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Tab 8

U.S. Department of Justice

Civil Division

Domestic Policy Council
Deliberative Document

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 26 1986

MEMORANDUM

TO: Carlton E. Turner
Chairman, Drug Use Prevention Working Group
Domestic Policy Council

FROM: Richard K. Willard
RKW Chairman
Legislative Review Task Force

RE: *Revisions to Draft Executive Orders and Legislative Update*

Attached are new draft Executive Orders revised after receipt of comments and suggested text revisions from the White House Counsel's office, OPM, HHS, FBI, DOL and others. This memorandum is intended as a broad summary of those comments in order to highlight the major areas of concern.

A continuing issue is whether the Executive Order should be limited to employees in sensitive positions. I recommend that the Order cover all employees, with mandatory testing and more severe sanctions for employees in sensitive positions. (Tab A.) The alternative draft covers only employees in sensitive positions, except for section 1(a). (Tab B.)

Section 1:

It has been recommended that Section 1 of Tab B be amended so that only employees in sensitive positions are required to refrain from illegal drug use. The proposed language is problematic because it seems to create a "double standard" for federal employees. The implication of the proposed revision is that illegal drug use by non-sensitive federal employees is not necessarily prohibited, at least off-duty.

The goal of the Executive Order should be to create a uniform government-wide standard prohibiting illegal drug use by all federal employees. To the extent that sensitive and non-sensitive employees have been treated differently in our draft Executive Orders, the dualism is based on different enforcement policies rather than a willingness to tolerate illegal drug use by non-sensitive employees. No federal employee should use

illegal drugs. However, the potential public safety and national security concerns of the sensitive federal employee justify the more rigorous enforcement tool of mandatory drug testing and more severe sanctions when drug use is detected.

Section 4:

It has been recommended that Section 4 be amended so that rehabilitation may be made available to employees in sensitive positions who do not come forward voluntarily prior to being caught. We have acceded to this suggestion. This section has also been reworded to make clear that agencies are not required to keep employees in sensitive positions who are undergoing rehabilitation. It should be kept in mind that certain agencies such as CIA and FBI do not have non-sensitive positions and thus may discharge employees who seek rehabilitation for drug addiction.

Section 5:

Several revisions have been suggested to Section 5. Their basic thrust is to provide employees in sensitive positions who are found to be using illegal drugs a "second-chance" before removal will be required. In keeping with this more lenient approach, we have revised this section to provide two basic personnel options: (1) an agency head will now have discretion to retain an employee in a sensitive position initially found to be using illegal drugs; (2) an agency head will still be required to remove or transfer an employee in a sensitive position twice found to be using illegal drugs. On the other hand, we have avoided the creation of a "safe-harbor" for drug users in sensitive positions by making it clear that they can be removed or transferred to a non-sensitive position even after the initial determination of illegal drug use.

Another revision to this section requires that some kind of disciplinary action (at a minimum, a reprimand) be taken with regard to any determination of illegal drug use. (In Tab A, this provision includes non-sensitive employees.)

Section 7:

It has been recommended that Section 7 be amended to commit to agency heads the discretion to "determine which employees involved in law enforcement, national security" and other related categories would be designated "employees in sensitive positions," so long as such employees fall within the categories now enumerated in paragraphs (d)(i)-(viii). We believe that this language does not meaningfully expand the discretion of the agency heads while simultaneously weakening the legal defensibility of actions taken pursuant to the order.

It is important to keep in mind that, under Section 2(b) agency heads are "authorized" but not required to test particular sensitive employees or groups of employees as they see fit. The

Executive Order is an umbrella which legally protects agency heads who wish to test; it is not an order compelling them to test any given employee or set of employees, let alone an order compelling blanket testing.

However, apart from the testing issue, the standards contained in the Executive Order are based upon a Presidential determination as to job sensitivity. If agency heads have the discretion to determine whether 1% or 50% of their employees are "sensitive," then the legal benefit of the Presidential determinations on suitability and performance "nexus" will be weakened.

Legislative Review:

The following initiatives are underway in the legislative review area. First, the Drug Policy Board is undertaking a review of significant criminal legislative initiatives. The Policy Board will take the lead in preparing comments on the draft legislative package assembled by Speaker O'Neill, since 90 percent of this package deals with law enforcement matters. We have referred to appropriate task forces of the Drug Use Prevention Working Group those portions of the O'Neill package that concern them and will ultimately funnel their comments to the Policy Board. In addition, the Policy Board will develop legislation for the Administration to propose in the law enforcement area, based upon draft legislation prepared by the Criminal Division of the Justice Department.

