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THE WHITE HOUSE

WASHINGTON

December 1, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: ROBERT M. KRUGER *RMK*

SUBJECT: OPM Guidelines Regarding Drug Testing

An editorial in The Washington Post on November 29, 1986, argues that in subjecting employees to disciplinary action, including removal from the federal service, for illegal drug use, the soon-to-be issued OPM guidelines depart from the President's previous assurances that drug users will be helped, not punished. The Post editorial quotes from the President's response to a question at an August 13 news conference about the constitutionality of drug testing. The President said:

Well, I think I made it plain on one count. They won't be incriminating themselves because what I have said is that, in voluntary testing, these individuals that might turn up and that are found to be drug addicts, I would say that there should be not threat of losing their job or of any punishment. They should be an offer of help that we would stand by ready to help them take the treatment that would free them from this habit. So its not a case of saying that we're not going to find a way to, as you say, have people incriminate themselves so they can be fired or anything else.

By quoting only the underlined sentences, the Post editorial ignores the fact that the President's statement was limited to drug addicts who volunteer for testing. I believe the Justice Department would regard the Post's omission as significant, based on the emphasis which the President's program places upon individual responsibility. Employees who elect not to voluntarily identify themselves and seek treatment, and who are subsequently identified as illegal drug users, consciously violate the requirement that federal employees refrain from drug use. As such, these employees, unlike their more responsible counterparts, commit a disciplinary offense. In a sense, by declining to step forward they use up their celebrated "first bite" at the apple.

The Executive Order embodies this distinction between voluntary and involuntary identification. Section 15(a) provides that "agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use drugs to an Employee Assistance Program." Section 5(b) provides that "agencies shall initiate action to discipline any employee who is found to use illegal drugs" but does not require such action

for an employee who voluntarily identifies himself as an illegal drug user prior to being identified through other means. Section 5(c) provides that "agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion or rehabilitation." Section 5(d) provides that "agencies shall initiate action to remove from the service any employee who is found to use illegal drugs" and refuses treatment or does not thereafter refrain from using illegal drugs.

The OPM guidelines closely track these provisions^{1/}:

- ° As required by Section 5(a) of the Executive Order, Section 5(c) of the guidelines mandates that employees found to use illegal drugs be referred to Employee Assistance Programs and be given an opportunity to undertake rehabilitation.
- ° The requirement of Section 5(b) of the Executive Order to initiate disciplinary action against drug users who do not voluntarily identify themselves is contained in Section 5(d) of the guidelines. Section 5(d) of the guidelines provides that agencies have discretion in deciding what disciplinary actions to initiate and lists a range of possibilities including reprimand, enforced leave, suspension and removal. Section 5(d) of the guidelines also incorporates the authority under Section 5(d) of the Executive Order to remove employees for refusal to take a drug test or undergo rehabilitation or for failing to refrain from illegal drug use after treatment.
- ° Section 5(c) of the Executive Order has its counterpart in Section 5(b) of the guidelines. Section 5(b) of the guidelines states that the Executive Order authorizes removal for illegal drug use and requires it after a second such determination. Section 5(b) of the guidelines affirms that drug users must not be allowed to remain on "duty status in sensitive positions" and notes that removal may be necessary if there are no non-sensitive positions to which the employee may be transferred.

In sum, the guidelines make explicit that removal is one of the disciplinary actions to which involuntarily identified drug users are subject and that it may be required for employees in

^{1/}This analysis is based on the draft final guidelines received last week. I have not yet seen the OPM guidelines which, according to a New York Times report, were distributed on November 28 to all agency heads.

sensitive positions where there are no appropriate positions to which the employees may be transferred. But the Post is mistaken that the imposition of disciplinary action after a first involuntary identification as a drug user is a new and "entirely difference approach." It is not contradicted by the President's comments on August 13 and does not conflict with the Executive Order. In providing that the discipline to be meted out will depend in the particular case on the requirements of the Civil Service Reform Act and other appropriate factors, the guidelines ensure that the punishment will reflect the seriousness of the offense but that the availability of rehabilitation will not relieve employees from all responsibility for their actions.

The Washington Post

AN INDEPENDENT NEWSPAPER

Tests for Federal Workers

Drugs in the Office . . .

AS IF THE government's plans for sweeping mandatory drug testing of federal workers weren't frightening enough, it now turns out that employees may be fired after failing a single "confirmed" test. Last August, when the clamor about these intrusive tests was rising, President Reagan sought to reassure workers that the process would not be punitive. "There should be no threat of losing their job, or of any punishment," he said at a press conference. "There should be an offer of help, that we would stand by ready to help them take that treatment that would free them from that habit." But guidelines drawn up by the Office of Personnel Management, due to be published in the Federal Register next week, take an entirely different approach.

More than a million federal workers, including those in "sensitive positions," those with security clearances, presidential appointees, law enforcement officers and those involved in protecting public health or safety, would be subject to mandatory testing at the discretion of agency heads. Unless they voluntarily seek help, they would be subject to disciplinary action after a single, confirmed positive test. Penalties such as written reprimands and suspensions are suggested, but firing is allowed if a worker fails the first test.

How can this procedure possibly be a prelude to rehabilitation? And what does it say about the government as a compassionate and fair employer as well as a firm one?

Drugs in the work place are a problem in the federal government as well as elsewhere. People in certain jobs—air traffic controllers and police officers, for example—must be drug-free at all times. No employer should be without remedy in the case of a worker whose performance is clearly being affected because of drug abuse.

But why shouldn't the government's testing program be run with at least as much good sense as programs of enlightened private employers? If a worker shows signs of being a drug abuser, or if he fails a single test, shouldn't he have a chance at rehabilitation before the staggering penalty of firing is imposed? A worker can be reassigned, or put on leave if necessary, or required to complete counseling and demonstrate a continuing freedom from drugs. These are the kinds of responses to a first test failure that make sense.

Add the potential for errors in the testing procedure to the severity of the penalty, and you have reason for OPM's regulators to reread the president's earlier assurances and to make some sensible changes in the guidelines.

. . . And AIDS in the Foreign Service

YET ANOTHER seemingly intrusive federal employee policy surfaced over Thanksgiving. But it is very different from the drug proposal and much more acceptable. The State Department proposes to screen Foreign Service applicants, employees and their adult dependents for signs of the AIDS virus in the course of regular physical examinations required of applicants and of employees about to embark on an overseas assignment. Employees

but they will not be sent to parts of the world where medical facilities are inadequate.

It should be emphasized that many people who show no signs of having AIDS will test positive for the antibodies. Scientists do not yet know how many in this group will eventually contract AIDS. But based on the small amount of data available, a great many will. Is it fair to restrict the careers of employees on the basis of probability? That's

TRANSCRIPT OF PRESIDENT REAGAN'S

Thank you. Please be seated. As you know and have been told, I do have a short statement here.

Before we begin, I thought I'd mention the one reason for our visit to Illinois, especially this morning at the state fair, was to bring a special message to American farmers, one of concern and hope amid general prosperity that has brought record employment, rising incomes and the lowest inflation in more than 20 years.

Some sectors of our farm economy are hurting, and their anguish is a concern to all Americans. I think you all know that I've always felt the nine most terrifying words in the English language are: "I'm from the government, and I'm here to help."

A great many of the current problems on the farm were caused by government-imposed embargoes and inflation, not to mention government's long history of conflicting and haphazard policies. Our ultimate goal, of course, is economic independence for agriculture and, through steps like the tax-reform bill, we seek to return farming to real farmers. But until we make that transition, the government must act compassionately and responsibly.

In order to see farmers through these tough times, our administration has committed record amounts of assistance, spending more in this year alone than any previous administration spent during its entire tenure. No area of the budget, including defense, has grown as fast as our support for agriculture.

Earlier this month, we announced our decision on grain exports, and this morning we announced a drought-assistance task force and, with regard to storage problems, the availability of price-support loans for all the grain in this year's crop.

The message in all this is very simple: America's farmers should know that our commitment to helping them is unshakable. As long as I'm in Washington, their concerns are going to be heard and acted upon.

One other brief point: tomorrow, the Senate will cast a crucial vote. The question is that of assistance to the freedom fighters, who are trying to bring democracy to Nicaragua where a communist regime, a client state of the Soviet Union, has taken over. The question before the Senate is: Will it vote for democracy in Central America and the security of our own borders, or will it vote to passively sit by while the Soviets make permanent their military beachhead on the mainland of North America?

That's the end of the statement and now, as is traditional with the presidential press conference, I start by calling on the representative of the two major news bureaus. Terry?

U.S.-Soviet Arms Negotiations

The American negotiators just completed two days of top-level talks in Moscow. Did they narrow any differences on arms control, perhaps paving the way for a summit later this year? And how did the Soviets react to your offer to delay deployment of the Strategic Defense Initiative in return for an agreement to deploy it later?

