THE WHITE HOUSE

WASHINGTON

WORKING GROUP ON DRUG ABUSE POLICY

Thursday, November 20, 1986
476 Old Executive Office Building
1:30 p.m.

AGENDA

1. Review of Administration Initiatives (The White House)

   -- Cabinet Meeting
   -- Executive Order
   -- Legislation
   -- Memo to Department Heads

2. Ambassadors Meeting - Summary (The White House)

3. Implementation of Executive Order/Testing (OPM)

4. Status of Contractor Testing (Justice)

5. Status Reports

   -- Office of Substance Abuse Prevention (HHS)
   -- Private Sector Intiaitives (ACTION)
   -- Drug-Free Public Housing (HUD)
   -- Drug-Free Transportation (DOT)

6. Status - White House Conference for Drug-Free America

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DOMESTIC POLICY COUNCIL WORKING GROUP ON DRUG ABUSE POLICY

Carlton Turner, CHAIRMAN (Attending)
Deputy Assistant to the President for Drug Abuse Policy
The White House/x6554 (Dena Cruz)

Richard Willard 9/1/48 (Sending Thomas Barba & Robert Cynkar)
Assistant Attorney General, Civil Division
Department of Justice/633-3301 (Rosalie Bern)

Donald Ian Macdonald 4/15/31 (Attending)
Administrator, Alcohol, Drug Abuse and Mental Health
Administration, Department of Health and Human Services
443-4797 (Debbie)

Michael E. Baroody 9/14/46 (Sending Patrick Cleary)
Assistant Secretary for Policy
Department of Labor/523-6181 (Adella Edmondson)

Gary Bauer (Sending John Walters)
Under Secretary
Department of Education/732-4000 (Macy Moy)

Ann B. Wrobleski 4/3/52 (Sending James F. Hoobler)
Assistant Secretary Designate, International Narcotics Matters
Department of State/647-8464 (Linda Dougherty)

Chapman B. Cox (Sending Stephen Olmstead)
Assistant Secretary for Force Management and Personnel
Department of Defense/695-5254 (Sheila or Woody Sadler)

Chuck Hobbs (Not attending - no rep)
Acting Assistant to the President for Policy Development
The White House/x6630 (JoAnn)

Martin Coyne (Attending)
Director of Scheduling and Advance
Office of the First Lady/x7910 (Deborah Balfour)

Constance Horner (Sending Mark Barnes)
Director
Office of Personnel Management/632-6106 (Judy Freeman)

Debbie Steelman (Sending Barry Clendenin)
Associate Director for Human Resources, Veterans and Labor
Office of Management and Budget/x4852 (Connie)

Matthew Scocozza (Sending Richard Walsh)
Assistant Secretary for Policy and International Affairs
Department of Transportation/366-4544 (Delores)

Francis Keating (Sending Michael Lane)
Assistant Secretary for Enforcement
Department of the Treasury/566-2568 (Robin or Jan)

Sylvester Foley (Sending James Crane & Michael Seaton)
Assistant Secretary for Defense Programs
Department of Energy/252-2177 (Michele)

Michael Dorsey 2/6/43 (Attending)
Assistant Secretary for Public and Indian Housing
Department of Housing and Urban Development/755-0950 (Diane)

Henry "Rick" Ventura (Sending Robert MacKichan)
Deputy Director
ACTION/634-9380 (Dennis Stephens)

OTHERS

Phil Brady (Attending)
Vice President's Office/x7928 (Kim)

Ralph Bledsoe (Attending)
Domestic Policy Council/x6640 (Fran)

James Stark (Attending)
Director, Political and Military Affairs
National Security Council/x7353 (Kay)

Becky Norton Dunlop 10/2/51 (Attending)
Senior Special Assistant to the Attorney General
Department of Justice/633-1721 (Nancy)

Eileen Doherty (Not attending - no rep)
Associate Director, Internal Affairs
Private Sector Initiatives/x6676

Robert Kruger (Attending)
Associate Counsel to the President/x7953

Thursday, November 20
1:30 - 2:30 / Room 476 OEOB

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OK Gary Bauer (is a passholder)
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Sending: John Walters 2/8/52

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Sending: Stephen G. Olmstead 11/10/29

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Robert Kruger
Associate Counsel to the President
x7953

DRUG PREVENTION LITIGATION REPORT

U.S. Department of Justice
Civil Division

ISSUE 3
November 17, 1986

SPECIAL EDITION

This special edition of the Drug Prevention Litigation Report is published to distribute copies of the decision rendered by District Judge Robert Collins in National Treasury Employees Union v. Von Raab, C. A. No. 86-1450 (E.D. La. Nov. 14, 1986), enjoining the Customs Service from conducting drug testing of its employees when they are tentatively selected for promotion to certain positions within the Service. The Court held that such testing without a warrant and probable cause violated the Fourth Amendment as well as the Fifth and Ninth Amendments.