Second, we understand that OMB is undertaking a comprehensive review of the resource allocation and budgetary ramifications of significant legislative proposals.

Finally, our task force received yesterday legislative proposals from HHS and Education, which we have circulated for comment. We will assemble these proposals, together with the Department of Justice draft bill on drug-free schools and workplaces, into a demand-side legislative package to submit to you later this week.

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A

This document was created in the DPC deliberative process and may not be circulated, disseminated or released without the approval of the DPC.

All Positions Version: 8-26-86 9:00 a.m.

Executive Order No. _____ of August __, 1986

Drug Free Federal Workplace

WHEREAS the use of illegal drugs, on or off duty, by federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust given to such employees as servants of the public;

WHEREAS federal employees who use illegal drugs, on or off duty, are less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

WHEREAS the use of illegal drugs, on or off duty, by federal employees impairs the efficiency of federal departments and agencies by undermining public confidence in them, and thereby making it more difficult for other employees who do not use illegal drugs to perform their jobs effectively;

WHEREAS the use of illegal drugs, on or off duty, by federal employees can pose a serious health or safety threat to members of the public and to other federal employees;

WHEREAS the use of illegal drugs, on or off duty, by federal employees is unacceptable in the federal workplace, and creates suspicion and distrust within an agency or department that disrupts its smooth and efficient functioning;

WHEREAS the use of illegal drugs, on or off duty, by federal employees in certain positions evidences an unreliability, an instability, and a lack of judgment that is inconsistent with access to sensitive information, and renders such employees susceptible to coercion, influence, and irresponsible action under pressure so as to pose a serious risk to national security, the public safety, and the effective enforcement of the law;

WHEREAS federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves, and will only take such steps if made accountable for their unsuitable and illegal use of drugs; and

WHEREAS standards and procedures should be put in place to ensure fairness in achieving a drug-free federal workplace, to allow an

appropriate response to be made to the use of illegal drugs by a federal employee, and to protect the privacy of federal employees:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including Section 3301(2) of Title 5 of the United States Code; Section 7301 of Title 5 of the United States Code, Section 290ee-1 of Title 42 United States Code; and as President of the United States, and deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the federal service, it is hereby ordered as follows:

Section 1: *Drug Free Workplace*

(a) The laws of our nation prohibit the use of illegal drugs and federal employees are required to refrain from the use of these drugs.

(b) The use of illegal drugs by federal employees whether on duty or off duty is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for federal employment.

Section 2: *Drug Testing For All Employees*

(a) The head of each agency shall establish a program to test for illegal drug use under the following circumstances:

(i) When there is a reasonable suspicion that any employee uses illegal drugs;

(ii) In an examination authorized by the agency regarding an accident or unsafe practice; or

(iii) During or after admission into a rehabilitation program as described in Section 5 of this order.

(b) Agency heads shall establish programs which enable any employee to voluntarily submit to drug testing.

(c) The head of each agency may establish a drug testing program to identify any applicant who uses illegal drugs.

Section 3: *Additional Drug Testing for Employees in Sensitive Positions*

(a) The head of each agency shall establish a drug testing program for applicants for sensitive positions before appointment or selection.

(b) Agency heads are authorized to test any current employee in a sensitive position for the use of illegal drugs. The extent and criteria for such testing shall be determined by each agency head, based upon the degree of sensitivity of the agency's mission and its employees' duties and the available resources for a testing program.

Section 4: *Drug Testing Procedures*

(a) Agencies shall notify employees 60 days prior to the implementation of a drug testing program pursuant to this order that testing for use of illegal drugs is to be conducted and that counseling and rehabilitation are available and the procedures for obtaining such assistance.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting, and procedures to protect the confidentiality of test results and related medical and rehabilitation records.

(d) Programs shall be conducted in accordance with scientific and technical guidelines promulgated by the Secretary of Health and Human Services after consultation with the Director of the National Institute on Drug Abuse.

Section 5: *Rehabilitation*

All employees currently using illegal drugs who cannot voluntarily cease such activity on their own must seek counseling or rehabilitation services from their agency. Employees undergoing counseling or rehabilitation from their agency and employees who have been identified as users of illegal drugs under a voluntary testing program under section 2(b) of this order are not required by this order to be removed from employment or disciplined so long as they thereafter refrain from using illegal drugs. This section does not require an agency to maintain any person in a sensitive position if the agency determines that the persons' use of illegal drugs makes it

inappropriate for the person to remain in a sensitive position.

