

Ronald Reagan Presidential Library
Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Bledsoe, Ralph C.: Files
Folder Title: [Drug Abuse Policy - December
1986] (1)
Box: 26

To see more digitized collections visit:

<https://reaganlibrary.gov/archives/digital-library>

To see all Ronald Reagan Presidential Library inventories visit:

<https://reaganlibrary.gov/document-collection>

Contact a reference archivist at: reagan.library@nara.gov

Citation Guidelines: <https://reaganlibrary.gov/citing>

National Archives Catalogue: <https://catalog.archives.gov/>



U.S. Department of Justice

Civil Division

3998

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 22 1986

MEMORANDUM

TO : Addressees Listed Below

FROM : *RKW* Richard K. Willard
Assistant Attorney General
Civil Division

RE : Proposed Recommendation Of The Legislative
Task Force On Contractor Drug Testing

We have received responses from various agencies regarding current drug testing by their contractors and expressing their views as to whether the federal government should impose a government-wide policy of requiring that contractors conduct drug testing of their employees. With the exception of the Departments of Defense and Energy, most agencies are not interested in imposing such a requirement at this time. Based on the lack of interest, as well as the practical and legal implications previously discussed at our meetings, I propose that our task force recommend to the Working Group on Drug Abuse Policy that no government-wide requirement for contractor drug testing be imposed at this time. Attached is a draft memorandum to Carlton Turner explaining the basis for this recommendation.

If you believe that a meeting of the task force is necessary to discuss this recommendation before submitting it to the Working Group, please advise Bob Cynkar (633-3309) or Nanette Everson (633-1258) of my staff by December 30.

Attachment

Addressees:

Michael E. Baroody
Gary Bauer
Donald Ian Macdonald
Rick Ventura
J. Michael Dorsey
James Colvard
Lenore Mintz
Joel M. Mangel
Ronald E. Robertson
Deborah L. Steelman

Bruce Wood
Lee Cummings
Kevin P. Cummings
Jack M. Kress
Dennis H. Trosch
John Walters
Karen Wilson
Ellen Reichenbach
Robert H. Brumley
Gregory S. Dole

cc: ✓ Carlton Turner
Becky Norton Dunlop
Arnold I. Burns



U.S. Department of Justice

Civil Division

DRAFT

Office of the Assistant Attorney General

Washington, D.C. 20530

Domestic Policy Council
Deliberative Document

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

FROM: Richard K. Willard
Chairman
Legislative Review Task Force

RE : Report of the Legislative Review Task Force Regarding
Requiring Government-wide Contractor Drug Testing

The Legislative Review Task Force has met on several occasions to consider what action, if any, should be taken regarding drug testing of employees of contractors who do business with the federal government. Specifically, we have considered whether the federal government should adopt a government-wide policy requiring government contractors to conduct drug testing of their employees. Based on the practical and legal implications discussed below, we recommend against imposing a government-wide requirement that contractors conduct such testing of their employees at this time. However, to the extent that an agency wishes to have a particular contractor conduct employee drug testing, we are available to advise the agency of the possible constraints of such a requirement and assist them in the fashioning of a specific contractor drug-testing requirement.

One practical factor cautioning against imposing a uniform requirement that all government contractors conduct drug testing of their employees is the significant diversity among the sizes, responsibilities and missions of government contractors. While some agencies, such as the Department of Defense, may have contractors who employ a large number of employees, other agencies, such as Action, have primarily small contractors. In addition, the nature of federal government contractors may vary from agency to agency. For example, more than half of the Department of Health and Human Services contractors are colleges, universities, state and local governments and non-profit organizations. A uniform requirement that all government

contractors test employees for use of illegal drugs could significantly damage the ability of an agency to work with small contractors and public and private-sector groups or groups who may wish to donate a portion of their services.

While an attempt could be made to formulate a policy articulating which contractors should be subject to an employee drug-testing requirement, such an undertaking would most likely be cumbersome and very time-consuming considering the number and diversity of government contractors. Moreover, such varied requirements would require amendments to the federal acquisition regulations. Because we do not know at this time which contractors are already testing or planning to test in the future on their own initiative and which are not, a requirement of government-wide contractor testing would be inadvisable.

An additional practical consideration in requiring drug testing of all contractors is the current availability of laboratories that are equipped to handle and accurately test the large volume of drug testing that would be entailed pursuant to a government-wide requirement of contractor testing. Particularly at this time, as federal agencies are implementing drug-testing programs for federal employees pursuant to the President's Executive Order and contracting with laboratories for a substantial volume of drug testing nationwide, a similar requirement that all government contractors also procure such services may result in either over-burdening otherwise qualified laboratories or having contractors utilize laboratories which do not have the capabilities to conduct accurate testing. Obviously, the accuracy of the testing results and the promptness of testing specimens and reporting confirmed positive results are essential not only to the validity of any drug-testing program, but also to the success of any ensuing litigation. Thus, it would make the most sense to require any contractor testing gradually, after careful analysis of which contractors should conduct testing and there is sufficient laboratory availability to conduct needed testing.

Another important consideration in the analysis of mandatory contractor drug testing is that to the extent that a contractor is required by regulation or its contract with the United States to implement a drug-testing program for its employees, that action is likely to be considered "state action" subjecting the contractor's action to constitutional scrutiny.¹ The Supreme

¹ The personal liberties recited in the Constitution, including the Fourth Amendment prohibition against unreasonable search and seizures, are not protected against individual action. Rather, the Amendments afford protection against "state action," that is, action by the government.

Court's decisions in this area make it clear that conduct of private parties may constitute "state action" where the challenged conduct is "fairly attributable to the state." Rendell-Baker v. Kohn, 457 U.S. 830,838 (1982). The fact that federal acquisition regulations (or individual contractual provisions) would require contractor drug testing of employees would probably lead a court to conclude that a contractor's drug program constitutes state action.

Similar constitutional challenges have been raised to drug testing programs adopted by a number of defense contractors at the request of the U.S. Army Armament, Munitions and Chemical Command are currently pending in Oil, Chemical and Atomic Workers v. United States Department of the Army (D.D.C., filed September 5, 1986). In short, government-mandated contractor drug testing would provide a new avenue of attack against hitherto private drug testing programs by creating an arguable basis for characterizing contractor drug testing programs as federal action. While we believe that the constitutionality of government drug-testing programs will eventually be upheld by the courts, extensive litigation on this issue is very likely.

Additionally, government inducement of contractor drug-testing programs may result in both the contractors and the federal government having to defend in court contractor drug-testing programs that would otherwise not come before a court at all. Ordinarily, disputes over programs adopted by private employers would have to be resolved in accordance with applicable collective bargaining agreements, which often provide for grievance and arbitration procedures as exclusive remedies. Federal involvement would give the unions a pretext for arguing the existence of non-arbitrable issues (i.e., issues going to the validity of the government's requirements), and thus for invoking the jurisdiction of the courts. Further, to the extent that employees or their unions challenge the federal requirement in the context of challenges to contractors' actions thereunder, the government and its contractors may become embroiled in widely scattered litigation and find themselves in the position of defending not only the regulation or contractual provision, but also the manner in which particular contractors implement them.

These difficulties generated by government-mandated drug testing seem all the more unnecessary in light of the fact that a number of government contractors have already adopted drug testing programs on their own initiative and more may be expected to adopt such programs as employers' experience with employee drug testing continues to grow.

The Legislative Task Force elicited responses from various agencies regarding current drug testing by their contractors and their views as to whether the federal government should impose a

government-wide policy of requiring that contractors conduct drug testing of their employees. With the exception of the Departments of Defense and Energy, most agencies are not interested in having such a requirement imposed at this time. Based on the lack of interest, as well as the practical and legal implications outlined above, we recommend that no government-wide requirement for contractor drug testing be imposed at this time.

THE WHITE HOUSE
WASHINGTON

December 23, 1986

MEMORANDUM FOR THE WORKING GROUP ON DRUG ABUSE POLICY

FROM: CARLTON E. ^{CT}TURNER, CHAIRMAN

SUBJECT: Drug Testing

Attached for your information is a letter from Representative Patricia Schroeder concerning drug testing by Federal agencies. Representative Schroeder has reportedly sent the letter to each agency head. The letter will be discussed at the next Working Group meeting, scheduled for the first part of January 1987.

In this regard, I request that the Department of Justice prepare comments concerning any legal implications of the letter. Further, I request that OPM provide the Working Group with recommendations for responding to the letter.

As you may know, Ralph Bledsoe will take over as Chairman of the Working Group on January 1, 1987. It has been my honor to have served as Chairman during the five very productive months since the group was formed. I appreciate your dedication to a drug-free America and wish you every success in the future.

Attachment

PATRICIA SCHROEDER, COLORADO, CHAIRWOMAN
 GERRY SIKORSKI (MINNESOTA) CHARLES PASHAYAN JR. CALIFORNIA
 MERVYN M. DYMALLY CALIFORNIA FRANK HORTON NEW YORK

U.S. House of Representatives
 COMMITTEE ON POST OFFICE AND CIVIL SERVICE
 SUBCOMMITTEE ON CIVIL SERVICE

122 CANNON HOUSE OFFICE BUILDING

Washington, DC 20515

TELEPHONE (202) 225-4025

December 8, 1986

Honorable Lee M. Thomas
 Administrator
 Environmental Protection Agency
 Washington, DC 20460

Dear Mr. Administrator:

The Office of Personnel Management (OPM) promulgated guidelines entitled "Establishing a Drug-Free Federal Workplace," on December 1, 1986. I urge you to ignore these guidelines. They are contrary to the provisions of the Executive order on drug testing. There is no authority in law or regulation for the random program described in the guidelines. No funds have been authorized or appropriated for this purpose. On several key issues -- randomness, consent, and penalties -- the guidelines are an open invitation to litigation. Your agency could better perform its mission and save the taxpayers money by ignoring the OPM issuance.

