO*, 255 Conn. 800, 770 A.2d 14 (2001); *Groton v. United Steelworkers of America*, 254 Conn. 35, 757 A.2d 501 (2000); *State v. AFSCME, Council 4, Local 387, AFL-CIO*, 252 Conn. 467, 747 A.2d 480 (2000).

In order to quell any uncertainty stemming from these prior decisions, our decision in *Burr Road* set out to "clarify the factors a reviewing court should consider when evaluating a claim that an arbitration award reinstating a terminated employee violates public policy, and, by extension, the types of factual findings an arbitrator may make in order to assist a reviewing court in considering such a challenge." **1140 *Burr Road*, supra, 316 Conn. at 633, 114 A.3d 144. We distilled from our prior decisions those factors that we "expressly or implicitly" relied on to determine whether a grievant's termination is necessary to vindicate a particular public policy, namely: "(1) any *743 guidance offered by the relevant statutes, regulations, and other embodiments of the public policy at issue; (2) whether the employment at issue implicates public safety or the public trust; (3) the relative egregiousness of the grievant's conduct; and (4) whether the grievant is incorrigible." *Id.*, at 634, 114 A.3d 144.

As to each factor, we also articulated the applicable standard of review. For the first factor, we recognized that "[w]hether sources of public policy themselves mandate termination is a question of law subject to plenary review." *Id.*, at 635, 114 A.3d 144; *State v. AFSCME, Council 4, Local 391*, supra, 309 Conn. at 528–29, 69 A.3d 927. In regard to the second factor, we concluded that because it "hinges on general questions of law and policy" it is "subject to plenary judicial review." *Burr Road*, supra, 316 Conn. at 637, 114 A.3d 144. Under the remaining two factors, however, our review is much more deferential to the arbitrator's findings and determinations. Recognizing that "the factual findings of the arbitrator ... are not subject to judicial review," we clarified that, under the third factor, "[w]e defer ... to the arbitrator's ultimate determination whether termination was a just or appropriate punishment for the conduct at issue." *Id.*, at 638, 114 A.3d 144. We observed, however, that given the importance of public policy claims, "we review de novo the question whether the remedy fashioned by the arbitrator is sufficient to vindicate the public policies at issue." *Id.*, at 639, 114 A.3d 144. Finally, in regard to the fourth factor, we acknowledged that we "must defer to an arbitrator's assessment—whether express or implied—that a particular employee is unlikely to reoffend if reinstated." *Id.*, at 640, 114 A.3d 144.

We next proceeded to resolve the claim raised by the defendant union on the grievant's behalf under the clarified factors. *Id.*, at 640–41, 114 A.3d 144. After first determining that the first two factors were neutral; *id.*, at 644, 645, 114 A.3d 144; we concluded that under the third factor, the grievant's delay in reporting suspected patient abuse was not so *744 egregious that public policy required her termination. *Id.*, at 648–49, 114 A.3d 144. Specifically, we noted that the arbitrator determined that the grievant's conduct—failing to report the suspected abuse through the proper channels—was markedly less egregious than the actions of the other employees involved in the incident, namely, misconduct toward a patient. *Id.*, at 646, 114 A.3d 144. Relying on and in deference to the arbitrator's factual findings, we concluded that the grievant's conduct "was devoid of insidious motives" and, as in previous cases in which we had upheld such awards, "there was no evidence of intent to harm the [patient], the magnitude of the harm was minimal, and the conduct itself was not criminal in nature." *Id.*, at 646–47, 114 A.3d 144. We concluded that the finding of the arbitrator that the grievant was unlikely to reoffend resolved the fourth factor. *Id.*, at 649, 114 A.3d 144. In sum, we concluded that confirmation of the award did not run counter to public policy and we reversed the judgment of the

Appellate Court ordering the trial court to grant the application to vacate the award. *Id.*, at 621, 651, 114 A.3d 144.

In the time that has elapsed between our decision in *Burr Road* and today’s decision, courts have applied the analysis and factors that we articulated in *Burr Road* in at least two other cases.¹ See ****1141 *745** *Bridgeport Board of Education v. NAGE, Local RI-200*, 160 Conn.App. 482, 125 A.3d 658 (2015); *East Hartford v. East Hartford Police Officers’ Assn.*, Superior Court, judicial district of Hartford, Docket No. CV-14-6055713-S, 2016 WL 1265957 (March 2, 2016) (61 Conn. L. Rptr. 863). Although I recognize that the four cases in which the *Burr Road* factors have been applied provide only a limited sample size, I observe that in three of those cases—*Burr Road*, *East Hartford Police Officers’ Assn.*, and the present case—the court upheld the contested arbitration award, whereas in only one case—*Bridgeport Board of Education*—did the court vacate an arbitration award. These decisions illustrate that the *Burr Road* factors have produced certain unintended effects and are in need of modification in order to prevent future judicial review of arbitration awards challenged on public policy grounds from becoming a rubber stamp process in which the reviewing court is required to gloss over the arbitration award without conducting any meaningful inquiry. As this court has previously observed, “[e]xperience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better.” (Internal quotation marks omitted.) *Connecticut Junior Republic v. Sharon Hospital*, 188 Conn. 1, 17–18, 448 A.2d 190 (1982); *State v. Dabkowski*, 199 Conn. 193, 199, 506 A.2d 118 (1986) (“[t]he flexibility and capacity of the common law is its genius for growth and adaptation”).

¹ At least three other cases from this same time period raised public policy claims, but the courts reviewing the arbitration awards in those cases were not required to apply the *Burr Road* factors because they concluded that the public policy at issue was either nonexistent or not implicated by the facts of the case. See *Ippolito v. Olympic Construction, LLC*, 163 Conn.App. 440, 451–54, 136 A.3d 653 (2016) (concluding that enforcement of contract against homeowners did not implicate any well-defined state public policy); *Ledyard Police Union, Council 15, AFSCME, AFL-CIO v. Ledyard*, Superior Court, judicial district of New London, Docket No. CV-14-6022135S, 2015 WL 6557896 (October 6, 2015) (concluding that union’s alleged public policy could not be explicitly or implicitly inferred from General Statutes); *Garbarino v. Raymond James Financial Services, Inc.*, Superior Court, judicial district of Danbury, Docket No. CV-14-6016430-S, 2015 WL 4726738 (June 29, 2015) (recognizing state’s well-defined public policy in favor of protecting statements made in quasi-judicial proceedings but concluding facts did not implicate public policy).