Section 6. *Personnel Actions*

(a) An agency head must initiate action to remove from the service or discipline any employee who is found to use illegal drugs. An agency head may in his discretion, transfer to a non-sensitive position any employee who is found to use illegal drugs.

(b) An agency head shall initiate action to remove from the service or transfer any employee from a sensitive position who is found to use illegal drugs and:

(1) who has refused to undergo counseling or rehabilitation services as set forth in section 5; or

(2) who does not refrain from using illegal drugs after the first identification of that employee as a user of illegal drugs.

(c) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing the adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(d) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, conviction of a criminal offense, administrative inquiry, or the results of an authorized testing program. Positive drug test results are not conclusive and may be rebutted by other evidence that an employee has not used illegal drugs.

(e) Any action to remove or discipline an employee who is using illegal drugs shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(f) Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of title 21, United States Code, received as

a result of the operation of drug testing programs established pursuant to this order.

Section 7: *Coordination of Agency Programs*

(a) The Office of Personnel Management may promulgate government wide regulations to guide agencies in the implementation of the terms of this order.

(b) The Attorney General shall render legal advice regarding the implementation of this order and must approve all guidelines, regulations and policies adopted pursuant to this order.

Section 8: *Definitions*

(a) This order applies to all agencies of the Executive Branch.

(b) For the purposes of this order, the term "agency" means an Executive agency, as defined in 5 U.S.C. § 105; the Uniformed Services as defined in 5 U.S.C. § 2101(3); the United States Postal Service; or any employing unit or authority of the Federal government, other than those of the judicial and legislative branches.

(c) For the purpose of this order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21, United States Code, the possession of which is unlawful under chapter 13 of title 21, United States Code. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For the purpose of this order, the term "employee in a sensitive position" refers to:

(i) an employee in a position which an agency has designated Special Sensitive, Critical-Sensitive or Noncritical-sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position which an agency head has designated or in the future designates as sensitive in accordance with Executive Order 10450 of April 27, 1953 as amended;

(ii) an employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an

agency head under Section 4 of Executive Order 12356 of April 2, 1982;

(iii) individuals serving under Presidential appointments;

(iv) members of the Senior Executive Service as defined in Subchapter II of Chapter 31 of Title 5, United States Code;

(v) law enforcement officers as defined in 5 U.S.C. § 8331(20);

(vi) individuals employed under Schedule C in the excepted service under the authority of section 213.3301 of Title 5, Code of Federal Regulations and Executive Order 10577;

(vii) members of the uniformed services as defined in 5 U.S.C. § 2101(3);

(viii) air traffic controllers as defined in 5 U.S.C. § 2109; and

(ix) other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

Section 9: *Effective Date*

This Order shall become effective on the date of its issuance.

RONALD REAGAN

THE WHITE HOUSE

August __, 1986

B

This is a Domestic Policy Council deliberative process document and may not be circulated, disseminated or released without the approval of the Domestic Policy Council.

Sensitive Positions 8-26-86 9:05 a.m.

Executive Order No. _____ of August __, 1986

Drug Free Federal Workplace

WHEREAS the use of illegal drugs, on or off duty, by federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust given to such employees as servants of the public;

WHEREAS federal employees who use illegal drugs, on or off duty, are less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

WHEREAS the use of illegal drugs, on or off duty, by federal employees impairs the efficiency of federal departments and agencies by undermining public confidence in them, and thereby making it more difficult for other employees who do not use illegal drugs to perform their jobs effectively;

WHEREAS the use of illegal drugs, on or off duty, by federal employees can pose a serious health or safety threat to members of the public and to other federal employees;

WHEREAS the use of illegal drugs, on or off duty, by federal employees creates suspicion and distrust within an agency or department that disrupts its smooth and efficient functioning;

WHEREAS the use of illegal drugs, on or off duty, by federal employees in certain positions evidences an unreliability, an instability, and a lack of judgment that is inconsistent with access to sensitive information, and renders such employees susceptible to coercion, influence, and irresponsible action under pressure so as to pose a serious risk to national security, the public safety, and the effective enforcement of the law;

WHEREAS federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves, and will only take such steps if made accountable for their unsuitable and illegal use of drugs; and

WHEREAS standards and procedures should be put in place to ensure fairness in achieving a drug-free federal workplace, to allow an appropriate response to be made to the use of illegal drugs by a federal employee, and to protect the privacy of federal employees:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including Section 3301(2) of Title 5 of the United States Code; Section 7301 of Title 5 of the United States Code; by section 290ee-1 of title 42 of the United States Code and as President of the United States, and deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the federal service, it is hereby ordered as follows:

Section 1: *Drug Free Workplace*

(a) The laws of our nation prohibit the use of illegal drugs and federal employees are required to refrain from the use of these drugs.