1. Random Testing. Executive Order 12564 [51 Fed.Reg. 32,889 (1986)], does not authorize random testing. The order requires agency heads to establish drug testing programs, but the nature and extent of such testing is left to the discretion of the agency head. Indeed, the word "random" does not appear in the order.

Yet, random testing is at the crux of the OPM guidelines. Sections 3(a)(4) and 3(a)(5) of the guidelines spell out how to conduct tests in a random manner to avoid charges of arbitrary and capricious agency action. The guidelines emphasize that the alternative to random testing is comprehensive testing of everyone eligible, a far more expensive proposition for the agency.

OPM simply ignores the constitutional issues raised by a random testing program. Agency heads contemplating such a program cannot afford to do so. Almost every court which has considered a random testing program has struck it down as violating the Fourth Amendment's prohibition against unreasonable search and seizure. Most recently, the U.S. District Court for the Eastern District of Louisiana decided that the random testing program of the U.S. Customs Service was unconstitutional, and issued a permanent injunction prohibiting the Customs Service from conducting random tests of its employees. (National Treasury Employees Union v. von Raab, USDC E.La, Nos. 85-3522 and 35-4038, November 12, 1986). A

2/10/86

suit by three federal employee organizations challenging the constitutionality of the Executive order is pending before the same court.

2. Consent. The guidelines raise the issue of consent in two areas. The first is consent to the test itself as a condition of employment; second, consent to the release of the results of a urinalysis test to agency management.

Under the guidelines, if an employee or applicant does not give consent, he or she cannot hold the job. Section 4(d) states that an agency must take disciplinary action, including removal, against an employee who refuses to take a urinalysis test. A refusal to consent to release of drug test results to management is to be considered a refusal to take the test for disciplinary purposes.

The Executive order does not discuss consent, nor penalties for refusal to take a drug test. The order does require that drug testing programs "protect the confidentiality of test results" (Sec. 4(c)). Yet the OPM guidelines, under which an employee's test results will be disclosed to a minimum of three agency management officials, destroy confidentiality.

Further, agencies cannot simply require drug testing as a condition of employment. An individual cannot be forced to give up constitutional rights for the opportunity to work for the Federal government. And, an employee's consent to drug testing (waiving a Fourth Amendment right) or consent to release of test results (waiving confidentiality of patient records under 42 U.S.C. 290ee-3) would surely be held involuntary when withholding consent could lead to loss of a job. If an agency lacks an employee's voluntary consent, requiring the employee to submit to drug testing would make the results of such test unuseable and could well make both the agency and agency officials liable for violating the employee's rights.

3. Penalties. The Executive order stresses employee assistance, counseling, and rehabilitation. Even if an employee is temporarily removed from his or her job pending successful completion of a drug rehabilitation program, under the Executive order, that employee would be allowed to return to the job.

Under the guidelines, an employee could be fired and must be punished after one positive test or refusal to take the test and must be fired after two. Mandatory penalties of this sort are rare in Federal personnel law because mandatory penalties are frequently counterproductive and bad management.

Mandatory removal is particularly inappropriate when it is based on a technological process with a documented error rate of at

least 5% and severe quality control problems. A 1985 report on drug testing laboratories by the Centers for Disease Control found false positive error rates of up to 66 percent.

The guidelines mandate penalties after one positive test. Yet, they fail to mention the requirements of the nexus test and the Rehabilitation Act. The guidelines conveniently ignore the substantial job-relationship and reasonable accommodation hurdles which an agency must clear before it can impose any penalty. Taking an action against an employee who tests positive is a major legal undertaking for an agency. Whether this is the best use of your agency's limited resources is a decision for you to make, not OPM.

4. Cost. The White House has said that the drug testing program would cost \$56 million to implement. Office of Management and Budget officials subsequently admitted that this figure was pulled out of the air. I estimate the cost at closer to \$300 million. Congress has not authorized any funds for drug testing programs. Therefore, agencies must divert funds from authorized programs into any drug program.

Regardless of whether a government-wide drug testing program costs \$56 million or \$300 million, implementation of the guidelines will reduce the resources otherwise available for achieving the mission of your agency.

5. Human Dignity. Individuals are hired to perform work for the people of the United States. They are not hired to be escorted into a rest room, guarded while they urinate, and have the urine they produce checked for "color, temperature, or other evidence that tampering may have occurred." Management officials were not hired to act as rest room guards.

I find this entire process demeaning to human dignity and improper for the government. The drug testing fad is a politically motivated response to a serious social problem. As the head of a Federal agency, you can prevent this degradation from taking place. I urge you to do so.

With kind regards,

Sincerely,



PATRICIA SCHROEDER
Chairwoman



Office of the Director

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

January 9, 1987

The Honorable Patricia Schroeder
Chairwoman, Subcommittee on Civil Service
Committee on Post Office and Civil Service
U.S. House of Representatives
122 Cannon House Office Building
Washington, D.C. 20515

Dear Representative Schroeder:

This responds to your letter dated December 8, 1986, concerning the guidance issued by the Office of Personnel Management (OPM) on the implementation of President Reagan's Executive Order on a Drug-Free Federal Workplace.

Your letter suggests that agencies ignore the guidelines issued to implement the Executive Order on the grounds that the guidelines are contrary to the intent of the Executive Order. To the contrary, the guidelines are consistent with the Executive Order the President issued in September. That Executive Order directs OPM to issue government-wide guidelines for the implementation of the President's initiative. OPM worked closely with both the Department of Justice (DOJ) and the Department of Health and Human Services (HHS) to ensure that our guidelines are legally acceptable and complement the scientific and technical guidelines to be issued by HHS. In summary, the guidelines are correct implementing guidance of the Executive Order, and therefore there is no legal or policy reason which justifies ignoring them.

You have raised five objections to the guidelines. I will respond to them in order. First, you state that the Executive Order does not authorize random testing. You also state that OPM has ignored the constitutional issues raised by random drug testing programs. As you have noted, the Executive Order requires agency heads to establish programs to test for the use of illegal drugs by employees in sensitive positions. That requirement mandates the testing of employees in those sensitive positions designated by their agency head for testing. The guidelines provide agencies with alternatives for meeting the President's requirement that employees in those testing designated positions be tested for illegal drug use. One of those alternatives is random testing.

Noting the option of random testing of employees in sensitive positions in the guidelines does not demonstrate that OPM has ignored the constitutional issues that have

been raised by Federal employee unions. Indeed, many of the provisions of the guidelines, notably those on general and specific notice, privacy during drug testing, confidentiality of records, designation of sensitive positions for testing, and reasonable suspicion of illegal drug use as a basis for drug testing, were intended to address questions about the constitutionality of drug testing programs. See National Treasury Employees Union v. Von Raab, Civ No. 86-3522, slip op. (E.D. La. Nov. 14, 1986); Penny, et al. v. City of Chattanooga, No. CIV-1-86-417, slip op. (E.D. Tenn. Nov. 13, 1986); Lovvorn, et al. v. City of Chattanooga, No. CIV-1-86-389, slip op. (E.D. Tenn. Nov. 13, 1986); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986); Capua v. City of Plainfield, Civ. No. 86-2992, slip op. (D.N.J. Sept. 18, 1986). I believe that we have addressed many of those questions in ways that will allow the President's initiative to withstand constitutional challenge. More importantly, I believe these programs will responsibly balance the undeniable public interest in a drug-free Federal workforce and the privacy interests of individual Federal employees.

Second, you assert that two forms of employee consent required under the guidelines are impermissible. As you note, the guidelines provide that an agency will take disciplinary action against those employees who refuse to take the drug test. In addition, the guidelines provide for consent to the limited release of drug test results and that failure to give that consent is tantamount to a refusal to take the drug test. You state that these provisions are impermissible because they condition Federal employment on the taking of a drug test. You assert that that precondition requires the waiver of a constitutional right against an unreasonable search and could make both the agency and agency officials liable for the violation of an employee's constitutional rights.

The provisions of the guidelines at issue are a necessary adjunct to the President's directives on drug testing. Without them, the program would be ineffectual. The provision requiring agencies to discipline employees for refusing to take a drug test allows agencies a broad latitude to take disciplinary action, not necessarily removal action, against an employee for that refusal.

In addition, the Executive Order and the guidelines require consent to testing in the same manner as any employee may be required to submit to testing for fitness for duty as a condition of employment. The requirement that

an employee submit to testing as a condition of employment - whether the consent is implied or express - raises no greater Fourth Amendment issue than that raised by such other fitness for duty testing as physical examinations that some Federal employees are routinely required to consent to as conditions of employment. In any event, as you are aware, Federal employees may be required to consent to reasonable requirements or limitations on their conduct.