The arbitration award at issue in *East Hartford Police Officers’ Assn.* reinstated a police officer who had been terminated after it was discovered that he had improperly accessed an investigative database in order to obtain personal information about a former girlfriend and other individuals. *East Hartford v. East Hartford Police Officers’ Assn.*, supra, 61 Conn. L. Rptr. at 863. In reviewing the arbitration award, the trial court first recognized that the award did indeed implicate a public ***746** policy, namely the public trust placed in the police given their ability to access confidential information. *Id.*, at 864. After reciting the four factors in *Burr Road*, the trial court concluded that the award implicated public safety and public trust but that the public policy did “not mandate termination.” *Id.* The court then concluded that under the third factor, the “offense was egregious,” but that the arbitrator did not find the grievant to be incorrigible. *Id.* Accordingly, the trial court denied the plaintiff’s motion to vacate the award. *Id.*

The second case, *Bridgeport Board of Education*, although far more demonstrative of the application of the *Burr Road* factors, involved such extreme facts that the factors inarguably weighed against the award. The grievant, a custodian employed by the Bridgeport public school system, was terminated after sending several ****1142** packets of handwritten and printed materials related to recent mass school shootings to various members of the Bridgeport city government and school system. *Bridgeport Board of Education v. NAGE, Local RI-200*, supra, 160 Conn.App. at 485, 125 A.3d 658. The handwritten notes from the grievant indicated that he was prepared to carry out a similar atrocity unless his grievances with a supervisor were addressed. *Id.*, at 485–86, 125 A.3d 658. A panel of arbitrators determined that the grievant’s actions were a “cry for help” and issued an award reinstating the grievant. (Internal quotation marks omitted.) *Id.*, at 488, 125 A.3d 658.

The Appellate Court reversed the trial court’s judgment denying the plaintiff’s application to vacate the arbitration award. *Id.*, at 505–506, 125 A.3d 658. The Appellate Court first recognized that the case implicated “well established public policies prohibiting workplace violence, threatening and harassment, and promoting safe settings for Connecticut public schools.” *Id.*, at 491, 125 A.3d 658. Under the first factor, the Appellate Court concluded that “[t]he answer to this question weighs heavily in favor of vacating the arbitration award” given the “intolerable” ***747** nature of the grievant’s acts. *Id.*, at 496–97, 125 A.3d 658. In regard to the second factor, the Appellate Court explicitly disavowed the union’s argument that because the grievant was only a custodian his position did not implicate the

public trust or safety by concluding that his conduct put students and the public at risk. *Id.*, at 497–98, 125 A.3d 658. Under the third factor, the Appellate Court disagreed with the arbitration panel’s determination that the grievant’s conduct was a “cry for help,” and noted that excusing the grievant’s conduct due to his personal stress would send an unacceptable message that such impermissible conduct would be tolerated if motivated by stress or poor judgment. (Internal quotation marks omitted.) *Id.*, at 502, 125 A.3d 658. Under the fourth factor, the arbitration panel had concluded that the grievant was not likely to repeat his offensive conduct, but the Appellate Court, however, concluded that there was a high likelihood of recidivism, given that the grievant had been subject to prior discipline in his current position and that any penalty short of termination would not serve to deter future similar conduct. *Id.*, at 505, 125 A.3d 658. As all of the *Burr Road* factors weighed in favor of vacating the arbitration award, the Appellate Court reversed the judgment of the trial court. *Id.*, at 505–506, 125 A.3d 658.

The only other case in which a court has extensively applied the *Burr Road* factors is, of course, the present case. In doing so, the majority first concludes that there is indeed an “explicit, well-defined and dominant public policy against the possession and recreational use of marijuana in the workplace.” See *Enfield v. AFSCME, Council 4, Local 1029*, 100 Conn.App. 470, 476, 918 A.2d 934, cert. denied, 282 Conn. 924, 925 A.2d 1105 (2007).

Under the first factor, the majority concludes that because the state’s personnel regulations allow for discipline, up to and including termination, in regard to the grievant’s offense of smoking and possessing marijuana at work, that public policy would not be offended *748 by the imposition of a penalty of less than termination. Under the second factor, whether the nature of the employment implicates public trust and safety, the majority concludes that the factor weighs against vacating the arbitration award. The grievant is a state employee who works as a skilled maintainer at the University of Connecticut Health Center (health center), a state-run medical facility, performing buildings and equipment maintenance, grounds work, and skilled trades tasks. In his position, the grievant had keys and access to the entirety **1143 of the health center campus as well as a state vehicle in order to traverse the property. The majority concludes, however, that the grievant’s position is “not the kind of general public oriented, ‘safety sensitive’ [position] typically associated with a public policy mandate that absolutely bars reinstatement following an instance of drug use.”

In its treatment of the third factor, the relative egregiousness of the misconduct, the majority determines that the factor “essentially is neutral,” despite its recognition that “the misconduct at issue was completely unacceptable....” Although the majority notes that the grievant’s acts were significant and fell squarely within the public policy against drug use in the workplace, it also recognizes that the grievant’s actions did not result in any actual harm to other persons or property, and that the arbitrator determined that the grievant had a positive prior work record and that the consequences of the grievant’s actions had a “sobering impact” on him. In concluding that the third factor is neutral in the present case, the majority relies in part on several federal arbitration cases that resulted in a grievant’s reinstatement being upheld even though the drug related conduct in those cases was more egregious than the grievant’s actions in the present case. Under the fourth factor, the majority simply defers, as *Burr Road* mandates, to the arbitrator’s finding that the grievant *749 deserved a second chance and that his penalty, including an unpaid suspension, was sufficient to deter any future temptation to use illicit drugs in the workplace.

Prior to articulating the ways in which I believe this court should modify its decision in *Burr Road*, I acknowledge from the outset that because “we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution.” (Internal quotation marks omitted.) *State v. AFSCME, Council 4, Local 391*, supra, 309 Conn. at 526, 69 A.3d 927; see also *State v. AFSCME, Council 4, Local 387, AFL–CIO*, supra, 252 Conn. at 473, 747 A.2d 480 (“[w]e have consistently stated that arbitration is the favored means of settling differences and arbitration awards are generally upheld” [internal quotation marks omitted]). As arbitration awards that are challenged as violative of a public policy are one of the few areas in which a reviewing court will eschew its profound deference to an arbitrator’s decision and conduct a more meaningful review, I propose modifying *Burr Road* not to disturb the traditional deference we afford to arbitration awards, but to ensure that the difference between the deference we grant to arbitration awards generally and the deference that we apply in reviewing awards that implicate public policy is not blurred to the point of nonexistence.