(b) The use of illegal drugs by federal employees in sensitive positions whether on duty or off duty is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for federal employment in sensitive positions.

Section 2: *Drug Testing for Employees in Sensitive Positions*

(a) The head of each agency shall establish a drug testing program covering all applicants for sensitive positions.

(b) Agency heads are authorized to test any current employee in a sensitive position for the use of illegal drugs. The extent and criteria for such testing shall be determined by each agency head, based upon the degree of sensitivity of the agency's mission and its employees' duties and the available resources for a testing program.

Section 3: *Drug Testing Procedures*

(a) Agencies shall notify employees in sensitive positions 60 days prior to the implementation of a drug testing program pursuant to this order that testing for use of illegal drugs is to be conducted and that counseling and rehabilitation

are available and the procedures for obtaining such assistance.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting, and procedures to protect the confidentiality of test results and related medical and rehabilitation records.

(d) Programs shall be conducted in accordance with scientific and technical guidelines promulgated by the Secretary of Health and Human Services after consultation with the Director of the National Institute on Drug Abuse.

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(1) who has refused to undergo counseling or rehabilitation services as set forth in section 4; or

(2) who does not refrain from using illegal drugs after the first identification of that employee as a user of illegal drugs.

(c) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing the adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(d) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, conviction of a criminal offense, administrative inquiry, or the results of an authorized testing program. Positive drug test results are not conclusive and may be rebutted by other evidence that an employee has not used illegal drugs.

(e) Any action to remove an employee who is using illegal drugs shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(f) Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of title 21, United States Code, received as a result of the operation of drug testing programs established pursuant to this order.

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RONALD REAGAN

THE WHITE HOUSE

August __, 1986

U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210

August 22, 1986

MEMORANDUM FOR: Richard K. Willard
Chairman, Legislative Review Task Force
Drug Use Prevention Working Group

FROM: George R. Salem

SUBJECT: Comments on August 18 Preliminary Report

I have undertaken an initial review of the materials provided us, and have several comments. I am enclosing a revision of your draft Executive Order which has been edited to the extent necessary to take account of these comments.

1. Fourth Amendment Considerations; Statutory Nexus Requirements.

We agree with your position that a program which limits mandatory testing to sensitive jobs stands the best chance of passing muster under the Fourth Amendment. These jobs involve national security, the protection of health and safety of the public and other similarly sensitive jobs. In our view, requiring each agency head to specifically identify the positions in each agency which will fall into any of these categories would strengthen the argument that the selection is constitutionally permissible. In addition, this process of agency designation will help ensure that the nexus between an employee's private drug use and his or her job performance is properly established for purposes of Civil Service Reform Act disciplinary requirements.

2. Due Process and Privacy Considerations.

While we also believe your analysis of due process and privacy rights implications may well be overly optimistic, the procedural protections in the proposed Executive Orders included with your preliminary report will no doubt help to defend any such order against constitutional challenges on due process or privacy grounds. Such arguments would be strengthened, in our view, by specifically guaranteeing an employee a right to a retest upon request, and ensuring privacy in the production of a sample for testing.

As a practical matter, we think it would also be wise to take into account the criminal process implications that will flow from a program of federal drug testing. It is my understanding that federal agencies may be under a legal

obligation, pursuant to 28 U.S.C. 535 (Investigation of Crimes Involving Government Officers and Employees) to refer to appropriate law enforcement personnel any positive drug test indicating use of an illegal substance. Moreover, such tests might be considered as probable cause for the issuance of search warrants. I believe we should explore these matters further in our discussions.