We believe the case was wrongly decided and constitutes an extreme and largely unprecedented holding on the merits. Recently, the Third Circuit upheld random and periodic testing of public employees (Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986)), and other courts of appeals have similarly rejected the claim that drug testing for fitness for duty required probable cause under the Fourth Amendment. Brotherhood of Maintenance Engineers v. Burlington Northern, No. 85-2360 (8th Cir. Oct. 1, 1986); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.), cert. denied, 429 U.S. 1029 (1976). Judge Collins' Fifth Amendment holding is in direct conflict with the Supreme Court's ruling in Schmerber v. California, 384 U.S. 757 (1966), finding that the prohibition against self-incrimination applies only to testimonial rather than physical evidence, and the Ninth Amendment ruling is inconsistent with Bowers v. Hardwick, 106 S. Ct. 2841 (1986). The court's jurisdictional ruling is also contrary to the holding in National Federation of

Federal Employees v. Weinberger, 640 F. Supp. 642 (D.D.C. 1986), involving the Army's civilian drug testing program which is currently on appeal before the District of Columbia Circuit. We will be filing a motion to stay the District Court's order and expect to vigorously pursue an appeal.

This represents the first adverse decision rendered against a federal agency conducting drug testing. While the decision constitutes a setback in achieving the drug-free workplace mandated by the President (particularly in light of the pending challenge before Judge Collins to Executive Order 12564), 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 Executive Order 12564.

Attachment

MINUTE ENTRY
November 14, 1986
COLLINS, J.

NATIONAL TREASURY EMPLOYEES UNION and ARGENT ACOSTA — CIVIL ACTION

VERSUS — NO. 86-3522

WILLIAM VON RAAB, Commissioner, United States Customs Service — SECTION "C"

* * * * * * * * * * * * * * * *

The Court is presented with a Motion by the defendant to Dismiss this action on the grounds that: (1) venue does not lie in this District; (2) plaintiffs lack standing to bring this action; (3) this Court lacks jurisdiction over this dispute; and (4) plaintiffs have failed to state a claim upon which relief may be granted. Plaintiffs oppose the Motion to Dismiss and have moved for preliminary injunctive relief. With the concurrence of all parties, pursuant to Rule 65(a)(2), the Court has consolidated hearing on the Motion for Preliminary Injunctive Relief with Trial on the Merits. The parties filed numerous exhibits into the record, but did not call any live witnesses. The parties agreed that no contested facts were presented. Accordingly, the Court makes its findings based upon the uncontroverted facts and exhibits filed into the record.

For reasons set forth below, the Court finds that venue is proper in the Eastern District of Louisiana, that the plaintiffs have standing to bring this action, that jurisdiction is properly vested in federal district court, and that plaintiffs have

stated a valid claim for relief. The Court finds that the drug testing plan at issue violates numerous provisions of the United States Constitution and must be enjoined and declared unconstitutional. Accordingly, the Motion to Dismiss is DENIED, and the Petition for Injunctive and Declaratory Relief is GRANTED.

The Drug Testing Plan

This action has been brought in federal district court seeking an injunction to block the United States Customs Service from further urine collection and analysis as a part of a "drug-testing" program implemented on July 21, 1986. The drug testing plan requires that United States Customs Service workers who seek promotion into certain enumerated "covered positions" submit to drug screening through analysis of their urine. "Drug screening through urinalysis is a condition of employment for placement into positions covered by the program." Customs Directive on Drug Screening Program, Plaintiffs' Exhibit No. 1 at 1. Customs employees who test positive through drug screening "are subject to loss of consideration for the position applied for . . . [and] . . . are subject to removal from the service." Plaintiffs' Exhibit No. 1 at 11. Any tentative selectee for the promotion who refuses to undergo drug screening "will lose consideration for that position." Plaintiffs' Exhibit No. 1 at 11. Urine samples are tested by using immunoassay as well as gas chromatography/mass spectrometry techniques. Plaintiffs' Exhibit No. 1 at 3. A collector is actually physically present

in the lavatory during the urination process, though observation is supposed to be "close but not 'direct.'" Plaintiffs' Exhibit No. 1 at 6. One Customs worker who has already been tested described the procedure as follows: "The laboratory representative accompanied each of us into the restroom, one by one. He placed some dye into the urinal and then stepped behind a partition. The representative was able to observe me from my shoulders up from behind the partition while I urinated into the sample jar." Affidavit of Lee Cruz, Plaintiffs' Exhibit No. 5 at 3. Prior to voiding into the sample jar, subjects are required to fill out a pre-test form stating medications taken within the last thirty days and any circumstances in which the subject may have been in contact with illegal substances over the last thirty days. Plaintiffs' Exhibit No. 1 at 5.

Having discussed the drug testing plan at issue, the Court will now focus on defendant's Motion to Dismiss.