In addition, refusal to give consent to limited release of drug test results does not destroy the confidentiality of drug test results required in the Executive Order. The limited release contemplated in the guidelines is required for agencies to use the drug test results as the President directed. Failure to consent to that limited release would constitute refusal to take the drug test and would be treated accordingly. You make reference to the confidentiality of patient records required under 42 U.S.C. 290ee-3 in support of your assertion that requiring consent to release of drug test results is inappropriate. The guidelines require, as did the Executive Order, that agency drug testing programs should include confidentiality requirements for drug test results consistent with the requirements for the confidentiality of patient records.

Employment is not conditioned upon consent to drug testing. Even if provisions of the Executive Order or the guidelines were to be found unconstitutional, neither agencies nor their officials would be held liable for violation of their employee's constitutional rights. As Judge Edenfield of the United States District Court for the Southern District of Georgia stated in his recent decision enjoining the Army from conducting its drug testing program at Fort Stewart, officials administering the drug testing program will surely be entitled to qualified immunity from liability for the violation of their employee's constitutional rights because the constitutionality of the testing program has not yet been decided. AFGE v. Weinberger, No. CV486-353 (S.D. GA. December 2, 1986), slip op. at 26.

Third, you state that the Executive Order stresses employee assistance, counseling, and rehabilitation and that the guidelines improperly require disciplinary action be taken against employees who test positive for illegal drug use. You also state that the requirement for mandatory removal after a second confirmed positive test result is inappropriate because mandatory penalties are "counterproductive and bad management" and because drug tests are inaccurate. You add that the guidelines fail to

mention the requirements of current law on nexus and the Rehabilitation Act.

I believe that OPM's guidelines address the President's strongly held and publicly expressed conviction that rehabilitation is an extremely important part of the overall drug-free workplace initiative. However, the President issued Executive Order 12564 on September 15, 1986 which further outlined his publicly announced plans. Chief among the several aspects of the program as enunciated in the Executive Order and as discussed in the OPM guidelines is the opportunity afforded Federal employees for counseling and referral for treatment or rehabilitation. Federal agencies are instructed to strengthen their Employee Assistance Programs to meet this need. In addition, the Executive Order requires additional drug awareness programs and supervisory training on drug abuse. The OPM guidelines reflect these approaches to the drug abuse problem with a major emphasis on treatment and rehabilitation. Attached to the guidelines is a Model Employee Assistance Program, a list of current operating drug abuse treatment consortia, and a list of treatment facility directories for agencies to use.

Although the President has extended his hand of compassion, he has made it clear that illegal drug use is unacceptable. Americans and Federal employees expect a safe, drug-free workplace. Therefore, the Executive Order also includes a discussion of the disciplinary aspects of the initiative. Sections 5(b) and 5(d) of that Executive Order make available disciplinary actions, already available under existing law and regulation, to the agencies for use in certain situations involving employees found to use illegal drugs. Section 5(b) of the Executive Order requires agencies to initiate disciplinary action upon an initial confirmed positive test result. Section 5(d) of the Executive Order requires agencies to initiate removal action against employees who are found to use illegal drugs once and thereafter refuse to obtain counseling or rehabilitation or do not refrain from using illegal drugs. The efficiency of the civil service is not promoted by retaining illegal drug users on the Federal payroll once they have been given the opportunity but have failed to rehabilitate themselves.

The guidelines follow the President's Executive Order in their provisions allowing agencies a broad range of disciplinary options for illegal drug use based on one confirmed positive test result. While the guidelines' overall intent and expression is for Federal managers to provide a helping hand to Federal employees with a drug abuse problem, agencies' inherent discretion to take action against employees who engage in misconduct was recognized by

the President in the Executive Order and is further explained in the OPM guidelines.

In some instances, a removal action (one of the possible disciplinary actions available to a Federal manager) based upon a first confirmed positive test result may be warranted. Some agencies in unique circumstances (for instance, the FBI or Secret Service) may be faced with no realistic alternative for some of their employees but to remove them for misconduct, no matter whether that misconduct involves illegal drugs, violence, or other activities. We do not expect this situation to arise often, nor do we expect such discretion to be unfairly applied. Moreover, an employee will, as always, have available the protections of the Civil Service Reform Act for the review of any possible abuse of such discretion by an agency.

One important aspect of both the Executive Order and the guidelines is their emphasis upon voluntary self-referral. For those employees who avail themselves of the opportunity to step forward and get help, the guidelines and the Executive Order extend a helping hand. Both the Executive Order and the guidelines provide that agencies are not required to take disciplinary action with regard to employees who voluntarily identify themselves as illegal drug users, obtain counseling or rehabilitation, and thereafter refrain from using illegal drugs.

You state that the guidelines ignore the allegedly inherent flaws in mass drug-testing. You also suggest that penalties should not be imposed for a positive drug test because of the alleged inaccuracy of drug testing. Of course, neither the Executive Order nor the guidelines provide that penalties are to be imposed solely because of a positive drug test; it is illegal drug use that triggers and warrants disciplinary action. More to the point, however, there should be no concern regarding the reliability of the drug testing required by the Executive Order. In testimony before the Human Resources Subcommittee for the Committee on Post Office and Civil Service, the Office of Technology Assessment supported the proposition that a two-tier testing procedure using an initial screening test followed by a specific confirming test like gas chromatography/mass spectrometry provides highly reliable results that are difficult to dispute.

The OPM guidelines clearly contemplate the use of such a confirming test in a two-tiered testing procedure. Throughout the guidelines confirmed test results are discussed. For example, see Sections 3f(4), 4a(6), 4f(6), 4f(7), 5a, 5d, and 5d(7). We anticipate that the scientific

and technical guidelines to be issued by the Department of Health and Human Services will set out the preferred test procedures, including a confirming test, and laboratory quality control in detail. It is also important to note that both the Executive Order and the guidelines emphasize that agencies are required to conduct their drug testing programs in accordance with those scientific and technical guidelines.

You also assert that the guidelines ignore existing law. In both the Executive Order, at section 5(g), and in the guidelines, at section 5(d), it is noted that the requirements of the Civil Service Reform Act and other pertinent statutes must be met when disciplinary action is taken. As you have noted in your letter, the mandates of existing law with regard to taking disciplinary actions have not changed. Agencies must operate within those constraints when taking disciplinary actions for illegal drug use.

Fourth, you state that the costs of the implementation of the drug testing guidelines will improperly reduce the resources otherwise available for achieving the mission of an agency. The President has stated that the drug abuse problem in our society is of grave national importance. In support of that undeniable fact, he has directed agencies to establish drug testing programs for Federal employees. I believe that it is a highly appropriate use of agency resources to provide their workforce with the assistance necessary to thwart a tremendous long term threat to the health and safety of the Federal workforce. The importance of expending adequate resources to fund agency drug-testing programs is twofold. Each agency wants to have the most reliable testing available to ensure the validity of a positive test before disciplining an employee. At the same time, the reliability of the testing is essential to defend any challenges to positive drug test results.

Finally, you assert that the drug testing program is demeaning to human dignity and is improper for the Government. Such an assertion ignores the drastic impact of illegal drug use on the dignity of millions of addicted Americans.

I believe that the guidelines require agencies to conduct their drug testing programs with maximum respect for human dignity. The scientific and technical guidelines soon to be issued by the Department of Health and Human Services will further elaborate upon privacy protections to be afforded employees during the testing process.

In conclusion, I must reiterate that I believe that the

guidelines are fully consistent with the President's expressed intentions for establishing a drug-free Federal workplace. Both the Executive Order and the guidelines address the President's comprehensive education and assistance effort in a complementary fashion. However, the President also recognized that illegal drug use by Federal employees is contrary to the efficiency of the service. The guidelines set out the options available to Federal managers and supervisors in assisting employees who need help and in disciplining those who are unwilling or unable to respond to that assistance.

I hope that the foregoing responses to the objections that you have raised to the program will prove helpful as you formulate your position on the President's program and that you will acknowledge the importance of supporting the President's important and valuable initiative for a drug-free Federal workplace.

Sincerely yours,

A handwritten signature in cursive script that reads "Constance Horner".

Constance Horner
Director

Congress of the United States
House of Representatives
Washington, D.C. 20515

Orig. Hewitt
C/S: Director
Colvard
Cooley
Agnew
Hall
Havarrro
Selapani
Tafferty

December 17, 1986

RECEIVED

DEC 19 1986

The Honorable Constance Horner
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Office of the Director

Dear Ms. Horner:

The Office of Personnel Management (OPM) recently issued regulations for "Establishing a Drug-Free Federal Workplace." These guidelines become effective immediately and are designed to implement President Reagan's Executive Order 12564 of September 15, 1986. We strongly urge you to rescind, reformulate or postpone the implementation of these regulations.

We believe that OPM's regulations directly conflict with the President's wish to initiate a program that would not result in the punishment or firing of federal employees. In some instances, OPM calls for the removal of an employee who refuses to take a drug test or who tests positive after the "first confirmed determination."

Secondly, these regulations significantly underestimate the problems associated with large scale drug-testing. The Office of Technology Assessment (OTA) has noted "intrinsic limitations with the drug screening tests." In testimony before the House Subcommittee on Human Resources on September 16, 1986, OTA emphasized, in particular, insufficient quality control at laboratories performing the tests.