Well, that isn't exactly what we've proposed to the Soviet Union—delaying our Strategic Defense Initiative, and I'm not going to discuss what was in my letter, and no one who has been guessing at it has guessed right

[African] President [Pieter W.] Botha himself has said the same thing, and that his goal is to eliminate apartheid.

Campaigning for the GOP

You came here today on behalf of Republican candidates, and two years ago you had a landslide victory in Illinois. And yet, the man you campaigned with over and over—Sen. [Charles H.] Percy [R-Ill.]—lost. And I'd like to ask you this. What value do you place on a presidential trip, particularly in an off-year, with the exception of drawing crowds to these fund-raisers?

Well, I don't know. I don't believe that coattails, if there is a dissatisfaction with some candidate, I don't think that someone else's coattails can do that individual any good. But there is another facet you haven't even mentioned. It may sound crass, but you can also help them raise the funds they need for campaigning. And so far I've been rather successful in that area.

Drug Testing and the Constitution

Mr. President, you've said that you would support voluntary drug testing in the work place and perhaps mandatory drug testing for those with sensitive government jobs. I'd like to ask, sir, how any form of drug testing, voluntary or not, which is subject to peer pressure, can be truly voluntary and also what that does to our constitutional rights not to incriminate ourselves and the presumption against self-incrimination and the constitutional guarantee and the presumption of innocence.

Well, I think I made it plain on one count. They won't be incriminating themselves because what I have said is that, in voluntary testing, these individuals that might turn up and that are found to be drug addicts. I would say that there should be no threat of losing their job or of any punishment. There should be an offer of help, that we would stand by ready to help them take the treatment that would free them from this habit. So it's not a case of saying that we're now going to find a way to, as you say, have people incriminate themselves so they can be fired or anything else.

And I just have to believe that the time has come, as it did once around the turn of the century in this country, and again, cocaine was the villain. We had a great drug epidemic around the turn of the century, and it really was eliminated simply from the rank, by the ranks; the people suddenly said, "Enough already." And then whether it was peer pressure, whether it was friend helping friend or whatever, that disappeared for a very long time.

Well, now we have the thing back again. We have done all and are doing and going to continue to do all that we can to intercept the drugs. And you might be interested to know that, since we've been here, we have increased by 10 times over the seizure of narcotics with our drug enforcement. But that isn't going to do it. The only answer is going to be taking the customer away from the drugs, turning them off.

Sir, how can it be truly voluntary though if a member of your staff declines to take a voluntary drug test. Aren't you, or is not someone on your staff, likely to be a little suspicious?

He might be suspicious, but nothing's going to happen to him in the case of firing or anything else. And what

ers make it pay buy American than an Ameri retary Shultz. that?

Well, you fellows away, and you can talk to us and fire Now, we're not subsidizing the 5 long-term grain purchase of four They have not yet

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Tearing Down

Yesterday, y couragement to Berlin Wall ton point in the fu beyond rhetori agenda for neg

Well, I would l mit meeting to d think it's a wall t happen to believ put it up, and th stead of a wall, action it should l of the Four Pow; that if we c gor ther, I don't thin think they wante

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last July in what his brother said were suspicious circumstances. Legal sources close to the United States Attorney's Office said that the office had not been aware of the Administration shipments when the case was filed and that the shipments might seriously undercut their case.

'Basic Issues of Fairness'

"It raises basic issues of fairness to prosecute someone for committing a crime at the same time that the Government authorizes the same conduct," one highly placed Government source said.

Many of the defendants say they now believe the United States Customs Service, which began the sting operation, did not know the Administration was shipping arms. They theorize the Administration was not willing to tell Customs the problem for fear of disclosing its covert operation, which has now been made public.

"Obviously, the right hand did not know what the left hand was doing," said William M. Kunstler, a lawyer for one of the defendants, a Los Angeles businessman named Nico Minardos.

Benito Romano, the Executive Assistant United States Attorney for the Southern District, said it was improper for him to go much beyond the public record in the case, but added, "Obviously, new facts have come to

Continued on Page 5, Column 4

Reagan Drug Testing Plan to Start Despite Court Rulings Opposing It

By LENA WILLIAMS

Special to The New York Times

WASHINGTON, Nov. 28 — The Administration is going ahead with its program of drug testing of Federal employees despite recent court decisions that such widespread random tests are unconstitutional and despite reservations among some top advisers to the White House.

The Office of Personnel Management today distributed to all agency heads and Cabinet officers copies of its new guidelines on illegal drug use by Federal workers.

The regulations were drafted in response to President Reagan's executive order Sept. 15 calling for a "drug-free workplace" and requiring each agency head to establish a program to test for use of illegal drugs by employees in sensitive positions.

Effective Immediately

The rules, which were written by the personnel management agency in conjunction with the Justice Department and the Department of Health and Human Services, will become effective

immediately, according to James Lafferty, a spokesman at the agency.

"They become effective as soon as they are received," said Mr. Lafferty. "We assume the first time they will see the guidelines will be Monday."

Under the new guidelines, heads of Federal agencies will have immense discretion in deciding what disciplinary action should be taken if an employee is found using drugs, including possible dismissal after a first offense of employees in sensitive positions.

1.1 Million Are Covered

The personnel agency estimates that 1.1 million of the Government's 2 million civilian employees fall into the category of "sensitive employees." These include Presidential appointees, law-enforcement officers and people with access to classified information.

The dismissal provision appears to contradict assurances given by Mr. Reagan last September that the program of drug testing and screening would not be used to discharge or punish Federal workers. Employees must be dismissed after a second offense.

James M. Peirce, president of the National Federation of Federal Employees, said the Office of Personnel Management's regulations appeared to be "more illegal" than the President's executive order. At least three Federal employees unions, including the N.F.F.E., have filed suits challenging the constitutionality of the program.

"The executive order and the O.P.M.

Continued on Page 9, Column 2

PROTESTS E NEW BRAZ

Fresh From Victo Bitterness on P

By ALAN R

Special to The New Y

RIO DE JANEIRO, weeks after leading I governing party to a s in midterm elections, Sarney has suddenly be of bitter recrimination sion to start lifting a price freeze.

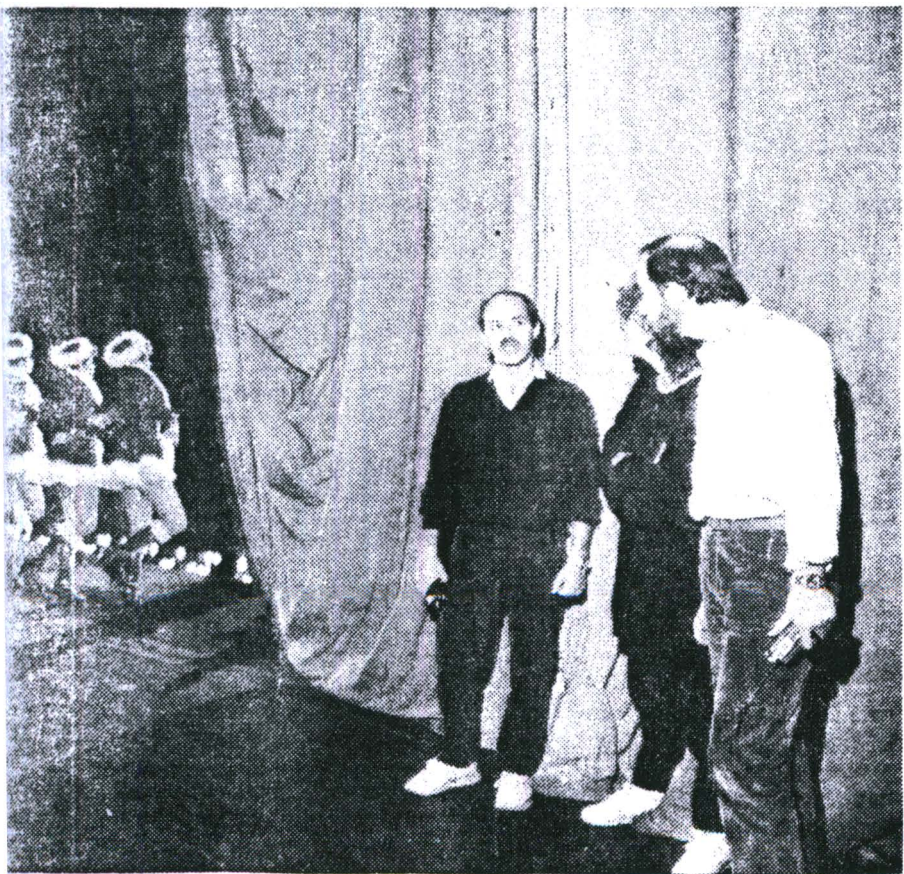
In the first violent a demonstrations since ended here last year, policemen clashed Thu lia with several thousa students protesting pri

Opposition Moves

Leaders of the gover Democratic Movemen loudly criticized the measures, which were six days after the Nov. 1 and gubernatorial elect the crossfire, the cow Minister, Dilson Funa: resignation Wednesday turned down by the Pr

In contrast, leftist opp which fared poorly in th cause of the popularit freeze and growth-orient into effect in February quickly to try to exploit t

Continued on Page 4



The New York Times/Angel Franco

ector, talking with Tony Berk, an assistant, as the Rockettes performed on stage "The Magnificent Christmas Spectacular" at Radio City Music Hall.

nos: Camels Amid the Rockettes

At New AIDS Test Center

By JANE GROSS

Mildred Johnson pulled a folder from the file drawer, arranged her face in a neutral but kindly configuration and led a young man into her office to deliver some terrifying news.