Venue Lies In The Eastern District Of Louisiana

Venue is proper in the Eastern District of Louisiana. Under Title 28 United States Code section 1391(e), "A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity . . . may, except as otherwise provided by law, be brought in any judicial district in which . . . (2) the cause of action arose, or . . . (4) the plaintiff resides if no real property is involved in the action." Both subsections support

venue in this District. The Fifth Circuit has held that a cause of action can arise in several forums for purposes of venue, and that "the court should not oppose the plaintiff's choice of venue if the activities that transpired in the district where suit is brought were not insubstantial and the forum is a convenient one, balancing the equities and fairness to each party." Florida Nursing Home Association v. Page, 616 F.2d 1355, 1361 (5th Cir.), cert. denied (as to venue issue), 449 U.S. 872 (1980), rev'd on other grounds, 450 U.S. 147 (1981). The Customs Service houses its headquarters for the entire South Central Region in New Orleans. Hundreds of Customs employees are located in the Eastern District of Louisiana. Employees from this District will be required to take drug tests here to receive promotions to covered positions. Activities that will transpire in this District where the suit has been brought are not insubstantial. The Court rejects defendant's restrictive notion that the only forum in which the drug testing plan may be challenged is Washington, D.C. While the Customs Directive may have been conceived and drafted in Washington, D.C., the great bulk of Customs employees who are subject to the program are outside of Washington, D.C. and will be tested outside of Washington, D.C. Activities in the Eastern District of Louisiana contemplated under the drug testing plan are substantial.

The defendant has failed to cite a single factor that makes

this an inconvenient forum. The United States has attorneys all over the country, including the Eastern District of Louisiana. While Customs is disappointed that plaintiff, National Treasury Employees Union (NTEU), exercised its unqualified right under Federal Rule of Civil Procedure 41(a)(1)(i) to voluntarily dismiss an earlier action it brought in the District of Columbia before answer was filed, Customs could have prevented this by filing an answer before the NTEU had an opportunity to voluntarily dismiss. By choosing to exercise its right under Fed. R. Civ. P. 12(a) to delay as long as 60 days before answering, the defendant lost an opportunity to prevent a voluntary dismissal of plaintiff NTEU's action brought in Washington, D.C. Having chosen to delay the filing of an answer, the defendant cannot now complain that plaintiff exercised its right to voluntarily dismiss in Washington, D.C. before issue was joined, and to refile in the Eastern District of Louisiana.

Venue also lies in the Eastern District of Louisiana under Title 28 United States Code section 1391(e)(4) because "the plaintiff resides" in this District. There are two plaintiffs in this action: the National Treasury Employees Union and Argent Acosta. Plaintiff Argent Acosta, President of NTEU Local 168 (which has its office in New Orleans) is a resident of this District, as are most of the employees he represents in this action. Moreover, at least one court has held that a labor organization "resides" wherever its individual members

are for purposes of Section 1391(e)(4). Columbia Power Trades Council v. U.S. Department of Energy, 496 F. Supp. 186, 189 (W.D. Wash. 1980), rev'd on other grounds, 671 F.2d 325 (9th Cir. 1982). Finally, even if NTEU proper did not "reside" in this District, numerous courts that have considered the issue have concluded that Section 1391(e)(4) does not require all the plaintiffs to reside in the forum, but only one. Section 1391(e)(4) permits an action to be brought against the federal government by plaintiffs from more than one district, in any district in which at least one of the plaintiffs resides. Exxon Corporation v. FTC, 588 F.2d 895, 898-99 (3d Cir. 1978); Santa Fe International Corp. v. Watt, 580 F. Supp. 27, 29 & n. 4 (D. Del. 1984); Dow Chemical v. Consumer Product Safety Commission, 459 F. Supp. 378, 384, n. 4 (W.D. La. 1978). The Court concludes that venue lies in the Eastern District of Louisiana under both Sections 1301(e)(2) and (e)(4) of Title 28 United States Code.

The National Treasury Employees Union Has Standing To Bring This Action

In its brief in support of its Motion to Dismiss, the defendant contended that the NTEU lacked standing to bring the instant lawsuit on behalf of its members. Although the defendant conceded the standing issue at oral arguments, the Court addresses it nevertheless.

A very recent Opinion of the United States Supreme Court

compels the finding that the NTEU has standing to bring this action. International Union, United Automobile Aerospace, and Agricultural Implement Workers of America v. Brock, 54 LW 4764 (August 19, 1986), held that a union whose members claimed that they were eligible for benefits under the 1974 Trade Act has standing to bring a federal court lawsuit on behalf of the members challenging the secretary's interpretation. The Supreme Court applied the three-part test from Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977). Hunt held that an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. In the instant litigation, individual NTEU members would otherwise have standing to sue in their own right. The interests the NTEU seeks to protect are germane to the organization's purpose, namely, protecting union members from degradation, harm, humiliation and loss of promotions or jobs. Neither the claim asserted by the NTEU, that the drug testing plan violates constitutional protections, nor the type relief requested, a permanent injunction, requires the participation of individual members in the lawsuit. Applying Brock and Hunt to the facts of this case, the Court concludes that the NTEU has standing to object to the

drug testing program.