We question the consistency of OPM's regulations with 5 U.S.C., Sect. 7543, which states in part, "an agency may take an action...against an employee only for such cause as will promote the efficiency of the service." Congress rejected attempts by the Administration to amend this law last year. We are concerned that OPM is now attempting to circumvent Congressional intent through the proposed regulations.

The Honorable Constance Horner

December 17, 1986

Page 2

A decision rendered by the Federal Court for the Eastern District of Louisiana on November 12, 1986 -- that a drug-testing program proposed by the U.S. Customs Service was an invasion of privacy and unconstitutional -- is further grounds for a reconsideration of the program.

We urge you to rescind OPM's drug guidelines, or at least to postpone implementation until a Federal Court ruling is made on the lawsuit filed by federal employees against the President's Executive Order -- National Treasury Employees Union et al. vs. Ronald Reagan (Docket # 86-4058 in the Eastern District of Louisiana). We look forward to your attention to our concerns at your earliest convenience.

Sincerely,

Edward F. Ferguson

Norm Dicks

Gary L. Ackerman

Scott A. Allen

Francis

Bob Kesterman

Murray H. Squally

Paul E. Bui

Esteban E. Torres

Albert P. Bond

Art J. Allen

Matthew B. Martinez

Mary P. Callahan

Barbara D. Doser

BR Livingston

Kaveh M. Mousavi

Robert Garcia

Robert J. Muzich

Charles A. Hayes

Frank McCloskey

Vil Fazio

Nancy L. Johnson

Mo Udell

Coelho

Don Edwards

Robert J. Matsui

Geny Sikorski

Baumgardner

Walter S. Fauntleroy

Van L. Hill

Marcus Kastner

John W. Coakley

BY ORDER OF SIGNATURE
FROM LEFT TO RIGHT:

THE HONORABLE EDWARD F. FEIGHAN

THE HONORABLE GARY L. ACKERMAN

THE HONORABLE EDOLPHUS TOWNS

THE HONORABLE MERVYN M. DYMALLY

THE HONORABLE ESTEBAN E. TORRES

THE HONORABLE CHESTER G. ATKINS

THE HONORABLE MARY ROSE OAKAR

THE HONORABLE BOB LIVINGSTON

THE HONORABLE ROBERT GARCIA

THE HONORABLE CHARLES A. HAYES

THE HONORABLE VIC FAZIO

THE HONORABLE MORRIS K. UDALL

THE HONORABLE DON EDWARDS

THE HONORABLE AL SWIFT

THE HONORABLE BARNEY FRANK

THE HONORABLE TOM FOGLIETTA

THE HONORABLE GEORGE CROCKETT, JR.

THE HONORABLE NORM DICKS

THE HONORABLE PAT SCHROEDER

THE HONORABLE BOB KASTENMEIER

THE HONORABLE DAVID E. BONIOR

THE HONORABLE ALBERT G. BUSTAMA

THE HONORABLE MATTHEW G. MARTIN

THE HONORABLE BARBARA BOXER

THE HONORABLE DAVE McCURDY

THE HONORABLE ROBERT J. MRAZEK

THE HONORABLE FRANK McCLOSKEY

THE HONORABLE NANCY L. JOHNSON

THE HONORABLE TONY COELHO

THE HONORABLE ROBERT J. MATSUI

THE HONORABLE GERRY SIKORSKI

THE HONORABLE WALTER E. FAUNTRO

THE HONORABLE MARCY KAPTUR

NINETY-NINTH CONGRESS

GARY L. ACKERMAN, NEW YORK, CHAIRMAN

GUS YATRON, PENNSYLVANIA
MORRIS K. UDALL, ARIZONA

DAN BURTON, INDIANA
BENJAMIN A. GILMAN, NEW YORK

U.S. House of Representatives

COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON HUMAN RESOURCES

511 HOUSE OFFICE BUILDING ANNEX 1
Washington, DC 20515

TELEPHONE (202) 225-2821

OGC per
ORIG: Seaman, K...
cc: Di...
Haw...
L...
Hew...

RECEIVED

DEC 01 1986

November 29, 1986 Office of the Director

The Honorable Constance Horner
Director, Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Dear Mrs. Horner:

I have reviewed OPM's regulations on "Establishing a Drug-Free Federal Workplace", which are scheduled to go into effect immediately. The regulations are seriously flawed, and directly contradict President Reagan's previous statements on the purposes of drug-testing. For these reasons, I request that OPM rescind the regulations.

First, the regulations conflict with the President's stated objectives. In an interview published by Newsweek on August 11, the President stated:

I would rather see a voluntary program in which we can say to them...that they won't lose [their] jobs there won't be punishment. What there would be is an offer of help to tell people, if this is your problem let us help you cure yourself of addiction.

OPM's regulations, however, are highly punitive, even authorizing removal of an employee for refusing to take a drug test or after just one confirmed finding of drug use. Once again, the President has said one thing, but his Administration has done something else.

Second, OPM's regulations are directly contrary to Federal law. 5 USC §7513(a) states that a Federal agency may take adverse action against an employee "only for such cause as will promote the efficiency of the service." That is, there must be a "nexus" between an employee's off-duty activities and his or her on-duty performance. Last September, the Administration proposed legislation to revise that section of the law, but Congress did not enact it and 5 USC §7513(a) remains in full force.

Third, the regulations ignore the flaws inherent in mass drug-testing. On September 16, the Subcommittee on Human Resources received expert testimony from the Office of Technology Assessment, which stated:

Mrs. Horner
Page two
November 29, 1986

There are intrinsic limitations with the drug screening tests, and errors are inevitable from other substances in the urine and from laboratory performance errors, especially in mass screening programs. However, when positive results from screening tests are confirmed with a specific test such as g.c./m.s. [gas chromatography/mass spectrometry], the results are highly reliable and difficult to dispute. Errors in performing or interpreting the g.c./m.s. have occurred, but the principal area in which improvement is needed is in the performance of the initial screening tests, where the quality of the laboratories and the proficiency of laboratory personnel need to be constantly monitored.

In short, "false positives" can occur at both the initial screen and the confirmatory test. Assistant Attorney General Richard K. Willard testified before the Subcommittee on September 25 and stated: "I am not willing to accept any number of false positives as being acceptable." Yet OPM's regulations are silent on quality control of the laboratories which will perform initial and confirmatory tests, deferring that question to "technical guidelines" to be published by the Department of Health and Human Services (HHS). OPM's regulations should not go into effect until HHS has issued its guidelines and they have been reviewed by the scientific community.

Finally, I call your attention to the many reports in the media of a burgeoning business in the sale of "clean" urine samples. While this may conform with the Administration's entrepreneurial spirit, it further confirms warnings I issued during the Subcommittee's hearings that mass drug-testing programs will serve only to brand the innocent as guilty while permitting hardened drug users (assuming there are any in the Federal employ) to go free.

In view of these flaws and contradictions, and in view of the pending suit by Federal employees challenging the constitutionality of drug-testing, I ask OPM to rescind its regulations and to permit a period of public comment on the issues they raise.

Sincerely,


Gary J. Ackerman
Chairman

cc: Attorney General Meese

STENY H. HOYER
8TH DISTRICT, MARYLAND

DEMOCRATIC STEERING
AND POLICY COMMITTEE

CO-CHAIRMAN
COMMISSION ON SECURITY AND
COOPERATION IN EUROPE

APPROPRIATIONS COMMITTEE

TREASURY, POSTAL SERVICE,
GENERAL GOVERNMENT

LABOR,
HEALTH AND HUMAN SERVICES,
EDUCATION

DISTRICT OF COLUMBIA

Congress of the United States

House of Representatives

Washington, DC 20515

December 17, 1986

orig. Herbitt

CYS: Director

Colvard

Agnew

Gall

Happerty

RECEIVED

DEC 24 1986

Office of the Director

The Honorable Connie Horner
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Dear Ms. Horner,

I am writing to express my strong opposition to the guidelines your Office recently issued regarding drug testing for Federal employees and to the Executive Order issued by the President, requiring drug testing for Federal employees in "sensitive positions."

First, the Executive Order invades the basic privacy of the Federal worker. It presumes the existence of a drug problem among these workers, which has never been shown to be the case. Second, by defining "sensitive positions" so broadly that it could be construed to encompass nearly every Federal worker, the Executive Order creates a dragnet approach which mandates searches and seizures without probable cause or reasonable suspicion. Finally, the Order fails to recognize that all drug testing procedures result in false positives. By allowing action to be taken against employees on the results of a single drug test, which could be false, the employee's rights of due process are savaged.

Because of these concerns, the Executive Order has had a serious negative impact on employee morale. The Executive Order however, is not nearly as negative as the guidelines issued by your Office, which appear to ignore what little safeguards there were in the Order.

Specifically, the Executive Order clearly provides that disciplinary action shall not be required of employees who after a positive test, obtain counseling or rehabilitation and thereafter refrain from using illegal drugs. Further, it is clear that agencies shall initiate action to remove employees who are found to use illegal drugs only if they refuse such rehabilitation and do not refrain from using illegal drugs.

The Honorable Connie Horner
December 17, 1986
Page 2

The OPM guidelines however, state that "Upon the first confirmed determination that an employee uses illegal drugs, there are a range of disciplinary actions available to an agency, from a written reprimand to removal." This directly contradicts the President's clear intention that neither disciplinary action nor removal shall be used against employees who, after a first test, pursue rehabilitation and refrain from further illegal drug use.