"Your test was positive," Ms. Johnson told her client, who was known to her only by a three-digit identification number, "but that does not necessarily mean you have AIDS."

For the next hour and a half, as day turned to dusk outside the windows, Ms. Johnson answered and asked questions, counseled and comforted, as she has in the month since the New York City Health Department opened its first center to offer AIDS antibody tests on an anonymous basis.

Anxiety Over Tests

The test measures the presence of antibodies to the virus causing acquired immunodeficiency.

offices — where fears a confirmed, and lives entered — there cele denial and to

The Nov. 28 opening marked a shift in a city that has been widely where in the city bu ally. Until the center had been in the City by 1,200 people are registered at the ment and at the h But these settings may patient give his name a sistent offer of counsel center does

In its first 150 blood te received results on 77, w results, 11 positives a sives, which require rep a recent afternoon.

Reagan's Drug Testing Plan to Start Despite Court Opposition



The New York Times

Constance Horner, the director of the Office of Personnel Management, expressed doubts about the need for routine testing of large numbers of civilian workers.

Continued From Page 1

regulations ignore the concept of a connection between on-the-job performance and discipline," Mr. Peirce said. "The law is very clear that there must be a connection, a 'nexus' between a disciplinary act and an employee's performance."

Even some of Mr. Reagan's aides, many of whom support the intent of his executive order, have expressed concern that mandatory drug tests without any reason to suspect use are ethically indefensible.

Constance Horner, director of the personnel agency, and Education Secretary William J. Bennett have also expressed doubts about the need for routine tests of large numbers of civilian

workers. Aides to Dr. Otis R. Bowen, the Secretary of Health and Human Services, said he was uncertain if the program struck a proper balance between punishment and therapy.

Suit in Louisiana

Meanwhile, a suit against the executive order is under consideration by Federal District Judge Robert F. Collins of the Eastern District in Louisiana.

Last month Judge Collins ruled in New Orleans that a drug-testing program run by the Customs Service was unconstitutional. In his decision, Judge Collins said the examination of customs workers' urine constituted "a warrantless search" made in the "total absence of probable cause or even reasonable suspicion." He issued a permanent injunction against the

agency program. The Administration is appealing the decision.

The President's guidelines and the new regulations also require each agency to offer counseling and rehabilitation to help employees overcome drug addiction. In addition, employees who fail the test, refuse to take it or fail to complete treatment or counseling successfully could be reprimanded in writing, suspended for 15 days or more, or placed on leave. The agency head would decide whether the employee would be paid during suspension.

The guidelines also provide that employees must be notified 60 days before

actual testing can begin, with an indication of the purpose of the testing program, the availability of counseling, when the testing will take place and the general categories of employees to be tested. Individuals already tested must be given 30 days' notice before a second test.

Agency heads are authorized to test job applicants but are not required to do so. However, they are prohibited from hiring any applicant who refuses to submit to the test or who fails it.

The cost of the program, estimated at \$56 million, will be paid by the agencies.

Texas Is Selling Drug-Free Urine To Meet 'Unanticipated Demand'

AUSTIN, Tex., Nov. 28 (AP) — An entrepreneur is selling drug-free urine for \$49.95 a bag in a business that a libertarian says could grow as drug tests become more common. Nightbyrd Laboratories' advertisement in an Austin entertainment newspaper says the urine is "for experimental purposes only." It guarantees "100 percent pure urine suitable for unanticipated urine demand."

The business describes itself as "our Urine Specialists."

The laboratory owner, Jeffrey Nightbyrd, 32 years old, said he was not interested in what customers did with the product. But he speculated that the most common use could be to beat on-the-job urine tests for drug use.

'I'd Make Some Money'

"The Government says they have a right to take bodily fluids," he said in a recent interview. "I just decided I'd make some money off that because people are going to resist."

Mr. Nightbyrd said he had shipped more than 200 orders from his Austin home. The urine is tested, then packaged in plastic bags that include a

would pay \$49.95 for urine," he said. "I have a \$5 pamphlet on how to beat the tests."

The urine customers are "yuppies and students going out into the job market," according to Mr. Nightbyrd.

Gara LaMarche, director of the Texas Civil Liberties Union, praised the idea, predicting there would be "a flourishing black market in clean urine" as drug tests become more widely used.

Calls It Unconstitutional

"Isn't that great?" Mr. LaMarche asked. His group maintains that urine tests are an unconstitutional invasion of privacy.

Mr. LaMarche said the sale of clean urine could cause second thoughts about the whole testing process.

"You are either going to have a test which isn't monitored, in which case the results are useless once this kind of clean urine market gets off the ground. Or you will have tests so degrading and intrusive that most people are going to find it very distasteful."

Dr. Robert Bernstein, the Texas Health Commissioner, said he knew of no state law that would prohibit urine sales.

Drug Program Is Begun By Union to Aid Pilots

WASHINGTON, Nov. 28 (AP) — The union representing most airline pilots announced Wednesday that it was undertaking a new program to help pilots with drug problems.

Henry Duffy, president of the Air Line Pilots Association, said that with the use of illegal drugs "spreading in wider and wider circles within our society, we feel we have to take positive steps now to help keep drugs from invading the cockpit."

Mr. Duffy said the union's board of directors agreed at its recent meeting in Miami to put new focus on helping pilots with drug dependency problems even though the number of such pilots "can be measured by the dozens."

Recently there have been indications that at least a small number of pilots are using illegal drugs at least in off-duty hours and that some may be dependent on drugs.

Mr. Duffy said the union continued to reject proposals calling for testing of airline pilots for drug use, arguing such testing would "only look at the user once every year or two" and is not reliable because of the potential for false readings.

The union urged adoption of an education and rehabilitation program similar to the one used for alcohol abuse with limited provisions for test-

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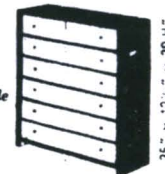
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THE WHITE HOUSE
WASHINGTON
November 19, 1986

*Thanks, Bob.
Please keep me
advised.*

MEMORANDUM FOR PETER J. WALLISON

FROM: ROBERT M. KRUGER *Rmk*

SUBJECT: OPM Guidelines for the Federal Personnel Manual
Regarding Drug Testing

As I reported to you previously, I reviewed the draft OPM guidelines for the Federal Personnel Manual regarding drug testing. Last week, I discussed these guidelines by telephone with Ann Agnew, Executive Assistant to the Director and Director of Policy Development at OPM, and Carrol Kinsey, Special Assistant to the General Counsel. Although Ann and Carrol both indicated that the Justice Department was in the process of recommending changes affecting concerns which we might raise, I offered several preliminary comments and observations, including the following:

- (1) The guidelines should set out a factual predicate for testing similar to that contained in Executive Order 12564. I also recommended avoidance of statements such "[t]he federal governments' civilian workforce is overwhelmingly . . . drug-free," in view of the weight that courts have attached to such statements in striking down governmental testing programs. Lovvorn v. The City of Chattanooga, Slip. Op. No. Civ-1-86-389 (E.D. Tenn., Nov. 13, 1986), National Treasury Employees Union v. Von Raab, C.A. No-86-1450 (E.O. La. Nov. 14, 1986).
- (2) It is necessary to tighten the criteria for determining "position sensitivity for drug testing purposes." For example, the guidelines should explain how the use of illegal drugs by an employee with access to confidential or secret material presents a particularly acute danger to national security. At the same time, it is important that the guidelines do not suggest that factors listed therein as relevant to a determination of the position sensitivity are all-inclusive.
- (3) The guidelines should make clear that in addition to authority to designate positions as sensitive, agency heads are empowered to determine the extent to which such employees are to be tested and the criteria for such testing. Executive Order 12564, Section 3(a). In this regard, it may be useful to suggest options or minimum criteria, e.g., how often testing should occur and whether it may be accomplished in conjunction with regularly scheduled medical examinations.