3. Rehabilitation Act Obligations.

The Rehabilitation Act requires that a reasonable accommodation be made for the handicapped. While your analysis quite properly draws a distinction between the obligation owed to an "addict" and the obligation owed to a "recreational user," the point where the latter begins to transform into the former is not always apparent. Moreover in some cases, a characteristic of the employee's addiction may be an inability to acknowledge the addiction and the need for professional help. Accordingly, interpretation of the Act's obligations to require reasonable accommodation in employment only to those who voluntarily admit their problem appears likely to invite serious legal challenge.

We believe our efforts could withstand legal challenge if an Executive Order provided appropriate job protection and rehabilitation assistance not only to those whose drug abuse problem is revealed for the first time through voluntary admission or other conduct, but also to those whose problem is revealed through testing. In order to ensure that the person is entitled to protection under the Rehabilitation Act (i.e., is dependent on drugs rather than simply a "recreational user"), we would suggest a certification by a family physician or supervisor that the employee has a physiological or psychological drug dependency. Moreover, as a matter of policy we believe a first-time determination of drug abuse, by testing or otherwise, should not be grounds for removal from employment, although lesser forms of personnel action would be appropriate in such cases.

While the Rehabilitation Act applies to pre-employment applicants as well as employees, it would not appear that it would be "reasonable" to require the federal government or any employer to hire an applicant who is not undergoing rehabilitation or to pay for rehabilitation of an applicant's addiction. It might be appropriate in the spirit of our efforts, however, to encourage flexibility when an addict-applicant is in a rehabilitation program already, and to ensure that positive test results are not used as a per se rejection tool should an individual apply for another federal job at a later time. Whether a

pre-scheduled, single drug test for all job applicants, paid for by the federal government and performed to its specifications, is likely to provide useful information in a cost-effective manner is another practical question.

4. Status of Existing Collective Bargaining Provisions.

An additional legal issue not covered in your memorandum is whether an Executive Order can alter conflicting practices and procedures in an existing collective bargaining agreement. The statutory authorities cited in your draft Executive Order as the basis for Presidential action in this area refer to statutes granting him authority to "regulate" the criteria for hiring and for the conduct of employees. If this is so, then on its face 5 U.S.C. 7116(a)(7) would make it an unfair labor practice to enforce any obligation of the new order that is in conflict with an existing collective bargaining agreement. Absent a sound legal argument to the contrary, we would recommend that any new Executive Order simply take cognizance of existing agreements and thus avoid disruptive and lengthy litigation with federal employee unions on this point.

I am enclosing for your consideration a proposed Executive Order that would conform with the suggestions noted above, together with a copy of your proposed order on sensitive employees (most of which is included verbatim, or with minor editing, in our revision). Our revision includes one additional suggestion not discussed above: that the testing program be extended to include abuse of otherwise legal (prescription) drugs which would substantially impair the ability of an employee to carry out sensitive duties.

Enclosures

cc: Peter J. Wallison
Carlton Turner

Executive Order No._____ of August __, 1986

Drug Free Federal Employment

WHEREAS drug abuse, on or off duty, by federal employees in sensitive positions is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust given to such employees as servants of the public who must set an example for other employees and the public;

WHEREAS drug abuse, on or off duty, by federal employees in sensitive positions evidences an unreliability, an instability, and a lack of judgment that is inconsistent with access to sensitive information, and renders such employees susceptible to coercion, influence, and irresponsible action under pressure so as to pose a serious risk to national security, the public safety, and the effective enforcement of the law;

WHEREAS drug abuse, on or off duty, by federal employees in sensitive positions can pose a serious health or safety threat to members of the public and to other federal employees;

WHEREAS drug abuse, on or off duty, by federal employees can impair the efficiency of federal departments and agencies by undermining public confidence in their functions, creating suspicion and distrust among employees, and result in increased absenteeism and in less reliable and decreased production;

WHEREAS drug abuse, on or off duty, can be ascertained by a program of random testing carried out under appropriate due process and privacy safeguards;

WHEREAS drug abuse, on or off duty, is primarily the responsibility of the abuser, but employers have an obligation under the law to make reasonable accommodation;

WHEREAS the laws governing the conduct of civil servants provide procedures for agency actions terminating employees on the basis of conduct;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statues of the United States, including Sections 3301(2) and 7301 of Title 5 of the United States Code, and as President of the United States, and deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the federal service, it is hereby ordered as follows:

Section 1: Drug Free Workplace

(a) All federal employees are required to refrain from drug abuse as defined by this order.

(b) Drug abuse by federal employees in sensitive positions whether on duty or off duty is contrary to the efficiency of the service.