In my review of the cases applying the *Burr Road* factors, I have identified two emerging trends that I believe should be addressed and rectified before they can continue to grow and inject confusion and error into the application of the factors by reviewing courts. First, I believe that, because the factors set forth in *Burr Road* are ultimately too rigid,

arbitrators will craft their awards pursuant to *Burr Road* in a manner to ensure that, under the applicable standard of review, *750 reviewing courts will have no option but to uphold the awards even in extreme and outrageous cases, such as the present one. This will allow arbitrators to self-insulate their awards from meaningful review in order to ensure that their awards are sustained on appeal. Second, given the broad and numerous subfactors in the third *Burr Road* factor, the net outcome under the third **1144 factor will almost always be neutral, as in the present case, unless the facts of the case indicate an extreme level of egregiousness. The near mathematical process of balancing the outcomes of the various sub-factors, either in favor of vacating or confirming an award, increases the probability of their canceling each other out and producing an indeterminate outcome under the third factor itself. This has the net outcome of reducing the overall flexibility of our analysis. Furthermore, I believe that some of the subfactors under the third factor should be more fully fleshed out and prominent in a reviewing court’s analysis, as they were in some of our decisions prior to *Burr Road*.

In regard to the first trend I have identified, stemming from the rigidity of the *Burr Road* factors, I observe that one of the benefits of our decision in *Burr Road* is that it clearly laid out the information that would be helpful to aid reviewing courts in their analysis as to whether a particular award violates public policy. The danger, however, is that by imposing a rigid framework under which we will review such claims, arbitrators now have a set of blueprints by which they may construct their arbitration awards to ensure that they will include the features that ensure such awards are upheld on appeal or only undergo cursory review. Indeed, in *Burr Road* we explicitly encouraged such a result, perhaps unintentionally, when we observed that the clarified factors would also serve as a guide for “the types of factual findings an arbitrator may make in order to assist a reviewing court in considering such a challenge.” *751 *Burr Road*, supra, 316 Conn. at 633, 114 A.3d 144. Because we also articulated the appropriate level of deference that a reviewing court should grant to particular findings, arbitrators may now craft their findings in a way to make certain that they have the final say on certain aspects of an arbitration award. This is most evident under the fourth factor, which asks whether a grievant is incorrigible. We noted that a reviewing court should defer to an arbitrator’s “express or implied” finding as to whether a particular grievant is at risk of repeating the offense if reinstated. *Id.*, at 640, 114 A.3d 144. Although we also outlined the process by which a reviewing court would analyze that factor in the absence of an explicit finding, such a scenario will almost never arise again in the wake of *Burr Road*. Rather, our decision serves as a clarion call for arbitrators to *always* make an explicit finding on recidivism, for if they do, that finding will automatically be deferred to and upheld on appeal.

I note that this risk has not yet fully germinated. Of the judicial decisions applying the *Burr Road* factors, all of them involved review of an arbitration award that was issued *prior* to our decision in *Burr Road*.² I believe, however, that going forward, reviewing courts will increasingly encounter arbitration awards issued as a mirror image of the *Burr Road* factors and, accordingly, reviewing courts will be required to defer absolutely to these awards and uphold their validity without conducting any meaningful review. In my opinion, such an outcome empowers arbitrators beyond their traditional role, particularly in cases such as the present **1145 *752 where the arbitrator was just one person—not a panel—and our deference to that one person’s determinations is greater than that we would accord to a trial court. This outcome effectively eliminates the role of the courts by erasing the distinction between the vast deference we apply to all arbitration awards and the qualified deference we apply when a party claims that an award violates public policy. See *Garrity v. McCaskey*, 223 Conn. 1, 6, 612 A.2d 742 (1992); *Groton v. United Steelworkers of America*, supra, 254 Conn. at 44–45, 757 A.2d 501.

² This court released its decision in *Burr Road* on May 5, 2015. The arbitration award in *East Hartford Police Officers’ Assn.* was issued on November 10, 2014. *East Hartford v. East Hartford Police Officers’ Assn.*, supra, 61 Conn. L. Rptr. at 863. The arbitration panel in *Bridgeport Board of Education* issued its award on January 9, 2013. *Bridgeport Board of Education v. NAGE, Local RI-200*, supra, 160 Conn.App. at 487, 125 A.3d 658. Naturally, the arbitration award at issue in *Burr Road* preceded the decision in that case and, in the present case, the arbitrator issued his award on January 25, 2014.

In regard to the second trend I have identified—the virtually inevitable result that the third factor will be neutral—I believe that the current subfactors of the third factor of *Burr Road* should be given a more prominent place in the analysis conducted by a reviewing court. When evaluating the relative egregiousness of a grievant’s conduct, the third factor currently directs reviewing courts to consider a myriad of subfactors, “including, but not limited to: (1) the severity of the harms imposed and risks created by the grievant’s conduct; (2) whether that conduct strikes at the core or falls on the periphery of the relevant public policy; (3) the intent of the grievant with respect to the offending conduct and the public policy at issue; (4) whether reinstating the grievant would send an unacceptable message to

the public or to other employees regarding the conduct in question; (5) the potential impact of the grievant's conduct on customers/clients and other nonparties to the employment contract; (6) whether the misconduct occurred during the performance of official duties; and (7) whether the award reinstating the employee is founded on the arbitrator's determination that mitigating circumstances, or other policy considerations, counterbalance the public policy at issue." *Burr Road*, supra, 316 Conn. at 638, 114 A.3d 144.

In applying these subfactors in the present case, the majority concludes that the outcome under the third *753 factor is ultimately neutral. Although the facts and arbitration award clearly demonstrate that the grievant purposely brought marijuana to work with the intention of smoking it during his work shift and then proceeded to actually do so, the arbitrator also found that the competing policy goals of progressive discipline and rehabilitation were implicated in the grievant's case and that the reduced penalties imposed on him in his reinstatement pursuant to the award would dissuade the grievant or his colleagues from using drugs in the workplace going forward. Thus, the outcomes under the subfactors of the third factor fall in such vastly different directions that the overall analysis under the third factor is essentially written out of the *Burr Road* analysis.

This result, which I believe will arise in the majority of cases, has the effect of weakening public policy review as a whole. Indeed, only in those cases that fall outside the bounds of even the extreme outer fringe of public policy claims and are plainly outrageous and societally unacceptable will the third factor prove to be of any determinative import. A prime example of this is *Bridgeport Board of Education*, in which the subfactors clearly weighed in favor of vacating the award given the manifest absurdity of reinstating the grievant after he seriously threatened to carry out a mass school shooting. *Bridgeport Board of Education v. NAGE, Local RI-200*, supra, 160 Conn.App. at 502–503, 125 A.3d 658. Otherwise, given the breadth of the inquiry under the third factor, most cases—such as the present—will yield a mixed bag of answers resulting in a neutral and unhelpful result.