- (4) The guidelines suggest that notice of drug testing will be provided to all employees at several stages, including immediately before a test conducted under the authority of Section 3(c) of the Executive Order (e.g., when the employee is suspected of being under the influence of drugs). The guidelines also suggest that employees will have to complete several waiver forms, e.g., consenting to testing, consenting to disclosure of positive test results to Employee Assistance Program (EAP) administrators and appropriate management officials, and consenting to the release of information during treatment in an EAP. Consideration should be given to consolidating this paperwork and eliminating unnecessary steps.

Yesterday, Carrol Kinsey confirmed that Justice had made numerous recommendations regarding the draft, covering, inter alia, the above-referenced matters. According to Carrol, these recommendations and a revised draft are currently before the Director.

I requested an opportunity to review the revised draft and suggested that the Director may also want to consult with the Labor Department and other agencies that have indicated a strong interest in the drug testing program. I also suggested that when the guidelines are finally ready for issuance, OPM consult with the White House about the timing of their release. Lastly, I raised the question of waiting for the Department of Health and Human Service to issue the scientific guidelines on testing and releasing both documents together.

Carrol promised to keep us advised of what the Director intends to do next.

THE WHITE HOUSE
WASHINGTON



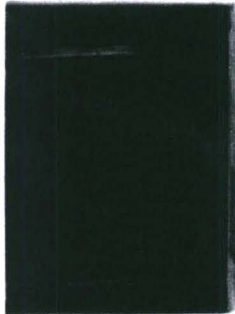
TO: *Bob Kruger*

FROM: PETER J. WALLISON
Counsel to the President

FYI: _____

COMMENT: _____

ACTION: *Pls. review*
and let's discuss. I
have not read.





Office of the Director

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

November 4, 1986

Mr. Peter J. Wallison
Counsel to the President
The White House
Washington, D.C. 20500

453804 *uw*

Dear Mr. Wallison,

Peter
I thought you would like to take a look at the attached draft FPM letter which OPM developed pursuant to E.O. 12564. When final, this will provide guidance to agencies on how to establish their individual drug testing program. (HHS is developing the technical guidelines to accompany this guidance.)

Obviously we are keeping these drafts very close hold. We have just begun our consultation with the Department of Justice and expect to complete that process and be ready to go public shortly after November 15.

Please let me know if you have any comments on our draft.

Sincerely,

Constance
Constance Horner

SUBJECT: Establishing a Drug-Free Federal Workplace

1. PURPOSE

a. The use of illegal drugs by a significant proportion of the national workforce has major adverse effects on the welfare of all Americans, and results in billions of dollars of lost productivity each year. The Federal government's civilian workforce is overwhelmingly hard-working and drug-free. However, as the Nation's largest employer, the Federal government and its two million civilian employees must be in the forefront of our national effort to eliminate illegal drugs from the American workplace. In recognition of this, President Reagan, in Executive Order 12564, set forth the policy of the United States Government to eliminate drug use from the Federal workplace.

not a useful legal predicate for drug testing
cannot overcome Constr. obis merely by asserting importance of setting example

b. The use of illegal drugs by Federal employees, whether on or off the job, can not be tolerated. Federal workers have a right to a safe and secure workplace, and all American citizens, who daily depend on the work of the Federal government for their health, safety, and security, have a right to a reliable and productive civil service. Federal agencies must take action for the protection of individual drug users, their coworkers, and the society at large.

better to track Preamble of EO
① econ. costs
② productivity
③ well-being
④ agency mission
⑤ example
⑥ social costs (crime)
⑦ special trust in public service

c. Agencies will establish a comprehensive drug control program which is humane, responsible, and effective. In recognition that employees who use drugs are, themselves, primarily responsible for changing their behavior, the program will include drug education and training, employee counseling and assistance, and voluntary drug testing. However, where appropriate, there will be mandatory drug testing and disciplinary action.

⑧ criminal justice
⑨ public confidence
⑩ health & safety
⑪ national security
⑫ effect

d. This will be a balanced program which emphasizes offering a helping hand to employees who are using illegal drugs. At the same time, it must be clear to all that continued illegal drug use by employees will not be tolerated.

e. Under the Executive Order, OPM is directed to issue government-wide guidance to agencies on the implementation of the terms of the Order.

2. AGENCY RESPONSIBILITIES

a. The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public. Agencies should make every reasonable effort to ensure workforce understanding of, and employee organization cooperation with, their drug prevention programs. Communications should emphasize the importance of the drug prevention program for agency mission and the community at large. Further, agencies should ensure that their drug prevention programs complement agency programs to deal with alcohol abuse and related employee problems.

b. Each agency plan shall include:

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(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

} provide guidance

(2) Employee Assistance Programs (EAP's) with high level direction, emphasizing education, counseling, referral to rehabilitation, and coordination with available community resources;

} provide guidance

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees (agencies may wish to include material on alcohol abuse in this training);

(4) Provision for self-referral as well as supervisory referrals to counseling or treatment with maximum respect for individual confidentiality consistent with safety and security; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with E.O. 12564 and the guidance contained below.

c. Agencies shall ensure that drug testing programs in existence as of September 15, 1986 are brought into conformance with E.O. 12564.

d. Agencies should consult with the Attorney General regarding their drug testing programs, as provided by Section 6(b) of the Order.

3. AGENCY DRUG TESTING PROGRAMS

a. Testing in Sensitive Positions. The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions.

(1) For purposes of this program, the term "employee(s) in a sensitive position" refers to:

i. An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, 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 No. 12356;

} sec

iii. Individuals serving under Presidential appointments;

iv. Law enforcement officers as defined in 5 U.S.C. 8321(20); and

v. 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.

(2) Because of the wide variations in individual agency mission and function, unique characteristics of agency workforces and applicant pools, and agency program needs, no precise government-wide listing of sensitive positions by occupational series

or title, for purposes of drug testing, is possible. Accordingly, these determinations must be primarily an agency responsibility. In meeting this responsibility, agencies should refer to guidance on position sensitivity contained in FRM Chapters 731 and 732.

(3) However, agencies should also recognize that position sensitivity for drug testing purposes may be defined somewhat differently than for other programs. Thus, while the use of illegal drugs by any employee renders that employee unfit for public service, and while new or continued employment of any person who uses illegal drugs is contrary to the efficiency of the service, the dangers to public health and welfare, and to fellow employees, are particularly acute for certain kinds of positions. This includes positions where access to confidential or secret material is involved, positions of high trust and confidence, and positions where effective functioning depends on the total absence of chemically induced mental or physical impairment. Thus, in addition to positions where national security considerations are present, as well as positions where there is a clear impact on public health or safety (e.g., air traffic controllers; operators of motor vehicles; medical, nursing, and related health care personnel) or positions where there is a clear relationship to illegal drug control (e.g., law enforcement officials such as customs agents and drug enforcement agents), other positions should be reviewed with particular care when one or more of the following are present as regular, recurring duties: operation or maintenance of any transportation, motor vehicle, aircraft, or heavy or other large mechanical or electrical equipment; work with explosive, toxic, radioactive, or other dangerous materials; work with fluids or gases under heat or pressure; work by employees uniquely positioned to exploit highly sensitive computer or financial data for financial gain.

(4) Agency heads have the discretion to determine which positions should be tested for illegal drug use. When selecting sensitive positions for drug testing purposes, however, agencies should ensure that the selection process does not result in arbitrary, capricious, or discriminatory selections. Agencies must be able to justify their selection of those positions that are deemed sensitive for drug testing purposes as a neutral application of position selection criteria. When selecting positions for testing from within the category of positions already designated Special Sensitive, Critical Sensitive, and Non-critical Sensitive, agencies should use selection criteria that take into account the degree of sensitivity of the actual duties required to be performed by employees in those positions and should not rely exclusively upon the general sensitivity designation. At the same time, agencies are absolutely prohibited from selecting positions for drug testing on the basis of a desire to test particular individual employees. The position and the sensitivity of the duties performed by the incumbent in that position are the determinative factors that should underly the decision that a position is sensitive for the purposes of drug testing.

b. Voluntary Testing. The head of each Executive agency shall establish a program for voluntary employee drug testing. This program will be open to all employees who are not covered by the mandatory program discussed in subsection (a) of this section. Agencies should allow any employee who volunteers for drug testing to come forward and submit his name for inclusion in the pool of employees to be selected for testing. Thereafter, the testing procedures will be applied to the volunteer in the same manner as they will be applied to the covered employee population.

c. Specific Condition Testing. In addition to the testing outlined in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

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(1) When there is a reasonable suspicion that any employee uses illegal drugs. For the purposes of this program "reasonable suspicion" exists when specific, articulable facts and reasonable inferences drawn from those facts are such that a reasonably prudent person would suspect that the employee uses illegal drugs. "Reasonable suspicion" that an employee uses illegal drugs may be based upon, among other things:

- i. observable phenomena, such as direct observation of drug use and/or the physical symptoms of being under the influences of a drug;
- ii. a pattern of abnormal conduct, impaired job performance, or erratic behavior;
- iii. arrest and/or conviction for a drug related offense;
- iv. the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking; or
- v. information provided either by reliable and credible sources or independently corroborated.

off-duty use
off-duty conduct

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

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

d. Applicant Testing. The head of each Executive agency is authorized to test any applicant for illegal drug use. One option agencies have is to test applicants for positions that are designated sensitive for drug testing purposes. Should an agency head choose to test applicants for illegal drug use, he or she may determine whether all applicants will be tested or whether applicants for certain positions or types of positions will be tested. Agencies should include notice of drug testing on vacancy announcements for those positions where drug testing is required. A sample notice provision for vacancy announcements or other information about the position would read as follows: "All applicants for this position will be required to submit to an urinalysis for illegal drug use prior to appointment in the Federal service."

do we have to give notice? should applicants have to sign waivers?

e. Hardship Exemption. Agencies may choose to exempt certain positions from the drug testing program on the basis of hardship due to the remote location of the duty station of the positions, the unavailability of on-site testing personnel, or the lack of an appropriate site for test administration. Agencies should, however, use reasonable means to overcome such hardships and administer the drug testing program as widely as possible.

4. DRUG TESTING PROCEDURES

a. 60 Day General Notice to All Employees.

(1) Agencies which have not yet implemented a drug testing program shall ensure that at least sixty days elapse between a general one-time notice to all employees that a drug testing program is being implemented and the beginning of actual drug testing. Such notice should indicate the purpose of the drug testing program, the availability of counseling and rehabilitation assistance through the agency's Employee Assistance

proposed... for... notice... issue...

Program, when testing will commence, the general categories of employees to be tested, and the general parameters of testing. Agencies may decide to include with their notice a description of their drug program or a copy of the internal personnel rules establishing their program.

(2) Agencies with drug testing programs already in place prior to issuance of Executive Order 12564 on September 15, 1986, are not required to stop testing and provide a sixty day notice period.

Supra

(3) Any agency may take action as described in part 3c. of this letter without reference to the 60-day notice requirement.

b. Special Notice to Covered Employees. Agencies should ensure a specific notice is given, in writing, to each employee in a covered position. We recommend that agencies obtain a written acknowledgement of receipt of the notice. A sample acknowledgement for agency consideration is provided as attachment 1 to this letter. The notice should contain the following information:

not rec'd by EO

(1) The reasons for the urinalysis test, consistent with agency policy formulated in accordance with section 3a. of this letter.

(2) Notice of the opportunity for an employee to identify himself voluntarily as a user of illegal drugs willing to undertake counseling and, as necessary, rehabilitation, thereby avoiding disciplinary action.

(3) Assurance that the quality of testing procedures is tightly controlled, that the test used to confirm use of illegal drugs is highly reliable, and that test results will be handled with maximum respect for individual confidentiality, consistent with safety and security.

(4) Notice of the opportunity and procedures for submitting supplemental medical documentation that may support a legitimate use for a specific drug.

(5) The circumstances under which testing may occur, consistent with the policy set forward in section 3 of this letter.

(6) The consequences of a confirmed positive result or refusal to be tested, including disciplinary action.

(7) The availability of drug abuse counseling and referral services, including the name and telephone number of the local Employee Assistance Program counselor.

c. Notice to Employees Tested Under Specific Conditions. Employees being tested under conditions outlined in section 3c., will receive notice that includes information contained in section 4b., paragraphs (1), (3), (4), (6), and (7).

** which is not since positive results*

d. Agency response to persons refusing to participate in a required drug test.

(1) To maintain the integrity of the testing and enforcement program, agencies must take disciplinary action to deal with employees who refuse to be tested. Such action may include, but is not necessarily limited to, removal of such employees as failing to meet a condition of employment.

stated in EO

(2) Applicants who are not current employees and who refuse to be tested must be refused that employment.

e. Technical Guidelines for Drug Testing.

(1) The Secretary of Health and Human Services, as directed by Executive Order No. 12564, has issued scientific and technical guidelines for drug testing programs (see attachment 2). Agencies will conduct their drug testing programs in accordance with these guidelines

(2) Agency heads may choose to test for illegal drug use on a random basis. If agency heads so choose, they may test by (1) random sampling; (2) random test scheduling; or (3) a combination of those two random testing techniques.

This should be confirmed w/ discretion. Agency heads to determine the extent of testing.

f. Confidentiality of Test Results. Agency drug testing programs under E.O, 12564 shall contain procedures to protect the confidentiality of test results and related medical and rehabilitation records.

(1) Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with performance of a drug abuse prevention program conducted by a Federal agency must be kept confidential and may be disclosed only under limited circumstances and for specific purposes. Agencies may wish to refer to regulations issued by the Department of Health and Human Services (42 C.F.R., Sect 2.1 et seq.) on maintaining the confidentiality of treatment records.

(2) Drug abuse treatment records may be disclosed without the consent of the patient only:

- to medical personnel to the extent necessary to meet a genuine medical emergency;
- to qualified personnel for conducting scientific research, management audits, financial audits, or program evaluation, with individual names removed from the data;
- if authorized by an appropriate court order granted after application showing good cause.

where is notice to date actual supervision disc

(3) Any other disclosure may be made only with the written consent of the patient, and only under certain circumstances. Such consensual disclosure may be made to the patient's employer for verification of treatment or a general evaluation of treatment progress.

(4) Agency drug testing programs should include confidentiality protections consistent with the above requirements. These protections should extend to drug testing records as well as to treatment and rehabilitation records.

(5) Accordingly, neither drug test results nor drug abuse treatment or rehabilitation records may be otherwise disclosed by agencies without the consent of the employee involved. A sample consent for release of patient information during and after treatment or rehabilitation, a sample release memorandum, and a sample consent for release of drug test information are included in attachments 3, 4, and 5, respectively. Any disclosure without such consent is strictly prohibited.

(6) As part of the drug testing procedure, agencies should obtain consent to disclose confirmed positive test results to the administrator of the agency Employee Assistance Program (EAP) and to the management official empowered to recommend or take action. This consent must be obtained prior the test itself. Consequently, refusal

to consent to release of this information will be considered a refusal to take the test.

(7) As provided by the employee consent, confirmed test results will be forwarded to the agency EAP program administrator and to the management official empowered to recommend or take action. Records of unconfirmed test results will be destroyed.

(8) Once a confirmed positive test result is disclosed to the EAP program administrator and the employee agrees to participate in a counseling program or a drug abuse treatment or rehabilitation program, consent to release information during and after counseling, treatment, or rehabilitation will be obtained. Obtaining that consent will be necessary for participation in the program. An employee's refusal to grant consent will be considered a refusal to permit further monitoring.

*refers to
drug testing
during treatment
what are the
institutions or sec.
concerns
is the cause of
a refusal to
permit
monitoring*

5. AGENCY ACTION UPON FINDING THAT AN EMPLOYEE USES ILLEGAL DRUGS

a. Drug Use Determination. The determination that an employee uses illegal drugs may be made on the basis of direct observation, a criminal conviction, confirmed results of the agency's drug testing program, the employee's own admission, or other appropriate administrative determinations.

b. Mandatory EAP Referral. Upon reaching a finding that an employee uses illegal drugs, agencies will refer the employee to an Employee Assistance Program and give the employee an opportunity to undertake rehabilitation. While agencies should provide reasonable assistance to employees who demonstrate a desire to become drug-free, the ultimate responsibility to be drug-free rests with the individual employee.

c. Mandatory Removal from Sensitive Positions. If occupying a sensitive position as identified by the head of the agency, the employee must not be allowed to remain on duty status in that position. The agency head may, in consideration of the employee's counseling or rehabilitation progress, return the employee to duty in a sensitive position if it is determined that this would not pose a danger to the safety or health of members of the workplace or the public, or jeopardize national security interests.

d. Disciplinary Actions. Except for employees who voluntarily identify themselves as users of illegal drugs, obtain appropriate counseling and rehabilitation, and thereafter refrain from illegal drug use, agencies are required to initiate disciplinary action against employees who are found to use illegal drugs. Agencies have discretion in deciding what disciplinary measures to initiate, consistent with the requirements of the Civil Service Reform Act and other appropriate factors. Among the disciplinary measures available to agencies are the following:

(1) Reprimanding the employee in writing.

(2) Placing the employee in an enforced leave status, consistent with the procedural requirements of 5 C.F.R. 752.203 or 752.404 as appropriate.

(3) Suspending the employee for fourteen days or less consistent with the procedural requirements in 5 C.F.R. 752.203.