(c) Persons who engage in drug abuse are not suitable for federal employment in sensitive positions.

Section 2: Drug Testing for Employees in Sensitive Positions

(a) The head of each agency shall identify as sensitive those positions which, in the judgment of the head of the agency, involve national security, the protection of health and safety of the public, and other similar positions requiring a high degree of public trust and reliance.

(b) The head of each agency shall establish a drug testing program, consistent with the standards set forth in this order, and other relevant rules, regulations and collective bargaining agreements and obligations, for all employees in sensitive positions. The extent of and related criteria for such testing shall be determined by each agency head, based upon the degree of sensitivity of the agency's mission and its employees' duties and the available resources for a testing program.

Section 3: Drug Testing Procedures

(a) Agencies shall notify all employees in positions to be designated as sensitive: (i) that their positions have been designated as sensitive; (ii) that drug abuse is prohibited, and the definition thereof; (iii) that testing for drug abuse is to be conducted, and the procedures therefor; and (iv) that counseling and rehabilitation are available, and the procedures for obtaining such assistance.

(b) Agency testing procedures shall provide for the privacy of employees in providing specimens for testing, for an immediate retest upon request of an employee, and for notification of employees to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Programs shall contain procedures for timely submission of request for retention of records and specimens; procedures for retesting; and procedures to protect the confidentiality of test results and related medical and rehabilitation records.

(d) Programs shall be conducted in accordance with scientific and technical guidelines promulgated by the Secretary of Health and Human Services after consultation with the Director of the National Institute on Drug Abuse.

Section 4: Rehabilitation

(a) All employees may seek drug abuse counseling or rehabilitation services from their agency on a voluntary basis, consistent with existing rules, regulations and any relevant collective bargaining provisions.

(b) An employee in a sensitive position who is found to be engaged in drug abuse shall have the opportunity, only after the first such determination of drug abuse, to obtain drug abuse counseling or rehabilitation services, upon certification by a physician or supervisor that the employee may have a physiological or psychological drug dependency.

(c) The Director of the Office of Personnel Management shall ensure that the contract negotiated with any carrier of health plans offered Federal employees under chapter 75 of title 5, United States Code shall include the provision of drug abuse counseling and rehabilitation services.

Section 5: Transfer and Removal Actions

(a) Any employee in a sensitive position engaged in drug abuse counseling or rehabilitation may be transferred to available non-sensitive duties until certification of successful completion of such counseling or rehabilitation.

(b) Any employee in a sensitive position engaged in drug abuse not eligible for counseling or rehabilitation, or who has not successfully completed a counseling or rehabilitation program in 3 months or such additional time as the agency head may in his discretion provide, shall be subject to appropriate personnel action; provided, however, that a first determination of drug abuse shall not be grounds for removal from employment.

(c) The results of a drug test conducted pursuant to this order and information developed by the agency in the course of the drug testing of the employee shall be admissible in evidence in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in administrative or disciplinary proceedings. Positive test results are preliminary results until confirmed as positive (by both initial and confirmatory testing) or by an admission of the employee.

(d) The determination of an agency that an employee in a sensitive position is engaged in drug abuse may be made on the basis of any appropriate evidence, including direct observation, conviction of a criminal offense involving drugs, administrative inquiry, or the results of an authorized testing program. Positive drug test results are not conclusive and may be rebutted by other evidence that an employee has not engaged in drug abuse.

(e) Any action to remove an employee who is engaged in drug abuse shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

Section 6: Applicable Agreements

To the extent this order is applicable to employees covered by collective bargaining agreements, any existing agreement shall for its duration control agency action involving rehabilitation, testing, and personnel actions to the extent of any direct conflict.

Section 7: Applicants for Employment

(a) Applicants for federal employment may be required to take a drug test of the same type as required for federal employees in sensitive positions, and with the same rights as those employees concerning retesting, submission of related medical evidence, and confidentiality.

(b) Applicants whose test results indicate drug abuse may not be hired, except that agencies shall give reasonable consideration to those applicants who are already enrolled in rehabilitation programs.

(c) Applicants whose test results indicate drug abuse may reapply for other positions at a future time,

and shall not be prejudiced by the results of any such test except where a history of drug abuse may be relevant to the specific sensitive nature of a position.

Section 8: Definitions

(a) This order applies to all agencies of the Executive Branch.