In order to give some of the subfactors a more prominent place in our analysis and allow for greater flexibility in the analysis **1146 overall given the wide diversity of factual scenarios in the cases in this area of law, I suggest that we should modify *Burr Road* in order to *754 highlight the importance of certain subfactors that would allow the third factor itself to be more determinative. I place particular emphasis on the fourth subfactor, “whether reinstating the grievant would send an unacceptable message to the public or to other employees regarding the conduct in question”; *Burr Road*, supra, 316 Conn. at 638, 114 A.3d 144; as the public perception of a public policy underlies the strength of the policy itself. For example, in the present case, upholding the arbitration award sends the concurrent message that an employee will retain his job even if he is caught in the deliberate act of using drugs while on the clock. Indeed, the result in the present case also sends a message to the public at large that will only reinforce the common, albeit unfounded, negative stereotype of state employees as occupying cushy jobs that tolerate workplace conduct that would be fatal in the private sector.³ This outcome will likely raise the ire of citizens who will perceive their tax money as being used to fund the paychecks of employees who spend their time at work getting high and will decrease public confidence in the professionalism and integrity of state employees. To be sure, it may even have a demoralizing effect on those state employees who conduct themselves responsibly and take pride in their work and who may resent being viewed under a cloud of public opprobrium. And, most unfortunately, it will send a signal to less than scrupulous employees who will perceive that—under the reasoning of today's decision—they can kick back and light up a joint during their down time at work with the knowledge that, if apprehended, they will be subject *755 only to some discipline, albeit harsh, but will not *actually* be fired.

³ Through sheer coincidence, the grievant's case reaches this court at the same time that the state's fiscal situation has required the layoff of numerous state employees. That these employees have lost their positions through no fault of their own while the grievant will retain his position after openly smoking marijuana on the job certainly sends a mixed and troubling message, both to the public and to those employees who were terminated from state service.

I note that prior to *Burr Road* this subfactor was somewhat more prominent in our treatment of public policy claims. In *AFSCME, Council 4, Local 387, AFL-CIO*, the arbitration award at issue reinstated a state correctional officer who was terminated after he used a workplace telephone to place a racist and profane call to a state senator's office. *State v. AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. at 468–69, 747 A.2d 480. In crafting the award, the arbitrator excused the correctional officer's conduct as “ ‘the outgrowth of various personal stressors....’ ” *Id.*, at 477, 747 A.2d 480. The trial court vacated the award and this court upheld that decision, noting that to do otherwise would “send the message that stress, or poor judgment, or other factors, somehow renders the conduct permissible or

excusable.” (Internal quotation marks omitted.) *Id.* Likewise, in *United Steelworkers of America*, the plaintiff challenged an arbitration award reinstating a municipal employee who had been fired after he was convicted of embezzling his employer’s funds. *Groton v. United Steelworkers of America*, *supra*, 254 Conn. at 36, 757 A.2d 501. In concluding that the trial court properly vacated the award, this court noted that by doing so “the public who are required to deal with [the town’s] employees will feel that they are being served in an honest and trustworthy manner.” *Id.*, at 49, 757 A.2d 501; see also *Bridgeport Board of Education v. NAGE, RI–200*, *supra*, 160 Conn.App. at 502, 125 A.3d 658 (recognizing that **1147 to uphold arbitration award would send message to public and other employees that threat “to commit random shootings in an educational setting is permissible or excusable”).

Accordingly, I suggest that the subfactors should be incorporated into our *Burr Road* matrix not as subsets of the third factor, but as factors in their own right. Although this would diminish the neat and contained *756 quadripartite analysis under the current incarnation of *Burr Road*, I believe that it would allow for a more flexible approach for reviewing courts. Such an approach would prevent our current analysis from growing narrower than it was in our inquiries prior to *Burr Road*. As our decision in *Burr Road* created no new law, but only catalogued and recalibrated our existing jurisprudence in this area, our present authority and the scope of our inquiry should not be significantly different from our previous decisions. First, such an approach would recognize that not every factor will always be relevant in every case, given the sheer diversity of the facts in cases that engender public policy challenges to arbitration awards. Thus, to prevent the possible neutral outcome of a factor from skewing the *Burr Road* analysis one way or the other, drawing out the subfactors will provide for a more holistic approach that fairly weighs all relevant considerations in regard to a particular arbitration award. Furthermore, allowing for a more flexible approach will work to prevent the other emerging trend I have identified where arbitrators will mirror their awards after the structure of *Burr Road* and include all of the necessary sound bites to ensure that their awards are deferred to and upheld on appeal without any serious review by a court. Additionally, our inquiry could be made even more flexible by reserving the ability to place greater emphasis on some subfactors over others depending on which are implicated by the particular facts of a case.

In conclusion, I predict that as future cases arise—particularly those in which courts are required to review arbitration awards issued after *Burr Road*—the need to modify the factors we apply will become increasingly evident. Although a general deference to the determinations of arbitrations facilitates and encourages the private dispute resolution system, curtailing the role of the court system in reviewing one narrow category of *757 arbitration awards that implicate important public policies will sow public skepticism of the arbitration process and the role of the court system in reviewing the outcomes of private dispute resolution. Indeed, the outcome in today’s decision will assuredly accomplish just that. This court should take the opportunity to temper these trends now before they become increasingly prominent and require much more serious and laborious modifications in the future. Accordingly, I concur in the judgment.

APPENDIX C EXAMPLES

All documents contained in Appendix C are provided for informational purposes only. Requirements may vary depending on the circumstances presented by a situation. It is recommended that before you use any of examples provided, you ensure compliance with all laws by seeking legal advice. FordHarrison attorneys are available through the CIRMAHotline to advise on such issues.

Example Letter of Conditional Offer of Employment

Date

[Employee name and address]

Dear [applicant],

[Appointing Authority] is pleased to offer you a conditional offer of employment as [job title] on behalf of [Employer].

This offer is contingent upon the satisfactory completion and results of a [list post-conditional offer testing to be conducted]. An authorization for this testing is enclosed; please complete it and return it to Human Resources as soon as possible. The background investigation will begin immediately upon receive of the authorization.