The Court Has Jurisdiction Over This Dispute

The defendant's next argument in favor of dismissal is that this Court lacks jurisdiction to entertain this dispute. Defendant contends that this action must be resolved according to the Civil Service Reform Act (CSRA), which precludes district court jurisdiction over federal labor relations disputes.

According to the defendant, the testing program constitutes a new "condition of employment." It is the defendant's position that the plaintiffs must, therefore, attempt to characterize the program as a "negotiable" employment practice with the Federal Labor Relations Authority (FLRA), and raise their labor practice challenges to the program before that administrative tribunal. The defendant contends that plaintiffs' constitutional challenges to the program will eventually receive Article III review because the plaintiffs are entitled to appeal any final FLRA decision to the appropriate Circuit Court of Appeals.

In addition to establishing the FLRA framework for resolving labor relations disputes, the defendant argues that the CSRA sets out the exclusive comprehensive process for resolving personnel claims of federal employees in the Merit Service Protection Board (MSPB) scheme. The defendant contends that if an employee, subjected to drug testing, is denied a promotion or suffers any other "adverse action," see 5 U.S.C. § 7512, he may appeal that agency decision to the MSPB. Therefore, the

defendants conclude, the MSPB alone may hear the type of personnel challenges the plaintiffs have presented to this Court in regard to the testing program.

The Court finds that the plaintiffs' claim for injunctive and declaratory relief is not cognizable under this broad administrative scheme of the CSRA, but rather is properly brought directly in federal district court.

The starting point for an analysis of the preclusive effect of the CSRA is the landmark Opinion of Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983). Bush involved an action brought by an aerospace engineer against the director of a federal space flight center to recover for alleged defamation and an alleged retaliatory demotion. The Supreme Court held that because the engineer's claims arose out of an employment relationship that was governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, it would be inappropriate for the Court to supplement that regulatory scheme with a new nonstatutory damages remedy. The defendant to the instant litigation contends that Bush v. Lucas requires dismissal for lack of jurisdiction. This Court disagrees. A close reading of Bush reveals that this Court has jurisdiction to grant the relief requested.

The critical language in Bush is as follows:

> Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors

> and procedures - administrative and judicial - by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies.[28]
>
> [28]Not all personnel actions are covered by this system. For example, there are no provisions for appeal of either suspensions for 14 days or less, 5 U.S.C. § 7503 (1982 ed), or adverse actions against probationary employees, § 7511. In addition, certain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme."

Bush v. Lucas, 103 S. Ct. at 2415 (emphasis added).

It is evident that warrantless searches do not constitute "personnel actions" within the statutory scheme into which defendant seeks to relegate NTEU. As discussed infra, this Court finds that examination of Customs workers' urine constitutes a warrantless search. Therefore, a claim for injunctive relief to block urinalysis is not covered under the CSRA. Accordingly, this Court is not deprived of jurisdiction by virtue of the CSRA.

The Court is unimpressed with defendant's attempt to distinguish footnote 28 of Bush as being limited to actions by "supervisors." Defendant's logic would lead this Court to the absurd result that an aggrieved Customs worker could sue his immediate supervisor for a warrantless search, but could not sue the ultimate supervisor, Commissioner Von Raab. It would

be pointless to require plaintiffs to amend their suit to name each individual supervisor that would be in charge of drug testing at each location across the country. It is much more rational and judicially economical to name the head of the agency as the party defendant. Moreover, footnote 28 discussed actions by "supervisors" because Bush v. Lucas involved a suit by a federal employee against his supervisor. The Court rejects defendant's contention that footnote 28 is somehow limited to ultra vires actions by supervisors. Nothing in the footnote supports such a tortured reading, and this Court refuses to so limit the scope of footnote 28.

Aside from Bush, defendant relies primarily upon National Federation of Federal Employees, et al. v. Weinberger, et al., 640 F. Supp. 642 (D.D.C. 1986) (hereinafter referred to as NFFE). In that case, Judge Hogan granted a motion to dismiss a claim that challenged drug testing procedures employed by the military. Although Judge Hogan placed great weight on the language in Bush discussed supra, he failed to discuss the critical Bush footnote 28. The rationale of NFFE is completely undercut by Bush footnote 28. Since warrantless searches are not personnel actions within the statutory scheme, the preclusive effect of the CSRA does not operate to deprive plaintiffs of the right to seek injunctive relief in federal district court. This Court is unpersuaded by the NFFE decision, since that case ignores a crucial point of law raised in Bush v. Lucas.