(4) Suspending the employee for 15 days or more consistent with the procedural requirements in 5 C.F.R. 752.404.

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(5) Suspending the employee, consistent with the procedural requirements in 5 C.F.R. 752.404, until such time as he or she successfully completes counseling or rehabilitation or until the agency determines that action other than suspension is more appropriate to the individual situation.

(6) Removing the employee, consistent with the procedural requirements of 5 C.F.R. 752.404, for: confirmed illicit use of an illegal drug; refusal to take a drug test authorized by E.O. 12564; refusal to obtain or successfully complete counseling or rehabilitation as required by the Executive Order; or once having completed counseling or rehabilitation, failing to refrain from illegal drug use.

(7) Separation from the Federal service. This is mandatory upon a second confirmed finding of illegal drug use.

e. Preponderance of Evidence Requirement. Agencies are reminded that any action, including removal, taken against an employee under title 5 United States Code, Chapter 75, must be supported by a preponderance of the evidence and must promote the efficiency of the service. Agencies shall maintain full documentation of decisions regarding the identification of critical positions and the establishment of reasonable suspicion that illicit drug use may be occurring. Care must also be taken in the conduct of tests and the handling of testing samples to ensure that requirements of evidentiary proof may be met.

6. STATISTICAL REPORTING

Agencies shall keep statistical records on: (1) the number of employees tested and the number of employees with confirmed positive tests; (2) the number of applicants tested and the number of applicants with confirmed positive tests. Personally identifying information in these statistical records is strictly prohibited.

7. EMPLOYEE COUNSELING AND ASSISTANCE

a. **Program Requirement.** Federal agencies are required by Public Laws 91-616 and 92-255, as amended, and by 5 C.F.R. 792 to provide for appropriate prevention, treatment and rehabilitation of Federal civilian employees with drug abuse problems. Agencies are authorized to establish Employee Assistance Programs to meet this mandate.

b. **EAP Requirement.** Executive Order 12564 identifies Employee Assistance Programs as an essential element to an agency's plan to achieve a drug-free workforce, and explicitly states that agencies shall refer all employees found to be using illegal drugs to their Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

c. **EAP Role.** Employee Assistance Programs play an important role in identifying and resolving employee substance abuse by: demonstrating the agency's commitment to eliminating illegal drug use; providing employees an opportunity, with appropriate assistance, to discontinue their drug abuse; providing educational materials to managers, supervisors and employees on drug abuse issues; assisting supervisors in confronting employees who have performance and/or conduct problems which may be based in substance abuse; assessing employee-client problems and making referrals to appropriate treatment and rehabilitation facilities; and following up with individuals during the

rehabilitation period to track their progress and encourage successful completion of the program.

d. EAP Elements. In keeping with Executive Order 12564, agencies should ensure that:

(1) EAP's are available to all employees, including those located outside of the Washington metropolitan area and major regional cities. Agencies are encouraged to explore a variety of means for meeting this requirement, including private contractors and cooperative arrangements with other Federal agencies, State and local governments, and non-profit organizations.

(2) At sites where it is not feasible to establish a continuing EAP, agencies should arrange for employee access on a "needs" basis to comparable local resources or, through travel or private telephone calls, to services of established EAP's in other locations.

(3) EAP's, whether in-house or operated through contract, are adequately staffed with fully qualified individuals who can:

i. Provide counseling and assistance to employees who self-refer for treatment or whose drug tests have been confirmed positive, and monitor the employees' progress through treatment and rehabilitation;

ii. Provide needed education and training to all levels of the organization on types and effects of drugs, symptoms of drug use and its impact on performance and conduct, relationship of the employee assistance program with the drug testing program, and related treatment, rehabilitation, and confidentiality issues;

iii. Ensure that the confidentiality of test results and related medical and rehabilitation records are maintained in accordance with the specific requirements contained in Public Laws 92-255 and 93-282, with regulations published in 42 C.F.R., Part 2, and with guidance contained in Section 4 of this Letter.

(4) Adequate treatment resources have been identified in the community in order to facilitate referral of drug abuse clients.

(5) All employees in the agency are informed about the EAP and its services.

(6) The Employee Assistance Program plays an appropriate role in the development and implementation of the agency's drug testing program. EAP's should not be involved in the collection of urine samples or the initial reporting of the results of drug tests, but rather be a critical component in the agency's efforts to counsel and rehabilitate drug-abusing employees, as well as in educating the workforce on drug abuse and its symptoms.

e. Further EAP Assistance.

(1) Attachment 6 provides a list of consortia throughout the United States. Agencies wishing to join an existing consortium should contact the individual listed regarding that possibility.

(2) Attachment 7 provides the names and addresses of organizations which have developed information on treatment facilities in the Washington, D.C. area and throughout the U.S.

(3) The Model Employee Assistance Program provided as attachment 8 addresses those functions we consider essential for an EAP to provide in support of the President's drug-free workforce initiative. It should be of use to agencies in developing new EAP's and in assessing the adequacy of existing programs. OPM's Employee Health Services Branch (Tel. FTS 632-5558) is available for technical assistance on these provisions.

Attachments

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-SAMPLE-

[AGENCY NAME]

ACKNOWLEDGEMENT OF NOTICE TO EMPLOYEES
WHOSE POSITION IS DESIGNATED SENSITIVE FOR DRUG TESTING PURPOSES

I acknowledge receiving notice of the establishment of [agency name]'s employee drug testing program. I understand that I may be selected for screening by urinalysis testing for the presence of controlled substances. I understand that a confirmed positive result of that testing or refusal to submit to testing may result in disciplinary action up to and including dismissal from the Federal service.

I have read the notice announcing the establishment of an employee drug testing program.

Printed or Typed Name

Signature of Employee

Date

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CONSENT FOR RELEASE OF PATIENT INFORMATION DURING OR AFTER TREATMENT OR REHABILITATION

I, _____, hereby consent to the disclosure of
(Employee/Patient name)
information concerning my progress in terminating illegal drug use. I
authorize the _____ to disclose that information and
(Treatment/Rehabilitation Facility)
information resulting from any follow-up drug test to
_____, director of the Employee Assistance Program
(Name)
at _____ and to _____, my supervisor, for
(Name of Agency) (Name of supervisor)
drug use monitoring under Executive Order 12564, which provides for a drug-
free Federal workplace.

I understand that this consent is subject to revocation at any time,
except to the extent that action has been taken in reliance thereon, and that
it will expire without express revocation upon
_____.
(date, event, condition.)

This consent to disclose the above-described treatment records was
freely given, without reservation, for the purpose set out above.

(Signature of employee/patient)

(Date on which consent is signed)

CLAUSE FOR USE IF EMPLOYEE IS A MINOR OR LEGALLY INCOMPETENT

I, _____, the [parent/legal guardian or personal legal
(Name)
representative] of the above named employee/patient, hereby consent to the
aforementioned release of information on his/her behalf.

(Signature)

(Date)

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RELEASE MEMORANDUM

SUBJECT: Release of Patient Information

FROM: [Program making the disclosure.]

TO: [Name or title of the person or organization to which the disclosure is to be made.]

In accordance with the attached "Consent for Release of Patient Information," we have released information to you on [Patient's name].

This information has been disclosed to you from records whose confidentiality is protected by Federal law. See 42 U.S.C. § 290ee-3. Federal regulations, at 42 C.F.R. Part 2, prohibit you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by those regulations. A general authorization for the release of medical or other information is NOT sufficient for this purpose.

(Note: This memorandum is substantially the same as the one appearing in Appendix D of FPM Supplement 792-2.)

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**CONSENT FOR RELEASE OF PATIENT INFORMATION
PERTAINING TO TEST FOR ILLEGAL DRUG USE**

I, _____, hereby consent to the disclosure of
(Employee/Patient name)
information concerning the results of a test taken by me on _____, for
(Test date)
illegal drug use. I authorize the _____ to disclose the results
(Testing organization)
of that test to _____, director of the Employee
(Name)
Assistance Program at _____ and to _____,
(Name of Agency) (Name of supervisor)
my supervisor, for drug use monitoring under Executive Order 12564, which
provides for a drug-free Federal workplace.

I understand that this consent is subject to revocation at any time,
except to the extent that action has been taken in reliance thereon, and that
it will expire without express revocation upon
_____.
(date, event, condition.)

This consent to disclose the above-described treatment records was
freely given, without reservation, for the purpose set out above. However, I
understand that a drug test will not be administered to me without this
consent. Failure to take the drug test may result in adverse disciplinary
action.

(Signature of employee/patient)

(Date on which consent is signed)

CLAUSE FOR USE IF EMPLOYEE IS A MINOR OR LEGALLY INCOMPETENT

I, _____, the [parent/legal guardian or personal legal
(Name)
representative] of the above named employee/patient, hereby consent to the
aforementioned release of information on his/her behalf.