Additionally, please call [contact person] with Human Resources for [Employer] to arrange for a [insert any testing needing to be done by appointment or any other information that is needed for employment – you may also make arrangements for testing and list appointment times here].

Please feel free to contact Human Resources with any questions or concerns. [provide hours of operation and phone number].

Sincerely,

[Representative]
[Employer]

**Example
Letter Retracting
Conditional Offer of Employment
(where FCRA does not apply)**

Date:

Dear [applicant]:

This letter is to notify you that we must withdraw our conditional offer of employment based on information contained in your [insert exam failed].

As you know, as part of our screening process, we check the background of applicants for employment purposes. In that process we conduct [list post-conditional offer tests]. You authorized us to conduct this screening process. Based on the information obtain from [indicate which test] that [list reason], we must withdraw your conditional offer employment. Please contact Human Resources if you wish to review a copy of [indicate report].

Sincerely,

[EMPLOYER]

By: _____

Its: _____

Fair Credit Reporting Act Sample Documents

Instructions for HR (not to be provided to applicants or employees):

For All Applicants or Employees: Provide a printed version of the following forms and obtain signatures where appropriate:

- Disclosure that Consumer Reports and/or Investigative Consumer Reports May be Obtained for Employment Purposes
 - Note: **This must be on a separate, stand-alone page** and CANNOT be included with the rest of the background check packet or any other printed application packet or materials.
- A Summary of Your Rights Under the Fair Credit Reporting Act (3 pages)
- Authorization to obtain Consumer Reports and/or Investigative Consumer Reports for Employment Purposes
- Acknowledgment of Receipt of “A Summary of Your Rights Under the Fair Credit Reporting Act”

For HR for all applicants or employees: Complete the Certification to the Consumer Reporting Agency certifying that Employer is complying with the enumerated background check requirements.

Instructions Regarding Connecticut Credit Checks

Note: The below additional state-specific instructions refer to “credit checks,” as distinguished from criminal background checks or other types of consumer reports.

Connecticut employers are prohibited from requiring that an employee or applicant consent to the employer obtaining a credit report containing the individual's

- Credit score.
- Credit account balances.
- Payment history.
- Savings or checking account balances.
- Account numbers.

This law exempts:

- Financial institutions.
- Employers that are required to obtain an applicant's credit score by law.
- Instances where 1) an employer reasonably believes the employee has engaged in specific activity that violates the law and relates to the employee's employment; 2) where the credit report is *substantially related* to the job in question or the employer has a bona fide

purpose for requesting a credit report that is substantially job-related and is disclosed in writing to the employee or applicant.

The credit report substantially relates to the job when the employment:

- Is a managerial position which involves setting the direction or control of a business, division, unit or an agency of a business;
- Involves access to customers', employees' or the employer's personal or financial information other than information customarily provided in a retail transaction;
- Involves a fiduciary responsibility to the employer, including, but not limited to, the authority to issue payments, collect debts, transfer money or enter into contracts;
- Provides an expense account or corporate debit or credit card;
- Provides access to (i) confidential or proprietary business information, or (ii) information, including a formula, pattern, compilation, program, device, method, technique, process or trade secret that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from the disclosure or use of the information; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; or
- Involves access to the employer's nonfinancial assets valued at two thousand five dollars or more, including, but not limited to, museum and library collections and to prescription drugs and other pharmaceuticals.

CONNECTICUT CREDIT CHECK DISCLOSURE: [Employer Name] may obtain a credit report about you because you are seeking to work in the following position:

[HR: INSERT POSITION AND INFORMATION REGARDING THE PURPOSE FOR REQUESTING OR USING CREDIT REPORT INFORMATION].

**DISCLOSURE THAT CONSUMER REPORTS AND/OR INVESTIGATIVE
CONSUMER REPORTS MAY BE OBTAINED FOR EMPLOYMENT PURPOSES**

[Employer] is hereby advising you that, for employment purposes, including but not limited to initial employment, promotion, reassignment, or retention, [Employer] may obtain or have prepared one or more consumer reports and/or investigative consumer reports bearing on your credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. Information may be obtained through personal interviews of your neighbors, friends, or associates, or of others with whom you are acquainted or who may have knowledge concerning any such items of information. You have the right, upon written request to [Employer] made within a reasonable time after receipt of this notice, to request disclosure of the nature and scope of any investigative consumer report. The scope of this notice is all-encompassing, allowing [Employer] to obtain from any outside organization all manner of consumer reports and/or investigative consumer reports now and throughout the course of your employment to the extent permitted by law.

This Disclosure is valid for current and future reports, and [Employer] intends for this Disclosure to cover both the application for employment and, if you are hired, any additional consumer reports and/or investigative consumer reports obtained while you remain an employee.

Print Name _____

Signature _____

Date _____

Para información en español, visite www.consumerfinance.gov/learnmore o escribe a la Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20552.

A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under the FCRA. **For more information, including information about additional rights, go to www.consumerfinance.gov/learnmore or write to: Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, D.C. 20552.**

- **You must be told if information in your file has been used against you.** Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment - or to take another adverse action against you - must tell you, and must give you the name, address, and phone number of the agency that provided the information.
- **You have the right to know what is in your file.** You may request and obtain all the information about you in the files of a consumer reporting agency (your “file disclosure”). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:
 - a person has taken adverse action against you because of information in your credit report;
 - you are the victim of identity theft and place a fraud alert in your file;
 - your file contains inaccurate information as a result of fraud;
 - you are on public assistance;
 - you are unemployed but expect to apply for employment within 60 days.

In addition, all consumers are entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See www.consumerfinance.gov/learnmore for additional information.

- **You have the right to ask for a credit score.** Credit scores are numerical summaries of your credit-worthiness based on information from credit bureaus. You may request a credit score from consumer reporting agencies that create scores or distribute scores used in residential real property loans, but you will have to pay for it. In some mortgage transactions, you will receive credit score information for free from the mortgage lender.
- **You have the right to dispute incomplete or inaccurate information.** If you identify information in your file that is incomplete or inaccurate, and report it to the consumer

reporting agency, the agency must investigate unless your dispute is frivolous. See www.consumerfinance.gov/learnmore for an explanation of dispute procedures.