Another reason why Bush and its progeny do not persuade this Court that it lacks jurisdiction is because plaintiffs to the instant litigation do not seek creation of a new judicial remedy, as was the case in Bush. As Justice Stevens pointed out in Bush: "Petitioner asks us to authorize a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors." 103 S. Ct. at 2406. Here, plaintiffs seek to invoke this Court's historic equitable powers to enjoin the defendant from engaging in unconstitutional activity. Plaintiffs are not seeking damages for drug tests that have already taken place. This Court does not now rule on the issue of whether it would have jurisdiction to entertain a suit for damages sustained as a result of Customs' drug screening plan. This Court merely holds that it has jurisdiction to grant equitable relief to Customs workers seeking to enjoin an unconstitutional program of warrantless searches.

It would be absurd for this Court to hold that plaintiffs must submit to unconstitutional programs established by the defendant, then seek damages under the CSRA. The more sensible approach is to enjoin the activity in the first place. Indeed, persons who test negative for drugs will have little likelihood of success in the CSRA framework since Customs would not take adverse action against such employees upon a negative test result. Yet, the employees would have been subjected to an unconstitutional search. This issue is discussed in the NFFE decision:

> With respect to the MSPB procedures at issue, if an individual Aberdeen employee either refuses to be tested or tests positively for drug use in both field and confirmation tests, and the Army takes 'adverse action' against him as that term is used in the CSRA, he may raise constitutional and statutory challenges to the testing program in MSPB proceedings. See 5 U.S.C. § 7703(B)(1) . . .
>
> If agency action is taken against a civilian employee that cannot be characterized within the framework of the CSRA as 'adverse,' so that the employee does not have an available avenue of relief to the MSPB, it appears that nothing would prevent the employee from bringing a Bivens-type action against the individuals who ordered or supervised his drug testing: in short, 'effective remediation' for alleged constitutional deprivations could not 'conceivably' be achieved through the administrative process. Daly, 661 F.2d at 963.

NFFE, 640 F. Supp. at 654.

Under the NFFE approach, the district court should decline to entertain complaints for injunctive relief to prevent a constitutional violation, but should exercise jurisdiction over certain claims seeking damages for the constitutional violations. This approach is irrational. Rather than forcing the plaintiffs to submit to an unconstitutional program then seek damages in court, this Court will exercise jurisdiction over the Petition for Declaratory and Injunctive Relief.

Turning to the merits of the Petition for Declaratory and Injunctive Relief, the Court finds numerous constitutional infirmities that compel this Court to grant the injunctive and declaratory relief requested.

The Drug Testing Plan Violates The Fourth Amendment

Testing of Customs workers' urine pursuant to the Customs Directive constitutes a full-blown search within the meaning of the Fourth Amendment to the United States Constitution. See Capua v. City of Plainfield, Slip Op. No. 86-2992 (D.N.J. Sept. 18, 1986); Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986); McDonnell v. Hunter, 612 F. Supp. 1122 (D.C. Iowa 1985). Drug testing of Customs workers' bodily wastes is even more intrusive than a search of a home. When analyzing urine specimens, the defendant is searching for evidence of illicit drug usage. The drug testing plan is no minor frisk or pat-down. It is rather a full-scale search that triggers application of Fourth Amendment protections.

The mandatory collecting of urine samples pursuant to the drug testing plan constitutes a seizure within the meaning of the Fourth Amendment. McDonell v. Hunter, 612 F. Supp. 1122 (D.C. Iowa 1985). Indeed, the urine is seized from the Customs workers in that they must hand over a jar of their bodily wastes for analysis by the defendant.

Even Schmerber v. State of California, 384 U.S. 757, 86 S. Ct. 853 (1966), cited by defendant and discussed infra in connection with violations of the Fifth Amendment, held that blood testing for the presence of alcohol "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." 86 S. Ct. at 1834. The Supreme Court noted

that the Fourth Amendment "expressly provides that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches shall not be violated . . .'" (emphasis in text of Schmerber). Id. The Supreme Court went on to hold that "it could not reasonably be argued . . . that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons' and depend antecedently upon seizures of 'persons' within the meaning of that Amendment." Id. This Court rejects defendant's contention that urinalysis does not involve search and seizure within the meaning of the Fourth Amendment. Quite to the contrary, the Court finds that the drug testing plan falls squarely within the ambit of the Fourth Amendment. Testing of urine, like the testing of blood, is a full-blown search and seizure.

Under the Customs Directive at issue, the searches and seizures are to be made in the total absence of probable cause or even reasonable suspicion. The plan does not call simply for the testing of those whom the defendant reasonably suspects of using or selling drugs at the work site. Rather, the plan uses a dragnet approach of testing all workers who seek promotion into so-called "covered positions." This dragnet approach, a large-scale program of searches and seizures made without probable cause or even reasonable suspicion, is repugnant to the United States Constitution. In weighing the massive intrusive

effect of the drug testing plan against the legitimate governmental interest in a drug-free work place and work force, the Court finds the plan to be overly intrusive and constitutionally infirm. While the goal is legitimate, the means selected by the defendant violate the protections of the Fourth Amendment.