(b) For the purposes of this order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services as defined in 5 U.S.C. 2101(3); the United States Postal Service; or any employing unit or authority of the federal government, other than those of the judicial and legislative branches.

(c) For the purpose of this order, the term "drug abuse" means: (1) the use of any controlled substance, as defined by section 802(6) of Title 21, United States Code, the possession of which is unlawful under chapter 13 of that title, unless that substance is possessed or used pursuant to a valid prescription or is otherwise authorized by law; or (2) the use of any drug, regardless of use pursuant to lawful prescription, which results in the inability to substantially perform sensitive responsibilities of positions designated pursuant to section 2(a) of this order.

Section 9: Effective Date

This order shall become effective on the date of its issuance.

RONALD REAGAN

THE WHITE HOUSE

August __, 1986

THE WHITE HOUSE

WASHINGTON

August 21, 1986

MEMORANDUM FOR THOMAS M. BARBA
SPECIAL ASSISTANT TO THE ASSISTANT ATTORNEY GENERAL

FROM: ROBERT M. KRUGER
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Executive Order on Drug Free Workplace

As promised, I have attached a draft of the language we propose substituting into the Executive Order. We will await an updated draft order to determine whether the other minor revisions we discussed are appropriate.

cc: Jay B. Stephens

Attachment

Section 1: Drug Free Workplace

All federal employees should recognize the public trust reposed in them and their obligation to ensure a drug free workplace.

The use of drugs by employees in sensitive positions poses special problems for national security, public health and safety, law enforcement and the protection of life and property. Accordingly, this Executive Order implements a policy of ensuring that employees in sensitive positions do not use drugs.

(a) All federal employees in sensitive positions are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by federal employees in sensitive positions whether on duty or off duty is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for federal employment in sensitive positions.

Section 2: (current Section 7)

* * *

(d) For the purposes of this order, agency heads shall determine which employees involved in law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence, constitute "employees in sensitive positions." In making this determination, the agency head may include, as appropriate, only employees in the following categories:

Section 4: Rehabilitation

All employees in sensitive positions who are found to use illegal drugs either must voluntarily cease such activity on their own or undergo counseling or rehabilitation services from their agency. Employees undergoing counseling or rehabilitation services from their agency are not required by this order to be removed from employment, so long as they thereafter refrain from using illegal drugs. This section does not require an agency to maintain any person in a sensitive position who is unqualified for that position.

Section 5: Personnel Actions

(a) An agency shall initiate action to remove any employee in a sensitive position who is found to use illegal drugs and who refuses to undergo counseling or rehabilitation services as set forth in Section 4 or who does not refrain from using drugs after identification as a drug user. An agency may satisfy this requirement by transferring such an employee to a non-sensitive position.

THE WHITE HOUSE

WASHINGTON

August 20, 1986

MEMORANDUM FOR ADMINISTRATION SPOKESMEN

FROM: TOM GIBSON gr for

SUBJECT: White House Talking Points

Attached for your information and use are talking points on America's crusade against drug abuse.

If you have any questions concerning these materials, please contact the Office of Public Affairs at 456-7170.

AMERICA'S CRUSADE AGAINST DRUG ABUSE

- Illegal drugs ruin lives, destroy families, and weaken entire communities. Drug abuse is not a private matter. For the sake of our Nation, it must end.

- Drug abuse was a major national problem when President Reagan took office, and fighting drug abuse became one of the earliest priorities of his Administration.

The Reagan Commitment

- In 1982, President Reagan published a comprehensive five-point strategy to stop drug abuse and drug trafficking. The strategy included international cooperation, drug law enforcement, drug abuse prevention, treatment, and research.

- Thirty-seven different federal agencies are working together in this vigorous national effort.

- Under the Reagan Administration, federal spending for drug law enforcement will virtually triple -- from a little over $700 million in FY 1981 to an anticipated $2.1 billion in FY 1987.

- President Reagan set up the Organized Crime Drug Enforcement Task Forces under the Attorney General in 1982 to attack drug trafficking by major criminal organizations.

- In 1982, the President asked the Vice President to establish a South Florida Task Force to respond to the drug trafficking emergency there. The effort pooled the resources of nine federal agencies, including the military, with state and local authorities.

- The unprecedented successes of the South Florida Task Force led in 1983 to the creation of the National Narcotics Border Interdiction System -- now a model for coordinating interdiction efforts around all our borders.