I plan to review this matter in full during OPM's FY 88 appropriation hearing before the Appropriations Subcommittee on Treasury, Postal Service and General Government. I will be working closely with my colleagues to develop a fairer and more rational approach to drug testing for positions where the public health and safety are in jeopardy. For the interim however, I would recommend clarifying the above discrepancy between the Executive Order and the guidelines regarding disciplinary actions.

I look forward to working with you to resolve Congress' many differences on this issue.

With kindest regards, I am

Sincerely yours,



STENY H. HOYER

PATRICIA SCHROEDER, COLORADO, CHAIRWOMAN
GERRY SIKORSKI (MINNESOTA) CHARLES PASHAYAN, JR., CALIFORNIA
MERYN M. DYMALLY, CALIFORNIA FRANK HORTON, NEW YORK

U.S. House of Representatives
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE

122 CANNON HOUSE OFFICE BUILDING

Washington, DC 20515

TELEPHONE (202) 225-4025

RECEIVED

DEC 08 1986

Office of the Director

orig. Hewitt
cc: Director
Calvard
Agnew
Hall
Navarro
Lafferty

December 8, 1986

Honorable Constance Horner
Director
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Dear Mrs. Horner:

The Office of Personnel Management (OPM) promulgated guidelines entitled "Establishing a Drug-Free Federal Workplace," on December 1, 1986. I urge you to ignore these guidelines. They are contrary to the provisions of the Executive order on drug testing. There is no authority in law or regulation for the random program described in the guidelines. No funds have been authorized or appropriated for this purpose. On several key issues -- randomness, consent, and penalties -- the guidelines are an open invitation to litigation. Your agency could better perform its mission and save the taxpayers money by ignoring the OPM issuance.

1. Random Testing. Executive Order 12564 [51 Fed.Reg. 32,889 (1986)], does not authorize random testing. The order requires agency heads to establish drug testing programs, but the nature and extent of such testing is left to the discretion of the agency head. Indeed, the word "random" does not appear in the order.

Yet, random testing is at the crux of the OPM guidelines. Sections 3(a)(4) and 3(a)(5) of the guidelines spell out how to conduct tests in a random manner to avoid charges of arbitrary and capricious agency action. The guidelines emphasize that the alternative to random testing is comprehensive testing of everyone eligible, a far more expensive proposition for the agency.

OPM simply ignores the constitutional issues raised by a random testing program. Agency heads contemplating such a program cannot afford to do so. Almost every court which has considered a random testing program has struck it down as violating the Fourth Amendment's prohibition against unreasonable search and seizure. Most recently, the U.S. District Court for the Eastern District of Louisiana decided that the random testing program of the U.S. Customs Service was unconstitutional, and issued a permanent injunction prohibiting the Customs Service from conducting random tests of its employees. (National Treasury Employees Union v. von Raab, USDC E.La, Nos. 86-3522 and 86-4088, November 12, 1986). A

suit by three federal employee organizations challenging the constitutionality of the Executive order is pending before the same court.

2. Consent. The guidelines raise the issue of consent in two areas. The first is consent to the test itself as a condition of employment; second, consent to the release of the results of a urinalysis test to agency management.

Under the guidelines, if an employee or applicant does not give consent, he or she cannot hold the job. Section 4(d) states that an agency must take disciplinary action, including removal, against an employee who refuses to take a urinalysis test. A refusal to consent to release of drug test results to management is to be considered a refusal to take the test for disciplinary purposes.

The Executive order does not discuss consent, nor penalties for refusal to take a drug test. The order does require that drug testing programs "protect the confidentiality of test results" (Sec. 4(c)). Yet the OPM guidelines, under which an employee's test results will be disclosed to a minimum of three agency management officials, destroy confidentiality.

Further, agencies cannot simply require drug testing as a condition of employment. An individual cannot be forced to give up constitutional rights for the opportunity to work for the Federal government. And, an employee's consent to drug testing (waiving a Fourth Amendment right) or consent to release of test results (waiving confidentiality of patient records under 42 U.S.C. 290ee-3) would surely be held involuntary when withholding consent could lead to loss of a job. If an agency lacks an employee's voluntary consent, requiring the employee to submit to drug testing would make the results of such test unuseable and could well make both the agency and agency officials liable for violating the employee's rights.

3. Penalties. The Executive order stresses employee assistance, counseling, and rehabilitation. Even if an employee is temporarily removed from his or her job pending successful completion of a drug rehabilitation program, under the Executive order, that employee would be allowed to return to the job.

Under the guidelines, an employee could be fired and must be punished after one positive test or refusal to take the test and must be fired after two. Mandatory penalties of this sort are rare in Federal personnel law because mandatory penalties are frequently counterproductive and bad management.

Mandatory removal is particularly inappropriate when it is based on a technological process with a documented error rate of at

least 5% and severe quality control problems. A 1985 report on drug testing laboratories by the Centers for Disease Control found false positive error rates of up to 66 percent.

The guidelines mandate penalties after one positive test. Yet, they fail to mention the requirements of the nexus test and the Rehabilitation Act. The guidelines conveniently ignore the substantial job-relationship and reasonable accomodation hurdles which an agency must clear before it can impose any penalty. Taking an action against an employee who tests positive is a major legal undertaking for an agency. Whether this is the best use of your agency's limited resources is a decision for you to make, not OPM.

4. Cost. The White House has said that the drug testing program would cost \$56 million to implement. Office of Management and Budget officials subsequently admitted that this figure was pulled out of the air. I estimate the cost at closer to \$300 million. Congress has not authorized any funds for drug testing programs. Therefore, agencies must divert funds from authorized programs into any drug program.

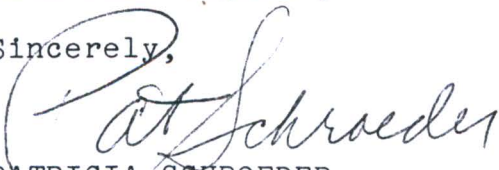
Regardless of whether a government-wide drug testing program costs \$56 million or \$300 million, implementation of the guidelines will reduce the resources otherwise available for achieving the mission of your agency.

5. Human Dignity. Individuals are hired to perform work for the people of the United States. They are not hired to be escorted into a rest room, guarded while they urinate, and have the urine they produce checked for "color, temperature, or other evidence that tampering may have occurred." Management officials were not hired to act as rest room guards.

I find this entire process demeaning to human dignity and improper for the government. The drug testing fad is a politically motivated response to a serious social problem. As the head of a Federal agency, you can prevent this degradation from taking place. I urge you to do so.

With kind regards,

Sincerely,



PATRICIA SCHROEDER
Chairwoman

THE WHITE HOUSE

WASHINGTON

December 23, 1986

MEMORANDUM FOR THE WORKING GROUP ON DRUG ABUSE POLICY

FROM: CARLTON E. ^{ew}TURNER, CHAIRMAN

SUBJECT: Drug Testing

Attached for your information is a letter from Representative Patricia Schroeder concerning drug testing by Federal agencies. Representative Schroeder has reportedly sent the letter to each agency head. The letter will be discussed at the next Working Group meeting, scheduled for the first part of January 1987.

In this regard, I request that the Department of Justice prepare comments concerning any legal implications of the letter. Further, I request that OPM provide the Working Group with recommendations for responding to the letter.

As you may know, Ralph Bledsoe will take over as Chairman of the Working Group on January 1, 1987. It has been my honor to have served as Chairman during the five very productive months since the group was formed. I appreciate your dedication to a drug-free America and wish you every success in the future.

Attachment

PATRICIA SCHROEDER, COLORADO, CHAIRWOMAN
GERRY SIKORSKI (MINNESOTA) CHARLES PASHAYAN JR. CALIFORNIA
MERVYN M. DYMALLY CALIFORNIA FRANK HORTON NEW YORK

U.S. House of Representatives
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE

122 CANNON HOUSE OFFICE BUILDING

Washington, DC 20515

December 8, 1986

TELEPHONE (202) 225-4025

Honorable Lee M. Thomas
Administrator
Environmental Protection Agency
Washington, DC 20460

Dear Mr. Administrator:

The Office of Personnel Management (OPM) promulgated guidelines entitled "Establishing a Drug-Free Federal Workplace," on December 1, 1986. I urge you to ignore these guidelines. They are contrary to the provisions of the Executive order on drug testing. There is no authority in law or regulation for the random program described in the guidelines. No funds have been authorized or appropriated for this purpose. On several key issues -- randomness, consent, and penalties -- the guidelines are an open invitation to litigation. Your agency could better perform its mission and save the taxpayers money by ignoring the OPM issuance.

1. Random Testing. Executive Order 12564 [51 Fed.Reg. 32,889 (1986)], does not authorize random testing. The order requires agency heads to establish drug testing programs, but the nature and extent of such testing is left to the discretion of the agency head. Indeed, the word "random" does not appear in the order.

Yet, random testing is at the crux of the OPM guidelines. Sections 3(a)(4) and 3(a)(5) of the guidelines spell out how to conduct tests in a random manner to avoid charges of arbitrary and capricious agency action. The guidelines emphasize that the alternative to random testing is comprehensive testing of everyone eligible, a far more expensive proposition for the agency.