Customs workers have a reasonable expectation of privacy in their urine. See Capua v. City of Plainfield, Slip Op. No. 86-2992 (D.N.J. Sept. 18, 1986); Patchogue-Medford Congress of Teachers v. Board of Education, Slip. Op. No. 3649 (N.Y. Sp. Ct., App. Div. August 11, 1986); Caruso v. Ward, Index No. 12632/86 (N.Y. Sup. Ct., N.Y.C. July 1, 1986). Urination is usually conducted in private, and persons do not normally urinate in public. Indeed, under many municipal ordinances, urination in public is unlawful. Customs workers do not lose an expectation of privacy in their urine merely by reporting to work at a work site supervised by the defendant. The Court notes that excreting body fluids and body wastes is one of the most personal and private human functions. While body fluids and body wastes are normally disposed of by flushing them down a toilet, Customs workers do maintain a legitimate expectation of privacy in their urine until the decision is made to flush the urine down the toilet and the urine is actually flushed down the toilet. The Customs Directive violates a legitimate expectation of privacy held by Customs workers.

This Court agrees with Judge Vietor's analysis in McDonell v. Hunter, 612 F. Supp. 1122 (D.C. Iowa 1985):

> Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine. However, urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.

McDonnell, 612 F. Supp. at 1127. See also, Jones v. McKenzie, 628 F. Supp. 1500, 1508 (D.D.C. 1986) (finding a reasonable expectation of privacy from a search of mandatory urine testing for drugs).

The Court concludes that the drug testing plan constitutes an overly intrusive policy of searches and seizures without probable cause or reasonable suspicion, in violation of legitimate expectations of privacy. The searches and seizures are unreasonable and wholly unconstitutional.

It Is Unconstitutional To Condition Public Employment On "Consent" To An Unreasonable Search

The Court rejects defendant's contention that Customs workers who are compelled to submit to urinalysis as a precondition to advancement into so-called "covered positions" have

voluntarily waived their constitutional rights. Quite to the contrary, the Court finds that Customs workers who submit to the plan do not and have not done so voluntarily, but give and have given consent as a result of "coercion, express or implied" within the meaning of Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041 (1973).

The Court holds that it is unconstitutional for the government to condition public employment on "consent" to an unreasonable search. The Court refuses to find voluntary "consent" to an unreasonable search where the price of not consenting is loss of government employment or some other government benefit.

This holding, that consent coerced from Customs workers is involuntary, is consistent with the Opinion of the Fifth Circuit in Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985), cert. denied, 106 S. Ct. 1198 (1986). In that case, a visitor to a prison was obliged to sign a visitor form as a precondition to visiting his two inmate sons. The form purported to waive Fourth Amendment rights. After being subjected to a strip search, the father brought an action challenging the search. The Fifth Circuit held that the trial court did not err in rejecting the Louisiana State Penitentiary's "consent" defense. Following the Fifth Circuit's guidance, this Court holds that purported consent to urinalysis by Customs workers is involuntary and is the result of coercion.

The Drug Testing Plan Violates The Self-Incrimination Clause Of The Fifth Amendment

The Court finds that the drug testing plan would violate the Fifth Amendment protections against self-incrimination. Customs workers who seek promotions are forced to provide bodily excrements to enable the defendant to seek evidence of any illicit drugs the workers may have taken. Additionally, Customs workers are required to fill out a pre-test form stating which medications were taken within the last thirty days and any circumstances where the subject may have been in contact with illegal substances in the last thirty days. This constitutes involuntary self-incrimination which is forbidden under the Fifth Amendment to the United States Constitution.

The Court is cognizant that Schmerber v. California, 384 U.S. 757 (1966) held that the privilege against self-incrimination protects an accused only from being compelled to testify against himself, or to provide "evidence of a testimonial or communicative nature." 384 U.S. at 761. The withdrawal of blood in Schmerber was held not to involve compulsion to those ends. Schmerber, however, is distinguishable from the instant case on numerous grounds. In Schmerber, the Supreme Court found that "there was plainly probable cause" to arrest and to charge the defendant, whereas in the instant case the defendant conducts the searches and seizures in the absence of probable cause. The Customs Directive applies to workers who have given no reason to believe they are using drugs and who have furnished no probable cause

to justify arrest. Moreover, Schmerber involved only the taking of a blood sample, whereas the Customs Directive requires both a urine sample and a pre-test form stating medications taken and any circumstances in which the subject may have been in contact with illegal substances. Taken as a whole then, the Customs Directive calls for "evidence of a testimonial or communicative nature." Finally, Schmerber involved the mere drawing and testing of a blood sample, a procedure that in no way detracts from human dignity and self respect. The Customs Directive, on the other hand, requires the presence of an observer in the restroom while a subject performs excretory functions. The observer listens to the bodily fluids being expelled and witnesses the voiding process closely but not directly. This gross invasion of privacy constitutes a degrading procedure that so detracts from human dignity and self respect that it "shocks the conscience" and offends this Court's sense of justice. Rochin v. California, 342 U.S. 165 (1952). The Court concludes that the Customs Directive violates the self-incrimination clause of the Fifth Amendment.