- **Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information.** Inaccurate, incomplete or unverifiable information must be removed or corrected, usually within 30 days. However, a consumer reporting agency may continue to report information it has verified as accurate.
- **Consumer reporting agencies may not report outdated negative information.** In most cases, a consumer reporting agency may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.
- **Access to your file is limited.** A consumer reporting agency may provide information about you only to people with a valid need – usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.
- **You must give your consent for reports to be provided to employers.** A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.consumerfinance.gov/learnmore.
- **You may limit “prescreened” offers of credit and insurance you get based on information in your credit report.** Unsolicited “prescreened” offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address from the lists these offers are based on. You may opt-out with the nationwide credit bureaus at 1-888-5-OPTOUT (1-888-567-8688)
- **You may seek damages from violators.** If a consumer reporting agency, or in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.
- **Identity theft victims and active duty military personnel have additional rights.** For more information, visit www.consumerfinance.gov/learnmore.

States may enforce the FCRA, and many states have their own consumer reporting laws. In some cases, you may have more rights under state law. For more information, contact your state or local consumer protection agency or your state Attorney General. For information about your federal rights, contact:

TYPE OF BUSINESS:	CONTACT:
<p>1.a. Banks, savings associations, and credit unions with total assets of over \$10 billion and their affiliates.</p> <p>b. Such affiliates that are not banks, savings associations, or credit unions also should list, in addition to the CFPB:</p>	<p>a. Consumer Financial Protection Bureau 1700 G Street, N.W. Washington, DC 20552</p> <p>b. Federal Trade Commission: Consumer Response Center - FCRA Washington, DC 20580 (877) 382-4357</p>
<p>2. To the extent not included in item 1 above:</p> <p>a. National banks, federal savings associations, and federal branches and federal agencies of foreign banks</p> <p>b. State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies and Insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act</p> <p>c. Nonmember Insured Banks, Insured State Branches of Foreign Banks, and insured state savings associations</p> <p>d. Federal Credit Unions</p>	<p>a. Office of the Comptroller of the Currency Customer Assistance Group 1301 McKinney Street, Suite 3450 Houston, TX 77010-9050</p> <p>b. Federal Reserve Consumer Help Center P.O. Box 1200 Minneapolis, MN 55480</p> <p>c. FDIC Consumer Response Center 1100 Walnut Street, Box #11 Kansas City, MO 64106</p> <p>d. National Credit Union Administration Office of Consumer Protection (OCP) Division of Consumer Compliance and Outreach (DCCO) 1775 Duke Street Alexandria, VA 22314</p>
<p>3. Air carriers</p>	<p>Asst. General Counsel for Aviation Enforcement & Proceedings Aviation Consumer Protection Division Department of Transportation 1200 New Jersey Avenue, S.E. Washington, DC 20423</p>
<p>4. Creditors Subject to the Surface Transportation Board</p>	<p>Office of Proceedings, Surface Transportation Board Department of Transportation 395 E. Street S.W. Washington, DC 20423</p>
<p>5. Creditors Subject to the Packers and Stockyards Act, 1921</p>	<p>Nearest Packers and Stockyard Administration area supervisor</p>
<p>6. Small Business Investment Companies</p>	<p>Associates Deputy Administrator for Capital Access United States Small Business Administration 409 Third Street, SW, 8th Floor Washington, DC 20549</p>
<p>7. Brokers and Dealers</p>	<p>Securities and Exchange Commission 100 F St NE Washington, DC 20549</p>
<p>8. Federal Land Banks, Federal Lank Bank Associations, Federal Intermediate Credit Banks, and Production Credit Associations</p>	<p>Farm Credit Administration 1501 Farm Credit Drive McLean, VA 22102-5090</p>
<p>9. Retailers, Finance Companies, and All Other Creditors Not Listed Above</p>	<p>FTC Regional Office for region in which the creditor operates <u>or</u> Federal Trade Commission: Consumer Response Center – FCRA Washington, DC 20580 (877) 382-4357</p>

**AUTHORIZATION TO OBTAIN CONSUMER REPORTS AND/OR INVESTIGATIVE
CONSUMER REPORTS FOR EMPLOYMENT PURPOSES**

I hereby authorize [Employer] to obtain or have prepared one or more consumer reports and/or investigative consumer reports on me for employment purposes, including but not limited to initial employment, promotion, reassignment, retention of employment, and any other use not prohibited by law, prior to and during my employment with [Employer]. These reports may contain information regarding my credit history, criminal record history, driving record history, credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, mode of living, and any other type of information that is permissible by all governing laws. I understand this information may be obtained from previous employers, companies, credit bureaus, corporations, law enforcement agencies, persons, educational institutions, and other agencies, businesses and individuals. I hereby authorize and direct all persons who may have information relevant to any such consumer report and/or investigative consumer report to disclose it to [Employer] or its agents.

This Authorization is valid for current and future reports, and I specifically understand that [Employer] intends for this Authorization to cover both the application for employment and, if I am hired, any additional consumer reports and/or investigative consumer reports obtained while I remain an employee.

Print Name _____

Signature _____

Date _____

**ACKNOWLEDGMENT OF RECEIPT OF “A SUMMARY OF
YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT”**

I acknowledge that I have received “A Summary of Your Rights under the Fair Credit Reporting Act.” I understand that if I have any questions regarding the Summary, I should not sign this form until my questions are answered to my satisfaction. By signing this form, I acknowledge that I have no questions, that I have reviewed this form and that I understand its contents.

Print Name _____

Signature _____

Date _____

Other names you have used

Social Security Number*

Date of Birth*

Driver’s License Number State Issued Name as it appears on Driver’s
License

Current address City State Zip

Previous Address 1

Previous Address 2

Phone number Email address

*This information will be used for employment-related background screening purposes only and no other purpose.

CONNECTICUT CREDIT CHECK DISCLOSURE

[Employer Name] may obtain a credit report about you because you are seeking to work in the following position:

[HR: INSERT POSITION AND INFORMATION REGARDING THE PURPOSE FOR REQUESTING OR USING CREDIT REPORT INFORMATION].

Print Name _____

Signature _____

Date _____

HR TO COMPLETE – CERTIFICATION TO

CONSUMER REPORTING AGENCY

**CERTIFICATION FOR CONSUMER REPORTS AND/OR INVESTIGATIVE
CONSUMER REPORTS FOR EMPLOYMENT PURPOSES**

[Employer] is requesting a consumer report and/or investigative consumer report for employment purposes on the individual listed below, and hereby certifies that it:

1. has complied with the requirement to provide the individual with a disclosure and that it has obtained the individual's authorization to receive a consumer report and/or investigative consumer report;
2. will not use any information in the consumer report and/or investigative consumer report in violation of any federal or state equal employment opportunity law or regulation;
3. has provided the individual with the additional investigative consumer report disclosure and will comply with any request by the individual for disclosure of the nature and scope of the investigation related to any investigative consumer report;
4. has complied with the obligation to provide information as to rights and has provided a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" to the individual; and
5. will comply with the requirement to provide the individual with the appropriate notices if [Employer] decides to take an adverse action based in whole or in part on any consumer report and/or investigative consumer report.

