Dear Ms. Canady:

The Office of University Counsel received your request for a formal opinion concerning the proposal of drafting a policy allowing for the drug testing of employees. You inquire as to whether Coastal Carolina University is authorized to adopt such a policy without being in violation of state or federal laws, and whether there are certain parameters in place to regulate the use of employee drug testing within a state agency.

The Office of University Counsel has reviewed state and federal law and has not found a provision preventing Coastal Carolina University from adopting a policy allowing the drug testing of employees.

The Fourth Circuit’s analysis in the area of workplace drug testing begins with the question of whether urinalysis is considered a “search” for Fourth Amendment purposes. The Fourth Amendment guarantees the privacy, dignity, and security of persons against certain capricious and evasive acts by officers of the government. Undeniably, it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has recognized as reasonable and as such, these intrusions are deemed “searches” under the Fourth Amendment. See Carroll v. City of Westminster, 233 F.3d 208 (4th Cir. Md. 2000). However, the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable.

In determining the reasonability of implementing a drug testing policy at Coastal Carolina University, the University must judge by balancing the drug test’s intrusion on the individual’s Fourth Amendment interest against the promotion of legitimate governmental interests, id.: Stigile v. Clinton, 110 F.3d 801, 803 (D.C. Cir. 1997). Additionally, the Supreme Court noted in Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602 (U.S. 1989), that although tests of blood, urine, and breath are “searches” for Fourth Amendment purposes, the government’s interest in public employee safety could justify departures from the usual warrant and probable cause requirements for a search, finding a reasonable an articulable ground a permissible basis for such a search.
Furthermore, the Fourth Circuit has held, “Regardless of whether any drug testing plan is in place, a government employer may require an employee to submit to urinalysis where the employer has reasonable, articulable grounds to suspect the employee of illegal drug involvement. See Roberts v. City of Newport News, 1994 U.S. App. LEXIS 26810 (4th Cir. 1994). See also, Stone v. City of Seneca, 2009 U.S. Dist. LEXIS 132476 (D.S.C. 2009). This reasonable and articulate ground to suspect the employee of illegal drug involvement must be individualized before the search is reasonable, however, in limited circumstances, where an important governmental interest would be jeopardized by a requirement of individualized suspicion, a search may be reasonable. See Bd. of Educ. v. Earls, 536 U.S. 822 (U.S. 2002), where The United States Supreme Court held the board of education’s drug testing policy constitutional, even though the policy failed to address an established problem and did not show individualized suspicion of drug use because it reasonably served the board’s legitimate interest in detecting and preventing drug use among students.

Moreover, §41-1-15 of the South Carolina Code establishes that an “employer may establish a drug prevention program in the workplace and that the program should include (1) a substance abuse policy statement that balances the employer’s respect for individuals with the need to maintain a safe, productive, and drug-free environment; (2) notification to all employees of the drug prevention program and its policies at the time the program is established by the employer or at the time of hiring the employee, whichever is earlier; (3) all interviews, reports, statements, memoranda, and test results received by the employer during a substance abuse testing program are confidential communications but may be used or received in evidence, obtained in discovery, or disclosed in any civil or administrative proceeding; (4) Employers, laboratories, medical review officers, insurers, drug or alcohol rehabilitation programs, and employer drug prevention programs, and their agents who receive or have access to such test results shall keep all information confidential.”

Additionally, §41 U.S.C. 81, the Drug-Free Workplace Act of 1988, requires all federal grantees to agree that they will provide a drug-free workplace as a precondition of receiving a contract or grant from a federal agency. The Act requires organizations to provide a drug-free workplace by: (1) publishing and furnishing a policy statement to employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy; (2) establish a drug-free awareness program to make employees aware of the dangers of drug abuse in the workplace, the policy of maintaining a drug-free workplace, any available drug counseling, rehabilitation, and employee assistance programs, and the penalties that may be imposed upon employees for drug abuse violations; (3) notify employees that as a condition of employment, the employee must abide by the policy and notify the employer within five calendar days if he or she is convicted of a criminal drug violation in the workplace; (4) notify the contracting or granting agency within 10 days after receiving notice that the employee has been convicted of a violation in the workplace; (5) impose
a penalty on or require satisfactory participation in a drug abuse assistance or rehabilitation program by any employee convicted of a reportable workplace drug conviction; and (6) make an ongoing, good faith effort to maintain a drug free workplace by meeting the requirements of the Act.

In conclusion, it is of the opinion of University Counsel, that Coastal Carolina University, is authorized to create a policy allowing for the drug testing of employees, should the institution decide to implement such. Furthermore, although drug testing is deemed a search under the Fourth Amendment, the search would be reasonable because of the University's legitimate interest in the need to maintain a safe, productive, and drug-free environment.

Sincerely,

Timothy E. Meacham  
University Counsel  
Coastal Carolina University

Katherine M. Brooks  
Legal Research Specialist  
Coastal Carolina University

May 3, 2016  
Date