The Drug Testing Plan Violates Penumbral Rights Privacy Guaranteed By The United States Constitution

The Court finds that the Customs Directive unconstitutionally interferes with the penumbral rights of privacy held by Customs workers. In Griswold v. State of Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965), the Supreme Court held that "specific

guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . These cases bear witness that the right of privacy . . . is a legitimate one . . . The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." Griswold, 85 S. Ct. at 1681-82. The constitutional right of personal privacy was reiterated by the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973). There the Court stated: "In a line of decisions . . . going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S. Ct. 100, 1001, 35 L. Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Roe, 93 S. Ct. at 726.

The Court finds that the Customs Directive detracts from the dignity of each Customs worker covered under the plan and invades the right of privacy such workers have under the United States Constitution. Excreting bodily wastes is a very personal bodily function normally done in private; it is accompanied by a legitimate expectation of privacy in both the process and the product. The Customs Directive unconstitutionally interferes with the privacy rights of the Customs workers.

The Drug Testing Plan Is So Unreliable As To Violate Due Process Of Law

The Court finds that the drug testing plan is far from an

infallible system. Indeed, the affidavit of a Customs worker who has already been tested, Benito D. Juarez, states that the laboratory representative mixed up his sample with that of another Customs worker:

> "After I urinated, I noticed that the laboratory representative was affixing a sticker to my sample bottle. The sticker he was affixing had the wrong social security number on it. He had already filled out the labels before collecting our samples, and apparently he placed Fred Robinson's sticker on my bottle. When I alerted him to his mistake, he went back and checked his papers to determine my social security number and then corrected his error."

Affidavit of Benito D. Juarez, Plaintiffs' Exhibit No. 6 at 3.

The entire process is fraught with the danger of mishaps and false-positive readings. The Affidavit of Dr. Arthur J. McBay, a toxicologist with a Ph.D. in Pharmaceutical Chemistry, describes the dangers:

> The EMIT screen suffers from limitations in its reliability. This test will give a positive result for the tested drug when other prescription and over the counter drugs have been ingested, and may react to food and other substances, including enzymes produced by the body itself. This is because of a phenomonon known as 'cross-reactivity.' The legitimate drugs that have triggered a positive result for marijuana, for example, include the anti-inflammatory drugs ibuprofen, fenoprofen, and naproxen, some of the most widely used drugs in this country. They are sold under the brand names Advil, Motrin, Nuprin, Rufen, Anaprox, Aponaproxen, Naprosyn, Navaonaprox and Nalfon. A number of drugs that are closely related in chemical structure to

amphetamines will also test positive, mainly diet and cold preparations containing ephedrine and phenylpropanolamine. These include Nyquil, Contac and other brand names. In addition, the immunoassay tests cannot distinguish between codeine, a legal drug, and heroin. Both are classified opiates.

I am also familiar with the Gas Chromatography/Mass Spectrometry method of urinalysis testing. If conducted properly, the combination of gas chromatography with mass spectrometry can provide a more reliable test for determining the presence of drugs in a urine sample, because it identifies the specific metabolites in urine samples. Positive identification, however, requires strict handling safeguards and procedures which insure that the samples are not exposed to excessive temperatures through the transportation process. The GC/MS test is significantly more expensive to conduct. . .

All drug testing procedures result in false positives. The reliability of all drug determinations, whether by immunoassay or GC/MS, depend on such factors as the certainty of specimen identification; specimen storage, handling, and preparation; preparation and storage of test reagents; proper cleaning and calibration of testing instruments and hardware; and the qualification and training of laboratory personnel performing the test and interpreting the results. The danger of carelessness in test performance and/or inadequately trained personnel may be a particular problem with immunoassays, which are popular for low-cost, large-scale screening of many specimens with readily available equipment and minimun personnel training. The problem nonetheless is also present when GC/MS is utilized.

Affidavit of Dr. Arthur J. McBay, Plaintiffs' Exhibit No. 8 at 3-4.

The Court concludes that the drug testing program is so fraught with dangers of false positive readings as to deny the Customs workers due process of law when they apply for promotion into covered positions. Furthermore, in balancing the legitimate law enforcement, societal and governmental interests of the defendant against the severity of the intrusiveness, the unreliability of the testing further convinces the Court that the drug tesing plan is unreasonable and not rationally related to achievement of the governmental interest.