[EMPLOYER]

Date _____

By: _____

Its: _____

[Employer] requests a consumer report and/or investigative consumer report on the following individual:

Name: _____
 First Middle Last

Complete Residential Address:

Street Number/P.O. Box Street Name

City State Zip Code County

Social Security Number: _____

Public Safety
Best Practices in Hiring
Sample Background Check Forms – Connecticut
Pre-Adverse Action & Adverse Action Letters

Instructions for HR (not to be provided to applicants or employees):

Step 1: Pre-Adverse Action Notice

Prior to any final decision to take an adverse action against an individual (*e.g.* not hiring an applicant or terminating an employee), based in whole or in part upon information in the individual's background check/consumer report and/or investigative consumer report, complete a Pre-Adverse Action Notice to notify the individual of the possible adverse action.

- Attach a copy of the consumer report and/or investigative consumer report in question.
- Attach a copy of the FCRA Summary of Rights.

Send the Notice, with attachments, using some form of delivery that provides proof of delivery (*e.g.* fax, e-mail, overnight mail, certified mail, return receipt requested, etc.), or deliver the letter, with attachments, to the individual and obtain a receipt.

- **Wait at least 7 business days** for the individual to dispute the consumer report and/or investigative consumer report and offer information to correct the disputed portion, unless the individual otherwise sooner acknowledges the validity of the negative information in the report.
- If the individual does not dispute the consumer report and/or investigative consumer report or otherwise satisfactorily establish the error of the relevant negative information within 7 business days, or an otherwise reasonable amount of time, take the adverse employment action and send the Adverse Action Notice to the individual as detailed in Step 2 below.

Step 2: Adverse Action Notice

After taking an adverse action, complete the Adverse Action Notice and deliver in a manner similar to the delivery of the Pre-Adverse Action Notice above.

- Attach a copy of the FCRA Summary of Rights

*Note: The headings designating the Pre-Adverse Action Letter, Summary of Rights, and Adverse Action letter below are for informational purposes for HR only and are not to be included in the text of the forms sent to the applicant.

Pre-Adverse Action Letter

[Letterhead]

Date:

Dear [applicant/employee name]:

As you know, as part of our employment screening process we check the background of applicants and employees for employment purposes. You authorized us to obtain one or more consumer reports and/or investigative consumer reports. The purpose of this letter is to provide you with a copy of a consumer report and/or investigative consumer report that we obtained in accordance with your authorization and a summary of rights under the Fair Credit Reporting Act prior to making our [hiring (or) employment] decision. There is information in this report that has caused us to consider [not hiring you; terminating you; not promoting you; other (specify)]. However, [Employer] has not yet decided upon this action.

If there is any information you wish to provide regarding the contents of the report, you may do so, in writing, directly with [Employer] within the next seven business days. If we do not hear from you within that time, we will assume that the information is correct and will take the adverse employment decision indicated above.

You also have the right to dispute, directly with the consumer reporting agency, [Consumer Reporting Agency Name], any information in its report. [Consumer Reporting Agency Name] will reinvestigate the disputed information free of charge and record the current status of the disputed information or delete the item(s) from its report within 30 days of receiving your dispute notice.

This report was furnished to us by [Consumer Reporting Agency Name], [Consumer Reporting Agency Address and Telephone Number]. Please understand that [Consumer Reporting Agency Name] only provided us with the report and is not responsible for making the employment decision. Therefore, [Consumer Reporting Agency Name] will be unable to provide you with information related to our decision.

We look forward to hearing from you.

Sincerely,

[EMPLOYER]

By: _____

Its: _____

Enclosures: (1) copy of consumer report and/or investigative consumer report; and (2) FCRA Summary of Rights

Adverse Action Letter

Date:

Dear [applicant/employee name]:

This letter is to notify you that we must [withdraw our conditional offer of employment (or) terminate your employment (or) other adverse action (specify)] based partially or wholly on information contained in the consumer report and/or investigative consumer report we received from [Consumer Reporting Agency Name].

As part of our screening process, we check the background of applicants and employees for employment purposes. You authorized us to obtain a consumer report and/or investigative consumer report and we provided a copy of this report to you prior to our [hiring (or) employment] decision. Based in whole or in part on the information in your consumer report and/or investigative consumer report obtained from [Consumer Reporting Agency Name], we are unable to [consider you for employment (or) continue your employment] with [Employer].

If you wish to discuss the contents of your consumer report file, or dispute the accuracy or completeness of the information listed, please contact [Consumer Reporting Agency Name] at the following:

[Consumer Reporting Agency Name]
[Consumer Reporting Agency Address]
[Consumer Reporting Agency Telephone]

Please note that [Consumer Reporting Agency Name] did not make this decision and is unable to provide you with the specific reasons for it. Please note that you have the right to confirm the nature and scope of the information contained in the report we received from [Consumer Reporting Agency Name] by obtaining another free copy of the report within 60 days of notice of this action. Further, you have the right to dispute the accuracy or completeness of the report with [Consumer Reporting Agency Name]. To obtain this information you will need to provide [Consumer Reporting Agency Name] certain information for identification purposes, which may include your full name, mailing address, social security number, the name of our company and a photocopy of your driver's license and social security number card at the address provided above. Please find enclosed another copy of A Summary of Your Rights under the Fair Credit Reporting Act.

[INCLUDE THE FOLLOWING PARAGRAPH ONLY IF THE CONSUMER REPORT AND/OR INVESTIGATIVE CONSUMER REPORT OBTAINED INCLUDED A CREDIT SCORE:

The consumer report and/or investigative consumer report that [Employer] used in making the decision to take the adverse action based wholly or partially on information contained in the consumer report and/or investigative consumer report contained a credit score. [Employer] has

been able to ascertain the following information regarding that credit score based on information received from [Consumer Reporting Agency Name].:

- (1) the credit score was [Credit Score];
- (2) the range of possible credit scores under the model used was [Range];
- (3) the key factors that adversely affected the credit score in the model used included [Up to 4 factors, unless number of inquiries is a key factor, in which case the maximum is 5];
- (4) the date on which the credit score was created was [Date]; and
- (5) the person or entity that provided the credit score or credit file upon which the credit score was created was [Name of person or entity].]

Sincerely,

[EMPLOYER]

By: _____

Its: _____

Enclosure: FCRA Summary of Rights

Para información en español, visite www.consumerfinance.gov/learnmore o escribe a la Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20552.

