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- The Rights of Employees to a Fair Predisciplinary Process: Part XIV – The Legality of Personal Searches.



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## The Cline Newsletter

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### THE RIGHTS OF EMPLOYEES TO A FAIR PREDISCIPLINARY PROCESS: PART XIV – THE LEGALITY OF PERSONAL SEARCHES.

This is the next in a series of articles concerning the legality of various internal affairs investigation tactics. In this issue we discuss the legality of searches of the person and their home.

Courts have recognized that strip searches and body searches are extremely intrusive and that public employees have a constitutional right in connection with such searches. The test for determining whether such a search in the workplace is valid has generally been the "reasonable suspicion" standard. Therefore, when employers have received a tip that correctional officers would be bringing drugs into the workplace — correctional institutions — courts have found employers were justified in conducting a strip search, which also extended to a body cavity search.

In *Kirkpatrick v. Gates*, the Ninth Circuit rejected the L.A. Police Department's claim that it had a right to perform a strip search on its officers without reasonable suspicion. In *Kirkpatrick*, a sergeant had required the

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body search of a number of its officers after a citizen had complained that he might have lost money during the booking process even though he was uncertain when or even whether such a loss of cash had occurred. There were several officers with the possible access to the suspect, and they were all ordered to be strip-searched.

The Ninth Circuit rejected this search due to the lack of “reasonable suspicion” that any one of the officers had taken any money from the complaining prisoner:

The government has an interest in the integrity of its police force, which may justify some intrusions on the privacy of police officers that the Fourth Amendment would not otherwise tolerate. However, because of their highly intrusive nature, investigative strip searches of police officers must be supported by a reasonable suspicion that the evidence will be found, despite the government’s interest in police integrity.

In another Ninth Circuit case, the court ruled that a police department — again the L.A.P.D. — could not conduct a warrantless search on a police officer’s home in violation of the Fourth Amendment. In *L.A. Police Protective League v. Gates*, the Department was conducting the investigation of an officer who allegedly engaged in off-duty burglaries. The department had ordered the officer to submit to a search of his own home, which he refused. He was then terminated for refusing to consent to the search.

The Ninth Circuit found the “ordered” search to be unconstitutional. The court further found it to be improper for L.A.P.D. to terminate the officer for not submitting to an unconstitutional search of his home:

By the same token, Gibson [the officer] could not be disciplined when he refused to allow the appellants to violate his constitutional rights. As the Supreme Court has pointed out, it is not proper to discharge an officer from duty in order to punish that officer for exercising rights guaranteed to him under the Constitution.

Guild representatives, though, should be cautious before advising their members not to submit to a

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search. In this case, the court ruled the search illegal and by definition the refusal could not be a basis for an unsubordination charge. If one resisting a potentially unlawful order is proven to be incorrect, however, an unsubordination charge could very well stand. “Work not, grieve later” is a mantra often invoked by arbitrators in this context.

In the next article we will consider the legality of various drug and alcohol testing tactics.

**To learn more about Prediscipline rights and the other rights of public safety employees visit the Cline and Associates website where you can order our book “THE RIGHTS OF WASHINGTON PUBLIC SAFETY EMPLOYEE: REPRESENTATIVE’S MANUAL.” This book is a 468 page compendium of labor law materials written especially for those involved in union-side representation of Washington public safety labor organizations.**

*Jim Cline*

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