- On August 14, 1986, the Reagan Administration announced Operation Alliance, a major new cooperative drug law enforcement effort along the 2,000 mile U.S.-Mexico border. Under the program, more than 20 U.S. agencies -- including federal, state and local authorities -- will coordinate efforts to choke off the flow of drugs, weapons and other contraband across the border. More than 500 federal law enforcement personnel will be hired or reassigned to the area. The Administration has asked Congress for $266 million over the next two years to hire additional agents and prosecutors and buy new air surveillance equipment.

- In 1981, the First Lady began a major program to increase public awareness of the dangers of drug abuse and to get people involved in helping young people "Just Say No" to drugs. Since that time, Mrs. Reagan has traveled over 100,000 miles to 28 states and six foreign countries in her campaign and has clearly become the national leader in the effort to stop drug abuse by young people.

The President's Program Has Made Gains

- In 1981, one foreign country was eradicating narcotics; today, 14 countries and all 50 states are eradicating. Shortages of marijuana supply are now being reported throughout the country, primarily as a result of eradication programs in Colombia and the United States.

- Aggressive enforcement activity against cocaine manufacturers in Colombia, Peru and Bolivia is disrupting the flow of cocaine. U.S. helicopters have been aiding the effort in Bolivia.

- Enhanced interdiction has increased U.S. seizures of illegal drugs. In 1981, we seized two tons of cocaine. In 1985, we seized 20 tons -- a ten-fold increase.

- Under the Organized Crime Drug Enforcement Task Forces, over 3,600 drug criminals have been convicted and more than $300 million of their assets seized.

- Since the First Lady became involved in 1981, the number of parent groups has grown from 900 to 9,000 groups nationwide. Our school-aged children have formed over 10,000 "Just Say No" Clubs around the country.

- The number of individuals who are using illegal drugs has stabilized in most categories and decreased in several. Most notably, the number of high school seniors using marijuana on a daily basis has dropped from one in 14 in 1981 to one in 20 in 1984-85.

- The U.S. Armed Forces have cut the use of illegal drugs in the military by 67 percent since 1981.

- Attitudes are changing. In 1985, polls showed 73 percent of our teenagers believed that possession of small amounts of marijuana should be treated as a criminal offense, compared to 44 percent in 1979.

The President's Redoubled Efforts Will Focus on the User

- On August 4, 1986, President Reagan announced six new goals to build upon what has been accomplished and lead us toward a drug-free America:

  1. Drug-Free Workplaces for all Americans;

  2. Drug-Free Schools from elementary to university level;

  3. Effective Drug Abuse Treatment to tackle the health dangers posed by drugs;

  4. Improved International Cooperation to achieve full and active involvement by every country with which the United States must work to defeat international drug trafficking;

  5. Strengthened Law Enforcement to take additional initiatives which will hit drug traffickers with renewed force; and

  6. Increased Public Awareness and Prevention -- the goal on which success ultimately depends -- to help every citizen understand the stakes and get involved in fighting the drug menace.

- President Reagan called for the commitment of all Americans in "taking a stand in every city, town, and village in this country and making certain drug users fully understand their fellow citizens will no longer tolerate drug use."

- As the President stated, "Our goal is not to throw users in jail, but to free them from drugs. We will offer a helping hand; but we will also...refuse to let drug users blame their behavior on others.... And finally, yet first and foremost, we will get the message to the potential user that drug use will no longer be tolerated; that they must learn to 'Just Say No.'"

Testing of Federal Employees

- The President's program does not include mandatory testing for all federal employees.

- Testing will be required for employees in positions which involve sensitive areas. Many of these agencies already have testing programs in place.

- For non-sensitive positions, the President would allow voluntary testing at the discretion of the agency head and would provide access to treatment and rehabilitation to those who are found to be drug users.

A Role for All Americans

- Although we must try to cut off the supply of illegal drugs, ultimate success depends upon stopping their use. This cannot be done solely by government programs; in fact, it requires the support and involvement of all Americans.

- President Reagan believes there is a role for each American in this effort. The task at hand is to fight illegal drug use in every segment of our society.

- There is a role for parents, teachers and students; for industry and labor leaders; for White House officials and the military; and for the entertainment industry and the news media.

> The time has come for each and every one of us to make a personal and moral commitment to actively oppose the use of illegal drugs -- in all forms and in all places. We must remove all traces of illegal drugs from our Nation.
>
> -- President Reagan
> July 30, 1986