A Summary of Your Rights Under the Fair Credit Reporting Act

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- **Access to your file is limited.** A consumer reporting agency may provide information about you only to people with a valid need – usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.
- **You must give your consent for reports to be provided to employers.** A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.consumerfinance.gov/learnmore.
- **You may limit “prescreened” offers of credit and insurance you get based on information in your credit report.** Unsolicited “prescreened” offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address from the lists these offers are based on. You may opt-out with the nationwide credit bureaus at 1-888-5-OPTOUT (1-888-567-8688)
- **You may seek damages from violators.** If a consumer reporting agency, or in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.
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States may enforce the FCRA, and many states have their own consumer reporting laws. In some cases, you may have more rights under state law. For more information, contact your state or local consumer protection agency or your state Attorney General. For information about your federal rights, contact:

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<p>1.a. Banks, savings associations, and credit unions with total assets of over \$10 billion and their affiliates.</p> <p>b. Such affiliates that are not banks, savings associations, or credit unions also should list, in addition to the CFPB:</p>	<p>a. Consumer Financial Protection Bureau 1700 G Street, N.W. Washington, DC 20552</p> <p>b. Federal Trade Commission: Consumer Response Center - FCRA Washington, DC 20580 (877) 382-4357</p>
<p>2. To the extent not included in item 1 above:</p> <p>a. National banks, federal savings associations, and federal branches and federal agencies of foreign banks</p> <p>b. State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies and Insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act</p> <p>c. Nonmember Insured Banks, Insured State Branches of Foreign Banks, and insured state savings associations</p> <p>d. Federal Credit Unions</p>	<p>a. Office of the Comptroller of the Currency Customer Assistance Group 1301 McKinney Street, Suite 3450 Houston, TX 77010-9050</p> <p>b. Federal Reserve Consumer Help Center P.O. Box 1200 Minneapolis, MN 55480</p> <p>c. FDIC Consumer Response Center 1100 Walnut Street, Box #11 Kansas City, MO 64106</p> <p>d. National Credit Union Administration Office of Consumer Protection (OCP) Division of Consumer Compliance and Outreach (DCCO) 1775 Duke Street Alexandria, VA 22314</p>
<p>3. Air carriers</p>	<p>Asst. General Counsel for Aviation Enforcement & Proceedings Aviation Consumer Protection Division Department of Transportation 1200 New Jersey Avenue, S.E. Washington, DC 20423</p>
<p>4. Creditors Subject to the Surface Transportation Board</p>	<p>Office of Proceedings, Surface Transportation Board Department of Transportation 395 E. Street S.W. Washington, DC 20423</p>
<p>5. Creditors Subject to the Packers and Stockyards Act, 1921</p>	<p>Nearest Packers and Stockyard Administration area supervisor</p>
<p>6. Small Business Investment Companies</p>	<p>Associates Deputy Administrator for Capital Access United States Small Business Administration 409 Third Street, SW, 8th Floor Washington, DC 20549</p>
<p>7. Brokers and Dealers</p>	<p>Securities and Exchange Commission 100 F St NE Washington, DC 20549</p>
<p>8. Federal Land Banks, Federal Lank Bank Associations, Federal Intermediate Credit Banks, and Production Credit Associations</p>	<p>Farm Credit Administration 1501 Farm Credit Drive McLean, VA 22102-5090</p>
<p>9. Retailers, Finance Companies, and All Other Creditors Not Listed Above</p>	<p>FTC Regional Office for region in which the creditor operates or Federal Trade Commission: Consumer Response Center – FCRA Washington, DC 20580 (877) 382-4357</p>

Example
Authorization to Conduct Post-Conditional Offer Testing
(where FCRA does not apply)

AUTHORIZATION TO CONDUCT EMPLOYMENT TESTING

I hereby authorize [Employer] to obtain [insert names of tests to be conducted] reports on me for purposes of obtaining employment with [Employer]. These reports may contain information regarding my credit history, criminal record history, driving record history, credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, mode of living, medical information, psychological information and any other type of information that is permissible by all governing laws. I understand this information may be obtained from previous employers, companies, credit bureaus, corporations, law enforcement agencies, persons, educational institutions, medical professionals hired by [Employer] and other agencies, businesses and individuals. I hereby authorize and direct all persons who may have such information to disclose it to [Employer] or its agents.

This Authorization is valid for current and future reports, and I specifically understand that [Employer] intends for this Authorization to cover both the application for employment and, if I am hired, any additional reports or information obtained while I remain an employee.

Print Name _____

Signature _____

Date _____

Example EEO Statement

Equal Employment Opportunity Policy

[The municipality] is committed to providing non-discriminatory employment opportunities to all employees and applicants for employment. The municipality will not discriminate against any employee or applicant for employment because of race, color, religious creed, age, sex, gender identity or expression, sexual orientation, marital status, familial status, pregnancy, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability, physical disability, genetic information or any other characteristic or activity protected by law. Employment decisions will be made without regard to an employee or applicant's race, color, religious creed, age, sex, gender identity or expression, sexual orientation, marital status, familial status, pregnancy, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability, physical disability, genetic information or other protected characteristic or activity. [The municipality] complies with all applicable federal, state and local laws governing non-discrimination in employment. This policy applies to all terms and conditions of employment, including recruiting, hiring, placement, promotion, demotion, discipline, termination, layoff, recall, transfer, leaves of absence, compensation, benefits, and training.

Additionally, [the municipality] expressly prohibits any form of workplace harassment based on race, color, religious creed, age, sex, gender identity or expression, sexual orientation, marital status, familial status, pregnancy, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability, physical disability genetic information or any other characteristic or activity protected by law. [The municipality] complies with all applicable federal, state and local laws governing non-harassment in employment.

All employees are expected to comply with this Equal Employment Opportunity Policy. Any violation of this policy may result in discipline up to and including discharge.

Any employee who believes he or she has been discriminated against or harassed must immediately report any incident to _____.

[The municipality] will not tolerate retaliation against any employee who reports acts of discrimination and/or harassment or provides information in connection with a complaint of discrimination and/or harassment

If you have any questions regarding this policy, please contact _____ at _____.

Best Practices in Hiring enhance productivity and reduce liability within Police Departments



CONNECTICUT INTERLOCAL RISK MANAGEMENT AGENCY
545 Long Wharf Drive, 8th Floor, New Haven, CT 06511
Telephone: 203-946-3700 | Email: cirma@ccm-ct.org
www.CIRMA.org