The Defendant Has Failed To Show That A Legitimate Governmental Interest Has Been Threatened

That the drug testing plan is not rationally related to the achievement of a legitimate governmental interst is highlighted by the conspicuous absence of any statistics by the defendant showing any drug problem whatsoever among federal workers. Indeed, in a United States Government Memorandum from the Commissioner of Customs to all Customs Employees, dated March 13, 1986, the Commissioner stated, "I believe that Customs is largely drug-free. . ." Plaintiffs' Exhibit No. 2 at 1. Since Customs has not demonstrated a drug problem among its work force, the drug testing plan is an overly intrusive scheme that bears no rational relationship to the protection of an endangered governmental interest. The defendant simply has not shown that a legitimate governmental interest has been threatened.

Even if it could show that its interest in a drug-free work force were threatened, the means selected to achieve that end are overly intrusive. After weighing the legitimate governmental interests of the plan against the severity of the intrusiveness, the Court concludes that the drug testing plan is unreasonable.

Receipt Of A Federal Benefit Cannot Be Conditioned Upon Waiver Of Constitutional Rights

The Court holds that it is unconstitutional for the government to condition receipt of a federal benefit, in this case federal employment or promotion, upon the waiver of constitutional rights. If the government were permitted to compel waiver of constitutional rights in order to receive a federal promotion, there would be little stopping the government from extending the principle to require, for instance, that all those who wish to receive welfare benefits must consent to have their urine searched, or that those who wish to ride upon federal highways must consent to have their urine searched. Essentially, the plan requires the federal Customs workers to prove their innocence. Under the United States Constitution, persons are presumed innocent until proven guilty. The Customs Directive would reverse that as to Customs workers.

As Judge Sarokin eloquently noted in Capua, et al. v. City of Plainfield, Slip Op. No. 86-2992 (D.N.J. 1986):

> The invidious effect of such mass, round-up urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest. The City of Plainfield essentially presumed the guilt of each person tested. The burden was shifted onto each fire fighter to submit to a highly intrusive urine test in order to vindicate his or her innocence. Such an unfounded presumption of guilt is contrary to the protections against arbitrary and intrusive government interference set forth in the Constitution. . .

Capua, Slip Op. at 17.

It is up to the government to obtain evidence in a constitutionally permissive manner against those who are suspected of illicit drug usage. If the government has probable cause to suspect a particular Customs worker is using or selling illicit drugs on the job, a warrant should be obtained in a court of law.

The Drug Testing Plan Is Utterly Repugnant To The United States Constitution

The plan put forth in the Customs Directive is so utterly repugnant to the United States Constitution, that this Court has no choice but to permanently enjoin Commissioner William Von Raab from further implementing it.

WHEREFORE, the Petition for Injunctive and Declaratory Relief is GRANTED. The Motion to Dismiss is DENIED. The

defendant is ENJOINED from conducting urinalysis drug testing in the absence of probable cause. The Court GRANTS a DECLARATORY JUDGMENT declaring the drug testing program to be unconstitutional.

Robert F. Collins
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NATIONAL TREASURY EMPLOYEES UNION and ARGENT ACOSTA

VERSUS

WILLIAM VON RAAB, Commissioner, United States Customs Service

CIVIL ACTION

NO. 86-2882

SECTION "C"

* * * * * * * * * * * * * * * * *

J U D G M E N T

This action came on for trial on November 12, 1986 before the Court, Honorable Robert F. Collins, District Judge, presiding, and the issues having been duly tried, and a decision having been duly rendered finding the Customs Directive urinalysis drug testing plan to be utterly repugnant to the United States Constitution,

IT IS ORDERED, ADJUDGED AND DECREED that Commissioner William Von Raab, defendant herein, be PERMANENTLY ENJOINED from conducting urinalysis drug testing in accordance with its published plan.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that DECLARATORY JUDGMENT be GRANTED in favor of the National Treasury Employees Union and Argent Acosta, against Commissioner William Von Raab, declaring the Customs urinalysis drug testing plan unconstitutional.

New Orleans, Louisiana, this the 14th day of November, 1986.

Loretta G. Whyte

LORETTA G. WHYTE, CLERK OF COURT

FEE_____
PROCESS_____
X CHARGE_____
CITE_____
DOCS_____

APPROVED AS TO FORM:

Robert F. Collins

UNITED STATES DISTRICT JUDGE

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

Office of the Director

November 12, 1986

Dr. Ralph C. Bledsoe
Special Assistant to the President and
Executive Secretary of the Domestic Policy Council
The White House
Washington, D.C. 20500

Dear Dr. Bledsoe,

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 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.

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.

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.

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:

(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;

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

(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;

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

, for purposes of drug testing, is possible. Accordingly, these determinations must arily an agency responsibility. In meeting this responsibility, agencies should o guidance on position sensitivity contained in FPM Chapters 731 and 732.

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

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

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

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

DRAFT

(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.

(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."

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 unavailablility 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

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.

(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:

(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).

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.

(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.

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.

(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.

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.

(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. Preponderence 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