OPM simply ignores the constitutional issues raised by a random testing program. Agency heads contemplating such a program cannot afford to do so. Almost every court which has considered a random testing program has struck it down as violating the Fourth Amendment's prohibition against unreasonable search and seizure. Most recently, the U.S. District Court for the Eastern District of Louisiana decided that the random testing program of the U.S. Customs Service was unconstitutional, and issued a permanent injunction prohibiting the Customs Service from conducting random tests of its employees. (National Treasury Employees Union v. von Raab, USDC E.La, Nos. 85-3522 and 86-4088, November 12, 1986). A

2/10/86

suit by three federal employee organizations challenging the constitutionality of the Executive order is pending before the same court.

2. Consent. The guidelines raise the issue of consent in two areas. The first is consent to the test itself as a condition of employment; second, consent to the release of the results of a urinalysis test to agency management.

Under the guidelines, if an employee or applicant does not give consent, he or she cannot hold the job. Section 4(d) states that an agency must take disciplinary action, including removal, against an employee who refuses to take a urinalysis test. A refusal to consent to release of drug test results to management is to be considered a refusal to take the test for disciplinary purposes.

The Executive order does not discuss consent, nor penalties for refusal to take a drug test. The order does require that drug testing programs "protect the confidentiality of test results" (Sec. 4(c)). Yet the OPM guidelines, under which an employee's test results will be disclosed to a minimum of three agency management officials, destroy confidentiality.

Further, agencies cannot simply require drug testing as a condition of employment. An individual cannot be forced to give up constitutional rights for the opportunity to work for the Federal government. And, an employee's consent to drug testing (waiving a Fourth Amendment right) or consent to release of test results (waiving confidentiality of patient records under 42 U.S.C. 290ee-3) would surely be held involuntary when withholding consent could lead to loss of a job. If an agency lacks an employee's voluntary consent, requiring the employee to submit to drug testing would make the results of such test unuseable and could well make both the agency and agency officials liable for violating the employee's rights.

3. Penalties. The Executive order stresses employee assistance, counseling, and rehabilitation. Even if an employee is temporarily removed from his or her job pending successful completion of a drug rehabilitation program, under the Executive order, that employee would be allowed to return to the job.

Under the guidelines, an employee could be fired and must be punished after one positive test or refusal to take the test and must be fired after two. Mandatory penalties of this sort are rare in Federal personnel law because mandatory penalties are frequently counterproductive and bad management.

Mandatory removal is particularly inappropriate when it is based on a technological process with a documented error rate of at

least 5% and severe quality control problems. A drug testing laboratories by the Centers for Dis false positive error rates of up to 66 percent.

The guidelines mandate penalties after one positive test, they fail to mention the requirements of the nexus test and Rehabilitation Act. The guidelines conveniently ignore the substantial job-relationship and reasonable accommodation hurdles which an agency must clear before it can impose any penalty. Taking an action against an employee who tests positive is a major legal undertaking for an agency. Whether this is the best use of your agency's limited resources is a decision for you to make, not OPM.

4. Cost. The White House has said that the drug testing program would cost \$56 million to implement. Office of Management and Budget officials subsequently admitted that this figure was pulled out of the air. I estimate the cost at closer to \$300 million. Congress has not authorized any funds for drug testing programs. Therefore, agencies must divert funds from authorized programs into any drug program.

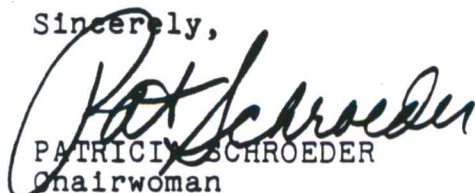
Regardless of whether a government-wide drug testing program costs \$56 million or \$300 million, implementation of the guidelines will reduce the resources otherwise available for achieving the mission of your agency.

5. Human Dignity. Individuals are hired to perform work for the people of the United States. They are not hired to be escorted into a rest room, guarded while they urinate, and have the urine they produce checked for "color, temperature, or other evidence that tampering may have occurred." Management officials were not hired to act as rest room guards.

I find this entire process demeaning to human dignity and improper for the government. The drug testing fad is a politically motivated response to a serious social problem. As the head of a Federal agency, you can prevent this degradation from taking place. I urge you to do so.

With kind regards,

Sincerely,


PATRICIA SCHROEDER
Chairwoman

HIGHLIGHTS

I. GOAL #1 - DRUG-FREE WORKPLACES

1. **Accelerate development of a drug-free Federal Workplace.**

- o Executive Order 12564 was signed by the President on September 15, 1986, directing the head of each Executive agency to increase drug abuse awareness and prevention, identify and rehabilitate illegal drug users, and improve the quality and accessibility of treatment services for employees.
- o A strong policy against illegal drug use, including drug testing, was implemented for White House Senior Staff in late September 1986.
- o Presidential letters were issued on October 4, 1986 to the head of each Executive department and agency, with the President's personal communication to each and every Executive Branch employee, calling upon them to take a leading role in eliminating the use of illegal drugs.
- o In August 1986, the Office of Personnel Management (OPM) negotiated improved health benefits covering drug and alcohol abuse rehabilitation, with each of the Federal Employee Health Benefits Program carriers improving the adequacy of sources of payment for drug and alcohol abuse rehabilitation.
- o OPM issued its government-wide guidelines on implementation of Executive Order 12564 on November 28, 1986 in Federal Personnel Manual (FPM) Letter 792-16.
- o A draft of the scientific and technical standards for urine testing of Federal employees has been prepared by the Department of Health and Human Services (HHS).
- o To prevent illegal drug users from entering Federal employment, illegal drug use questions are being included on revised Standard Forms 85 and 86, and agencies have the option of testing job applicants for illegal drug use.
- o Departments and agencies are now working on orders and other implementing directives for the establishment of prevention, treatment and rehabilitation programs.
- o The Department of Defense (DOD) is amending its existing program for compliance with the Executive Order. Department-wide implementation of the revised Directive is expected in Spring 1987.

Y
RN

2. **Work with government contractors to establish a policy of drug-free work environments.**
 - o The Legislative Review Task Force has been studying options for requiring selected contractors, particularly those in positions involving public safety and national security, to meet the drug-free requirements established for the Federal workforce. Recommendations will be presented to the Domestic Policy Council in February 1987.
3. **Encourage state and local governments and their contractors to develop drug-free workplaces.**
 - o In early Fall 1986, the President sent letters to state governors and legislators, outlining the President's six goals and asking them to follow his lead.
 - o Cabinet members are sending similar letters to the heads of their counterpart organizations in state and local governments.
4. **Mobilize management and labor leaders in the private sector to fight drug abuse in the workplace.**
 - o Presidential letters have been prepared to Chief Executive Offices of Fortune 500 companies and to major labor leaders, calling on them to mobilize in the national crusade for a drug-free America. *sent?*
5. **Communicate accurate and credible information about how drug abuse in the workplace can be eliminated.**
 - o HHS has established a toll-free "Drug-Free Workplace Helpline" -- 800-843-4971 -- to provide information to employers about eliminating drug abuse in the workplace.
 - o The Department of Labor (DOL) has begun collecting *ed ##* samples of outstanding or innovative programs being used in the private sector and meeting with their originators to determine what aspects may be applied to other programs.
 - o DOL and HHS are drafting a booklet on "Developing an Occupational Drug Abuse Program." The booklet is expected to go to press by April 1987.
 - o *has met?* DOL ~~is meeting~~ with HHS to establish a team of experts for on-site technical assistance and training to businesses and unions developing or expanding programs to get illegal drugs out of the workplace.

6. Ensure drug-free public transportation.

- o The Secretary of Transportation is taking the lead in a national effort to ensure safe transportation of people and goods.
- o Through regulation, the Department of Transportation (DOT) will require pre-employment, post-accident and random testing for commercial airline pilots and crew, and other employees directly responsible for the safety of flight operations.
- o In addition, periodic testing will be required as part of the annual physical for those who are required by DOT regulations to have such physicals.
- o In rail transportation, DOT implemented in 1986 the first rule in American history to deal with alcohol and drug abuse by railroad employees; and the Secretary has called upon Congress to give the Department authority to regulate directly the conduct of railroad employees who have safety-related responsibilities.
- o The National Highway Safety Administration (NHTSA) is working with the Department of Education to develop and distribute educational materials to state and local public transportation officials.
- o The Federal Railway Administration (FRA) ^{has} provides leadership for a national voluntary alcohol/drug abuse prevention program known as "Operation Road Block."
- o In addition to these actions, DOT has a number of other current or proposed actions which are summarized on pages ____.

II. GOAL #2 - DRUG-FREE SCHOOLS

1. Communicate accurate and credible information on how to achieve a drug-free school.

- o On September 15, 1986, the Secretary of Education issued the booklet Schools Without Drugs to provide parents, school officials, students and communities with reliable and practical information about the problem of school-age drug abuse and what they can do to achieve drug-free schools. Over 1 million of the booklets have already been distributed.