(Signature)

(Date)

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CURRENT OPERATING CONSORTIA

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<u>PHIC LOCATION</u>	<u>LEAD AGENCY</u>	<u>POINT OF CONTACT</u>	<u>TELE NO.</u>
SE, AK	FAA	JAMES OLIVER	907-271-5875
, GA	HHS	MARILYN MONTGOMERY	242-2713
MA	OPM	JOAN KENNEDY	223-2273
, NY	HHS	BOB MAZZOCHI	264-5505
, IL	FHS	FRANCES WENCE	353-1719
ATI, OH	FHS	FRANCES WENCE	353-1719
TX	HHS	MARY PERKINS	729-3126
CO	FHS	DR. R. LORTSCHER	776-0078
CITY, MD	FHS	JOHN MCCLAY	758-3597
ISLAND, NY	HHS	BOB MAZZOCHI	264-5505
F MICHIGAN	FHS	FRANCES WENCE	353-1719
, NJ	HHS	BOB MAZZOCHI	264-5505
RK CITY, NY	HHS	BOB MAZZOCHI	264-5505
ELPHIA, PA	HHS	BEVERLY JANDA	596-6712
AN, PR	HHS	BOB MAZZOCHI	264-5505
E, WA	ARMY CORP OF ENG.	TERRY CONOVER	206-764-3568
ISLANDS	HHS	BOB MAZZOCHI	264-5505
GTION, DC	FHS	AMY BARKIN (FHS) CAROL FAPE (OPM)	443-4357 653-8438

TREATMENT FACILITY DIRECTORIES

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National Directory of Drug Abuse and Alcoholism Treatment and
Prevention Programs, DHHS Publication No. (ADM)85-321
Printed 1985

Available from: National Institute on Alcohol and
Alcoholism
National Clearinghouse for Alcohol
Information
P.O. Box 2345
Rockville, Md. 20852
Tele: (301) 468-2600

National Institute on Drug Abuse
National Clearinghouse for Drug
Abuse Information
5600 Fishers Lane, Room 10A-43
Rockville, Md. 20857
Tele: (301) 443-6500

Washington Metropolitan Area Directory of Alcohol/Drug
Treatment Resources, OPM WPS-01 dated September 1984

Available from: Office of Personnel Management
Employee Health Services Branch (PSOG)
1900 E. Street, N.W. Room 7H39
Washington, D.C. 20415
Tele: (202) 632-5558

Coping Catalog (listing resources available in the Washington
Metropolitan Area for alcohol, drugs and other addiction
problems. Nominal Cost)

Available from: The Washington Area Council on Alcohol and
Drug Abuse
1221 Massachusetts Ave., N.W.
Washington, D.C. 20005
Tele: (202) 783-1300

MODEL EMPLOYEE ASSISTANCE PROGRAM
IN SUPPORT OF A DRUG-FREE WORKPLACE

1. Purpose. To implement fully an effective Employee Assistance Program (EAP) within (agency) which provides short term counseling and referral services to employees with drug problems. This is in keeping with the President's policy, set forth in Executive Order 12564, to eliminate drug use from the Federal workplace and to offer an opportunity for rehabilitation to users of illegal drugs.

2. Background. Public Law 92-255, as amended, requires Federal agencies to develop and maintain appropriate prevention, treatment and rehabilitation programs and services for drug abuse among Federal employees. Regulations implementing this requirement are contained in Title 5, Code of Federal Regulations (CFR) Part 792. Guidance is further provided in Subchapters 5 and 6 of Federal Personnel Manual (FPM) Chapter 792, and FPM Supplement 792-2. Executive Order 12564 of September 15, 1986, established further requirements for agencies and employees in order to obtain a Drug-Free Federal Workplace. On October 27, 1986, the President signed into law the Omnibus Drug Enforcement, Education, and Control Act of 1986, P.L. 99-570. That law reiterates Congressional concern about the prevention of illegal drug use and the treatment of Federal employees who use drugs.

3. Objective. The objective of the EAP is to assist employees with drug problems to find treatment, to follow-up with them during recovery and rehabilitation, and to help them remain drug-free.

4. Policy.

A. As an employer, the (agency) is concerned with the well-being of its employees, the maintenance of workforce productivity, and the preservation of a safe and secure workplace. The use of illegal drugs by (agency) employees, whether on or off the job, is inconsistent with these goals and will not be tolerated.

B. The (agency) stands ready to assist employees in becoming drug free.

C. Employees who are users of illegal drugs are encouraged to seek counseling and other appropriate assistance voluntarily, including that available through the (agency's) Employee Assistance Program.

D. The confidential nature of client records will be safeguarded and only disclosed in accordance with the confidentiality provisions of Title 42 CFR, Part 2.

E. Action will be initiated to remove from the (agency) any employee found to use illegal drugs who (1) refuses to obtain counseling or rehabilitation through the Employee Assistance Program; or (2) does not thereafter refrain from using illegal drugs.

F. To the extent feasible, program services will be provided to families of employees who have drug problems and to employees with family members who have drug problems.

5. Program Responsibilities.

A. Agency Employee Assistance Program Administrator. The Employee Assistance Program Administrator has the lead role in ensuring that the (agency's) EAP program meets the requirements of E.O. 12564, and is responsible for the development, implementation and review of the agency EAP. In addition to supervising the headquarters EAP Coordinator and counselor(s), the Administrator will provide advice and assistance in establishing field office EAP's. The EAP Administrator will advise agency components on the submission of annual statistical reports and will prepare consolidated reports on the agency's EAP activity for submission to the Office of Personnel Management on a fiscal year basis.

B. Employee Assistance Program Coordinators.

(1) The Employee Assistance Program Coordinator has responsibility for implementing and operating the EAP within an agency component, such as the Headquarters office or a field installation. More than one coordinator may be deemed necessary, depending on the size of the assigned component. Where the EAP services are contracted out, the coordinator has responsibility for monitoring the contractor performance and verifying services rendered within (agency). The person(s) selected for such assignments will be allotted sufficient official time to:

(a) implement effectively the agency employee assistance policy and program as well as to assist in the development and implementation of the agency drug testing program as it relates to the counseling and rehabilitation of drug-abusing employees;

(b) determine appropriate supervisory training and other activities needed to educate and inform the workforce about drugs and symptoms of drug abuse;

(c) develop and maintain counseling capability (through personnel, medical, or other counseling resource, including contracting out);

(d) establish liaison with community education, treatment and rehabilitation facilities; and,

(e) evaluate the program and report to management on results and effectiveness.

C. Employee Assistance Counselors. (1) In some instances, the EAP Coordinator may have the necessary skills, time and motivation to function as the Employee Assistance Counselor. The Employee Assistance Counselor serves as the initial point of contact for employees who ask or are referred for counseling, and will be allotted sufficient official time to implement the program effectively. As a minimum, persons designated as Employee Assistance Counselors should be, or provisions should be made for them to be:

(a) Trained in:

- counseling employees in the occupational setting,
- identification of drug abuse, and,
- administering the Employee Assistance Program.

(b) Able to communicate effectively with employees, supervisors and managers concerning drug use and its symptoms and consequences.

(c) Knowledgeable of community resources for treatment and rehabilitation of drug users, including information on fees and payment schedules.

(d) Able to discuss drug treatment and rehabilitation insurance coverage available to employees through the Federal Employee Health Benefits Program.

(e) Able to distinguish the occasional user from the addicted user and to suggest the appropriate treatment based on that information (e.g., after hours attendance at Narcotics Anonymous meetings to significant medical assistance).

(f) Able to provide training and education on drug abuse to employees, supervisors, union representatives, etc.

(2) In offices where counseling staff is not available within the agency, reasonable efforts should be made to provide employees with access to a qualified counselor outside of the agency. This may include authorizing official time for the employee to visit or be visited by a counselor personally, or other steps which may be appropriate.

(3) For employees referred as a result of drug-testing, counselors should document the treatment plan prescribed. Signature of this document by both the counselor and client will ensure mutual understanding of the treatment plan and the consequences of failure to remain drug free.

(4) In order for the counselor to be viewed as the source of assistance and understanding for employees, the person(s) performing these functions should not be involved in the actual drug testing of employees.

D. Employee's Role. All employees are encouraged to enhance their drug awareness through educational opportunities afforded by the EAP or the community at large. Employees who are illegal drug users are encouraged to seek counseling assistance voluntarily. Employees found to be users of illegal drugs are required to accept referral to the EAP and are urged to cooperate with medical treatment and/or rehabilitation programs that are indicated.