2. Encourage all schools to establish a policy of being drug free.

- o The Secretary of Education has continued his role as a national advocate for drug-free schools.
- o The Administration requested and was authorized additional funding in FY 1987-88 for state discretionary grants to school districts which have a sound plan for getting drugs out of their schools and keeping them out. The funds will reach the local schools before the start of the next school year.
- o The Department of Education (DOEd) is also expanding national prevention and awareness programs for students. Schools which are successful at fighting drug abuse will receive a large banner that reads: "Schools Without Drugs: The Challenge."
- o DOEd organized a January 1987 conference of representatives from state governors' offices and state education agencies on the new Education program.
- o The Department of Defense is developing a model schools program for implementation in Summer 1987. Both DOD overseas dependents and Section 6 schools already have drug abuse education and information programs in place.
- o ACTION is discussing possible joint efforts with DOEd whereby ACTION's 350,000 Retired Senior Volunteers can provide volunteer support to local PTA's and schools in promoting drug abuse awareness.
- o In consultation with DOEd, ACTION will invite representatives from major school districts to participate in a series of regional conferences for community-based volunteer groups.
- o ACTION will coordinate with DOEd in the development of a national drug abuse prevention essay, poster and video contest for the Nation's students, with underwriting by major corporations.

3. Increase penalties for distributing drugs to students and for using juveniles for the distribution and/or manufacture of illegal drugs.

- o The President requested and Congress authorized an extension to college and university campuses of the "school yard rule," whereby violators receive additional penalties for distributing or manufacturing drugs on or near a school.

- o In addition, the President requested and Congress authorized additional penalties for individuals who hire or otherwise use a person under 18 years of age to commit drug violations.
- o The Attorney General has distributed to all United States Attorneys and Assistant United States Attorneys a prosecution manual dealing with distributing drugs to students and for using juveniles for the distribution and/or manufacturing of illegal drugs.
- o The Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) have likewise distributed materials to their agents in the field to acquaint them with this new statute. Both agencies have been instructed to bring the statute to the attention of local law enforcement agencies.

III. GOAL #3 - EXPANDED DRUG TREATMENT AND RESEARCH

1. **Encourage states and communities to develop programs to treat specific drug-related health problems.**

- o The President requested and Congress authorized additional funding for emergency expansion of services in treatment centers which have a high demand for services by endemic drug users who could not otherwise afford treatment.
- o As of January 23, 1987, 36 states have applied for the those funds which are to be allocated according to population, and 29 states have received their share of these monies, as well as the first increments of the ADMS Block Grants.
- o HHS has developed a funding allocation formula for the portion of the money to be allocated according to need and is making every effort to assure the timely distribution of these funds.

2. **Expand research in health-related areas, including drug testing.**

- o HHS is developing enhanced epidemiology and surveillance systems which will ensure accurate tracking of the incidence and prevalence of alcohol and drug use and improved identification of risk factors and risk groups.
- o HHS is also expanding research which will strengthen resources for preventing, identifying and treating

illegal drug use. HHS has published 12 new grant announcements; contacted over 20,000 scientists; and streamlined the grants review process. In the first period of FY 1987, NIDA experienced a 14 percent increase in grant applications.

IV. GOAL #6 - INCREASED PUBLIC AWARENESS AND PREVENTION

1. Encourage all citizens and private sector organizations to join the First Lady's drug abuse awareness and prevention campaign.

- o On September 14, 1986, the President and First Lady presented a nationally-televised call to arms, challenging and encouraging citizens and private organizations to participate in the national crusade to eliminate the use of illegal drugs.
- o The Administration is encouraging the use of positive peer pressure by adopting the theme of "Just Say No" as the consistent message in all campaigns against the use of illegal drugs.
- o Since the September 14, 1986 nationally-televised address of the President and Mrs. Reagan, the number of requests for information on "Just Say No" clubs has more than doubled from 500 to over 1,000 each week.
- o On November 18, 1986, "D-Day Against Drugs" was declared in 450 cities, sponsored by the U.S. Conference of Mayors to focus attention on "Just Saying No."
- o Britain has adopted the "Just Say No" campaign as a national priority.

2. Encourage corporations, service organizations and the media to develop prevention programs within their organizations, communities and our Nation.

- o The White House Conference for a Drug-Free America is being planned to bring public attention to the dimensions of the drug abuse problem, evaluate existing anti-drug efforts, and formulate a national strategy for achieving a drug-free society.
- o One objective of the White House Conference will be to encourage media to redouble efforts in all media forms to stop illegal drugs and make their use unacceptable in our society.

- o The Administration is encouraging the development of public-private partnerships through an expanded drug abuse prevention program at ACTION. The ACTION program includes an honor roll of companies that contribute significant resources to drug abuse prevention and a speakers bureau.
 - o Discretionary grants and contracts will be awarded by ACTION for additional state parents' networks; demonstration models for youth peer prevention groups; and technical assistance to communities in fighting illegal drugs.
 - o ACTION is producing a series of television and radio public service announcements promoting public awareness and has developed a partnership with the National Association of Broadcasters to ensure widespread airing.
- 3. Ensure that Americans have access to accurate and effective information about illegal drugs and strategies for getting drugs out of their homes, schools, workplaces, communities, and Nation.**
- o HHS has established a new Office for Substance Abuse Prevention (OSAP), located in the Office of the Administrator, Alcohol, Drug Abuse and Mental Health Administration. OSAP will assist public and volunteer efforts by disseminating knowledge gained from prevention and treatment research, providing training and technical assistance, and supporting the development of community-based programs to prevent drug and alcohol abuse by young people.
 - o On January 13, 1987, the Secretary of Defense sent a memorandum to all components outlining the Department's role in the President's crusade against illegal drugs and urging all DOD personnel to get involved and spread the word that drugs are dangerous.
 - o Military recruiters have been encouraged to help American youth say no to drugs in their frequent contacts with this target population.
 - o The U.S. Coast Guard is planning to adopt the First Lady's "Just Say No" program for elementary school-age children on five large installations.
 - o The U.S. Attorneys, FBI and DEA agents and other Department of Justice officials often visit with young people, spelling out the facts about drugs and drug use and explaining to them the law and its consequences.

- o DOJ has produced a series of videos on the dangers of illegal drug use and has made these videos available to schools and other community groups together with a brochure describing possible uses for the video program.
- o The Department of Labor has been in contact with numerous unions, employers and assistance groups to discuss a drug-free workplace. In addition, DOL personnel have represented the Administration at conferences specifically devoted to drug abuse prevention.
- o Agencies of the Department of Transportation are providing information about drug abuse in their dealings with the public and the transportation industry. For example, drug abuse prevention is an integral part of the USCG's boating safety efforts and the FAA's safety and inspection responsibilities with pilots and airmen.

V. OTHER NATIONAL INITIATIVES

1. **Reduce the level of illegal drug activity in Public Housing Authorities.**

- o The Secretary of Housing and Urban Development (HUD) has taken the lead in a cooperative national effort to achieve drug-free public housing.
- o HUD has formed a partnership with the Departments of Justice, Health and Human Services, and Labor to work with local Public House Authorities, law enforcement officials, and appropriate local authorities in the effort.
- o The National Association of Housing and Redevelopment Officials (NAHRO) and HUD will jointly sponsor a National Conference on Drug-Free Public Housing on May 1-2, 1987 in Atlanta, Georgia to assist the attendees in forming action plans for their own housing developments.
- o In early 1987, the Partnership will select four or five public housing developments across the country for concentrated law enforcement, drug treatment and education, and job training activities.
- o HUD has been working with HHS to set up research and education programs in public housing. Their activities

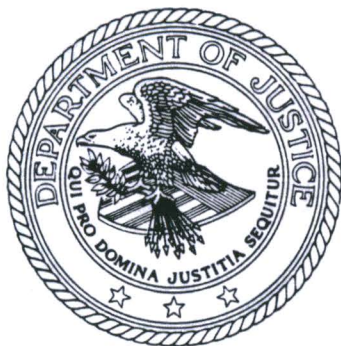
will be closely tied to Acquired Immune Deficiency Syndrome (AIDS) prevention activities which are geared to the IV drug user.

- o DOL is working with HUD and the National Association of Private Industry Councils (NAPIC) to make Job Training Partnership Act funds available. In cooperation with the Department of Education, a total package can be presented -- "Don't use drugs, stay in school, get a job."
- o On February 2, 1987, HUD issued a Notice announcing that extra points for Comprehensive Improvement Assistance Program funding will be given to Public Housing Authorities with existing or proposed efforts to achieve a drug-free environment.
- o HUD and "Just Say No" clubs are planning to jointly sponsor a poster contest for young people in public housing Just Say No Clubs.
- o On January 28, 1987, the Secretary of HUD sent a letter to Public Housing Authority directors encouraging them to form Just Say No clubs in their developments.

2. Improve drug and alcohol abuse prevention and treatment programs available to Indians and Alaska natives.

- o The Director of ACTION has initiated discussions with the Oglala Sioux Tribe in South Dakota as well as community leaders in Alaska on the optimal application of ACTION demonstration grant monies in meeting the special needs of Native Americans, with a focus on intergenerational volunteer efforts.
- o ACTION has also approached the W. Clement and Jessie V. Stone Foundation with a view toward providing volunteer training for developing positive prevention models within the Native American population.

*BIA input
on way*



DRUG PREVENTION LITIGATION REPORT

U.S. Department of Justice
Civil Division

ISSUE 4
December 16, 1986

Executive Summary

Following the issuance of an injunction in New Orleans to halt the Customs Service's testing of applicants for sensitive positions, two other adverse rulings have been rendered finding drug testing to violate the Fourth Amendment. In Savannah, Georgia, a district court held that the testing of Army civilian guards without reasonable suspicion violated the Fourth Amendment. In Chattanooga, Tennessee, a district court enjoined testing of fire and police personnel. Although the court agreed that the City "has a compelling interest in having its fire fighters free from drugs," the absence of standards to govern the frequency, purpose or methods for conducting the tests resulted in a finding that the testing violated the Fourth Amendment.

District court opinions now cover almost the complete range of analytical approaches to the Fourth Amendment issues raised by urinalysis. For example, though the court in Von Raab characterized urinalysis as "more intrusive than a search of a home", the Southern District of New York concluded that such testing was less intrusive than fingerprinting. Mack v. United States, No. 85 Civ. 5764 (S.D.N.Y. April 21, 1986). Fortunately, in terms of decisions having the status of governing precedent, the leading appellate decision upholding random or periodic testing of public employees remains intact with the denial of certiorari by the Supreme Court in Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), cert. denied, 55 U.S.L.W. 3389 (Dec. 2, 1986).

The focus of litigation activity is now moving to the appellate level. In Von Raab, we have moved to overturn the adverse ruling entered against the Customs Service. On December 15, 1986, we filed our brief on the merits of the appeal with the Fifth Circuit, and also requested a stay pending appeal and expedited scheduling of the argument (copies of the brief are available by calling 633-3309). The appeal should be fully briefed by the end of January. We have also filed a brief as amicus curiae in the D.C. Circuit seeking reversal of the Fourth

Amendment ruling in Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986), and argument before the D.C. Circuit in National Federation of Federal Employees v. Weinberger has been set for February 24, 1987.

Finally, on December 1, 1986, the Office of Personnel Management issued interpretative guidelines for Executive Order 12564. Guidelines are to be issued by the Department of Health and Human Services in the near future, clearing the way for the issuance of the agency plans required by the Executive Order for all federal agencies.

HIGHLIGHTS

<u>Pending Cases - Federal Participation</u>	Page
o Customs Service files brief on appeal challenging adverse New Orleans ruling	1
o Injunction issued enjoining Army's testing of civilian guards at Fort Stewart base	1
o Oral argument scheduled for February 24th before D.C. Circuit in <u>NFFE v. Weinberger</u>	2
o United States files brief as <u>amicus curiae</u> in D.C. Circuit supporting testing by D.C. School System	2
o Postal Service case settled by decree	2
 <u>Pending Cases - No Federal Participation</u>	
o Court enjoins testing of Chattanooga fire fighters and police	3
o Supreme Court denies <u>certiorari</u> in <u>Shoemaker v. Handel</u> , 795 F.2d 1136 (3d Cir. 1985)	3
o Sixth Circuit to address qualified immunity for drug testing programs	3
 <u>Status of Other Cases</u>	 4

PENDING CASES - Federal Participation

o *National Treasury Employees Union v. Von Raab, No. 86-3552*
(E.D. La.)

o *National Treasury Employees Union v. Reagan, No. 86-4058*
(E.D. La.)

On December 3, 1986, Judge Collins issued an Order denying the Customs Service's motion for stay pending appeal. In addition, Judge Collins sua sponte issued an Order to Show Cause why Commissioner Von Raab should not be held in contempt, based upon a form letter inadvertently sent out by a Customs District Office in Boston, Massachusetts on November 18, 1986. On December 8, 1986, we moved to vacate the Order to Show Cause explaining the circumstances regarding the distribution of the letter, and pointing out that, in compliance with the court's Order, Customs had halted all testing and modified its notices regarding the program.

We have also filed our notice of appeal, and moved forward expeditiously before the Fifth Circuit. To expedite the appeal, on December 15, 1986, we filed our brief on the merits with the record on appeal, and also requested that a stay be issued pending appeal and that oral argument be scheduled as soon as possible. With this approach, briefing could be concluded and argument heard by the Fifth Circuit as early as the beginning of February, 1987.

In the Executive Order case, plaintiffs moved for an enlargement of time to respond to the pending motion to dismiss, and the hearing on that motion is now scheduled for January 14, 1986.

* * *

o *American Federation of Government Employees, AFL-CIO, et al. v. Weinberger, No. CV486-353 (S.D. Ga.)*

On December 2, 1986, District Judge Edenfield issued a preliminary injunction enjoining the testing of Army civilian guards at the Fort Stewart base. Disagreeing with the jurisdictional ruling of Judge Hogan in National Federation of Federal Employees v. Weinberger, the court found that the Civil Service Reform Act did not divest the court of jurisdiction to hear the constitutional challenge. The court also found unobserved testing to constitute a search because the test discloses information regarding "the private affairs of an individual." For that reason, the court concluded that, as a general rule, the Fourth Amendment requires that testing be limited to instances where there is reasonable suspicion of illegal drug use. The court indicated, however, that testing

might be authorized for persons performing national security functions, or where the danger stemming from impaired performance would be especially great. Because the preliminary injunction is limited to Fort Stewart, it will not interfere with the Army's civilian testing program elsewhere. We expect to pursue an appeal after the district court enters a final judgment.

* * *

o *National Federation of Federal Employees v. Weinberger*, 640 F. Supp. 642 (D.D.C.), appeal pending, No. 86-5432 (D.C. Cir.)

Briefing of the appeal has now been concluded and argument is scheduled for February 24, 1987. Judge Edenfield in the AFGE decision (noted above), and Judge Collins in the NTEU decision (noted above), disagreed with the underlying jurisdictional ruling at issue here. Should the D.C. Circuit also disagree on the jurisdictional issue, the court may reach the merits of Fourth Amendment challenge to the Army's civilian testing program which has been briefed by the parties.

* * *

o *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1985), appeal pending, No. 86-5198 (D.C. Cir.)

On November 7, 1986, the United States, as amicus curiae, filed a brief supporting reversal of the district court's order enjoining drug testing for certain public school employees. Although the district court ruled against the District of Columbia School System on a number of different grounds, the appeal presents solely the Fourth Amendment issue of whether the District of Columbia may require its school bus attendants to undergo urinalysis for drug testing without first establishing probable cause that the particular employee is using illegal drugs. No argument date has been scheduled.

* * *

o *Evans v. Casey*, C.A. No. 86-1217 (E.D. Pa.)

This lawsuit involved a challenge to a regional postal district which instituted a drug testing plan for new employees. The matter has been settled with the entry of a consent decree whereby the program remains suspended until the Postal Service develops and implements a nationwide program. The Department of Justice approved this settlement to avoid litigating the constitutional issues in an unfavorable factual context.

PENDING CASES - No Federal Participation

o Roy Penny, et al. v. Thomas Kennedy, C.A. No. 1-86-417 (E.D. Tenn.)

o Robert M. Lovvorn, et al. v. The City of Chattanooga, C.A. No. 1-86-389 (E.D. Tenn.)

In these two actions, District Judge R. Allan Edgar held that the City of Chattanooga's drug testing program for its police and fire fighters violated the Fourth Amendment. Recognizing that the City has "a compelling interest in having its fire fighters free from drugs," the court nonetheless held that the Fourth Amendment required that testing be conducted on the basis of reasonable suspicion. This was required, according to the Court, because the City's program had "[n]o standards for the frequency, purpose, or methods of conducting the tests," thereby precluding the City's reliance upon the administrative search exception to the reasonable suspicion standard of the Fourth Amendment. In rendering this ruling, the court recognized that public "employees, as opposed to the general citizenry, have a somewhat diminished expectation of privacy" under the Fourth Amendment. The rationale for this decision would not necessarily require invalidation of federal government testing programs such as required by Executive Order 12564.

* * *

o Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), cert. denied, 55 U.S.L.W. 3389 (Dec. 2, 1986)

On December 2, 1986, the Supreme Court denied certiorari for the Third Circuit's leading decision upholding random and periodic drug testing required by the New Jersey Racing Commission for jockeys, trainers and other persons involved in horse races at public tracks. The court found such testing to be reasonable under the Fourth Amendment: "[w]hen jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the industry." 795 F.2d at 1142. The decision provides substantial support for the testing of employees whose job responsibilities are more critical to the public than racing horses.

o Raul Feliciano, Jr. and Richard Rojas v. The City of Cleveland, et al., No. 84-3436 (6th Cir.)

The Cleveland Police Department ordered a surprise urinalysis of its entire cadet class after receiving information that some cadets, whose names were not given, were using

marijuana or other drugs. No pre-existing regulations provided for urinalysis. Plaintiffs resigned after being advised that they would otherwise be given probationary termination letters that did not refer to drug use. They later, however, brought this action for damages under a constitutional tort theory alleging Fourth and Fifth Amendment violations. An interlocutory appeal from the district court's denial of a dispositive motion asserting a qualified immunity defense is pending in the Sixth Circuit.

STATUS OF OTHER CASES

o *Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School (N.Y. App. Div. August 11, 1986)*, appeal pending, N.Y. Court of Appeals

Following the Appellate Division's denial of the School Board's motion for reconsideration of the holding that drug testing of teachers constitutes an unreasonable search, the School Board perfected its appeal to the New York Court of Appeals. The School Board's brief is due on January 15, 1987.

o *Caruso v. Ward, No. 12632/86 (Sup. Ct. N.Y. Cty)*, appeal pending, App. Div., 1st Dept.

The appeal of the trial court's ruling that testing of New York police officers violates the Fourth Amendment should be heard by the Appellate Division in the January term. The City filed its brief on appeal at the end of November, and the plaintiffs' response is due on December 26, 1986.