E. Medical Personnel.

(1) Employee health units provide emergency diagnoses and first treatment of injury or illness of employees during duty hours. Where indicated, the employee should be further referred to a private physician or community health service. If such cases ultimately are determined to have stemmed from abuse of drugs, medical personnel should discuss the facts of the situation with the supervisor and the employee and refer the employee for counseling. A close working relationship with the EAP Counselor(s) is essential for program success. The Health Unit staff is available for consultation with and assistance to personnel assigned EAP responsibilities.

(2) Where such facilities do not exist, these services are provided whenever possible through existing occupational health facilities and/or community physicians or clinics.

6. Training and Education.

A. Supervisory training. Employee counselors will conduct training sessions for all agency supervisors on the handling of problems of substance abuse. Appropriate topics include:

- (1) Drug Awareness and symptoms of drug use.
- (2) Recommended methods for dealing with the suspected or identified drug user.
- (3) Supervisory responsibilities under E.O. 12564.
- (4) Confrontation and referral techniques.
- (5) Explanation of the (agency) employee assistance program and its relationship with the (agency) drug testing program.
- (6) General principles of rehabilitation including techniques for supervisors to assist employees in returning to the worksite, given specific (agency) needs and requirements.
- (7) Personnel management issues (e.g., relationship of this program to performance appraisal and disciplinary programs; leave usage; and, supervisory notes and documentation).

B. Employee education. The Employee Assistance Coordinator will ensure that employee seminars on topics dealing with drug use are provided periodically. Managers and supervisors shall encourage employee attendance at these seminars and provide other appropriate support. On a continuing basis, educational materials and information on drug abuse will be available to individual employees.

7. Publicity of EAP to employees.

A. This policy and program will be made known to all (agency) employees. All new employees will be informed of the services available under this program as they enter on duty.

B. The names and locations of Employee Assistance Counselor(s) should be listed in telephone directories and displayed on employee bulletin boards.

C. Periodic employee memoranda and other appropriate publications should be used to keep employees informed of EAP services.

8. Short-term Counseling and Referral.

A. Referrals to the Employee Assistance Program are for the purposes of identifying the problem, referring the employee to the appropriate treatment resource in the community and following up with the employee during recovery and rehabilitation.

B. Voluntary referrals, or self referrals, are to be encouraged throughout EAP materials.

C. In the case of a management referral as a result of a positive drug screen, the employee assistance staff will interview and/or consult with supervisors and management officials, as requested, and provide them with guidance on how to refer the drug abusing employee to the assistance program. Once a referral is made, and the employee agrees to the appointment with the counselor, the counselor will require the employee to sign a consent for release of information to the supervisor before assistance will be provided. Upon obtaining the signed consent, the counselor will assess the problem(s), review the employee's health insurance coverage and refer the individual to an appropriate treatment resource in the Community. The counselor will monitor the employee's treatment and keep the supervisor advised as to the progress being made. The counselor will periodically follow-up with the employee and his or her supervisor after any treatment which occurs and offer support and assistance as needed.

Community Resources. The EAP will develop a working relationship with community assistance resources. Program coordinators and counselors will determine which community agencies or individuals best meet employee and management needs. Contact should be established with specialized resources such as the following:

- A. State drug authorities for help in identifying treatment resources for drug abusing employees;
- B. Narcotics Anonymous for information on where and when meetings are held;
- C. Hospital and clinic treatment facilities in order to establish a working relationship between the counselor and the receiving treatment source; and,
- D. Drug abuse councils to keep abreast of the latest development regarding drug abuse.

Program Interrelationships.

A. Relationship with Drug Testing Program. As called upon, the EAP staff will work with the drug testing program staff in the development and implementation of the drug testing program. However, EAP staff are not to be involved in the collection of urine samples or the initial reporting of drug test results. EAP efforts are to focus on counseling and rehabilitating drug-abusing employees, as well as on educating the workforce regarding drug abuse and its symptoms.

B. Relationship of the Supervisor. Supervisors have explicit expectations of their employees in terms of job performance and behavior. When supervisors are advised of confirmed employee drug use, they are required to refer the employee to an Employee Assistance Program and to initiate an appropriate personnel action. Supervisors should work with the Employee Assistance Counselor to monitor the employee's progress during treatment and rehabilitation and take appropriate personnel action should the employee fail to remain drug free.

C. Relationship with Labor Organizations. The support and active participation of labor organizations is a key element in the success of an employee assistance program. Therefore, where there are units of exclusive recognition, management should:

(1) Communicate to labor organizations a strong commitment to providing assistance to employees.

(2) Consult or negotiate, as appropriate, concerning the implementation of the EAP.

(3) Include union representatives in appropriate training and orientation programs to ensure a mutual understanding of program policy, referral procedures, and other program elements.

D. Relationship to disciplinary Actions/Adverse Actions. In those situations involving illegal drugs, except as provided in Section 5(b) of Executive Order 12564, disciplinary action is required to be initiated against employees who are found to use illegal drugs. Managers and supervisors should work closely with their Employee Relations Staff, Personnel Office, in deciding which disciplinary measure(s) to initiate.

11. Recordkeeping and Reporting

A. Counseling Records. Records on employees who have been referred for counseling will be maintained in a secure and confidential manner. Information on any drug abuse client will be released only to the immediate supervisor in accordance with the employee's consent to release, and for the reasons identified in section 8C above. Any information obtained by a supervisor from the counselor must be maintained, as with all employee records, in a strictly confidential manner. In addition, to the extent that counseling records include employee treatment records, they shall be maintained in accordance with Title 42 CFR, Part 2. Consequently, access to these records will be strictly limited. All appropriate steps, including necessary physical safeguards, will be taken to ensure against unauthorized disclosure.

B. Statistical reports. The EAP Administrator will compile sufficient statistical data to provide the basis for evaluating the extent of drug abuse problems and effectiveness of the assistance program. The EAP Administrator will also submit an agency-wide report to the Office of Personnel Management annually. These reports will be purely statistical in nature and will not identify individual employees.

12. Program Evaluation. The EAP Administrator and Coordinators will regularly evaluate their program to determine the effectiveness and efficiency of services. These evaluations will include: services to employees with drug abuse problems, referral procedures and effectiveness, supervisory training, employee orientation, reporting systems, availability and accessibility of EAP, records systems, outreach activities, staffing and qualifications procedures. Written evidence of program evaluations, identified deficiencies and correction plans will be available for review by the EAP Administrator. Documented modifications in the program's assessment and intervention services should be made based upon the findings of such evaluations.

THE WHITE HOUSE

WASHINGTON

November 18, 1986

MEMORANDUM FOR THOMAS F. GIBSON, JR.
SPECIAL ASSISTANT TO THE PRESIDENT AND DIRECTOR
OF PUBLIC AFFAIRS

FROM: JAY B. STEPHENS
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Recent Court Cases Regarding Drug Testing

Three federal district courts have ruled against the constitutionality of drug testing since the President issued Executive Order 12564 on September 15, 1986. Only one of these cases involved a drug testing program implemented by a federal agency, the decision by Judge Collins of the Eastern District of Louisiana (New Orleans), invalidating the program implemented by the U.S. Customs Service. The other two cases (Chattanooga, Tennessee and Plainfield, New Jersey) involved drug testing programs covering municipal police and firefighters.

The Customs program, and obviously the programs involved in the municipal police and firefighters cases, were not implemented pursuant to the Executive Order. The Customs case, because it involved a federal agency (and because Judge Collins has before him a challenge to the Executive Order), is likely to attract considerable attention.

In a memorandum to all agency general counsel and to U.S. Attorneys regarding the Customs case, the Justice Department asserts that the case was wrongly decided and constitutes a largely unprecedented holding on the merits. Justice notes that higher courts, such as the Third Circuit Court of Appeals, have upheld drug testing of public employees. Justice points out that the Customs case represents the first adverse decision rendered against a federal agency conducting drug testing. Justice advises that the Court's order is limited to the Customs Service and leaves unaffected other agency drug testing programs or actions to be taken to implement the Executive Order.

Justice indicates it is likely to appeal the Customs case. For this reason, we believe the President should decline to discuss the merits of that case. Rather, Counsel's office recommends that the President respond to inquiries about all of these cases along the following lines:

- ° I am aware of recent court decisions that have not been supportive of drug testing. Of these, I understand only one has involved a program by a Federal agency, the case

involving a program by the United States Customs Service. Since that case may be appealed, it would be inappropriate for me to comment on it.

- ° I would note that no court has considered the drug testing program established by the Executive Order that I issued in September. Efforts by Federal agencies to implement that Order will continue.
- ° While we remain confident that drug testing under the Executive Order will be upheld by the Courts, the Administration's initiatives for a drug-free America extend well beyond the legal issue of drug testing. These include expanded drug abuse treatment and research, improved international cooperation, strengthened drug law enforcement and increased public awareness and prevention. Let us not allow anything to distract or deter us from our common goal -- the elimination of drugs from all areas of our daily life.

cc: David L. Chew