MEMORANDUM OF LAW

DATE: December 24, 1986

TO: Jack McGrory, Deputy City Manager
FROM: City Attorney
SUBJECT: Random Drug Screening of Probationary Police Officers

In your memorandum dated October 15, 1986, you requested that this office review a proposed San Diego Police Department (SDPD) program that requires all new police officers to submit to mandatory drug screening as a condition of employment during their probationary period. The Police Department indicated that this program is modeled after a program developed by the New York City Police Department (NYPD) and is designed to be part of the ongoing examination and selection process described in Rule VII of the Rules of the Civil Service Commission (Municipal Code section 23.0801 et seq.).

Since 1984, the NYPD has been randomly screening all students in the police academy and all probationary officers for illicit drug use as part of the continuing selection process. Tenured officers were only tested on a reasonable suspicion basis until June of 1986. At that time, the NYPD announced its intention to implement a program which would subject 1,200 officers in its Organized Crime Bureau to random periodic drug testing. The Patrolmen's Benevolent Association of the City of New York, which had not objected to the drug screening of the probationary officers, filed a lawsuit seeking an order enjoining the NYPD from implementing the new program.

On July 1, 1986, the Supreme Court of New York County ruled in favor of the Patrolmen's Benevolent Association and held that absent a reasonable suspicion of current drug use random drug testing of police officers, even as a condition of employment, violates the Fourth Amendment's guarantee against unreasonable search and seizure. Relying on Frost v. Railroad Commission, 271 U.S. 583, 593, 594, 46 S.Ct. 605, 607, 70 L.Ed. 1101 (1926) the New York Court reiterated the long established principle that a governmental agency cannot condition access to public benefits or

privileges upon a waiver of constitutional rights. The Court went on to specifically rule that the NYPD had failed to demonstrate or document that drug use by officers presented a discernable problem or danger sufficient to warrant a constitutional intrusion occasioned by standardless drug testing of the entire 1,200 member force of the Organized Crime Bureau.

In reaching its decision, the Court relied on information supplied by the NYPD that only thirteen officers in 1985 and nine in 1986 out of a force of over 26,000 officers had tested positive for drug use. Caruso v. Ward, 506 N.Y.Supp.2d 781 (1986). In another New York case, an appellate court upheld the termination of a probationary transit police officer who had tested positive for drugs on two occasions. However, the issue of the constitutionality of the nature of the test was not addressed in the court's decision which only concerned itself with the appeal rights of terminated probationary employees. Giannandrea v. Meehan, 499 N.Y.Supp.2d 129 (1986).

In August, another New York appellate court issued an order prohibiting a school district from directing probationary teachers to submit to urine tests for the purpose of detecting the use of controlled substances absent a reasonable suspicion that the individual teacher had been a drug user. That court also held that the reasonable suspicion standard is the appropriate constitutional basis for compelling a public employee to submit to a urine test for the purpose of detecting the use of controlled substances. Patchogue-Medford Congress of Teachers v. Board of Education, 505 N.Y.Supp.2d 888 (1986). In September, a federal district court in New Jersey issued an injunction prohibiting the City of Plainfield from ordering all fire fighters and police officers to participate in mandatory drug testing. Capua v. City of Plainfield, 643 F.Supp. 1507 (D.C.N.J. 1986). Distinguishing this case from Shoemaker v. Handle, 619 F.Supp. 1089 (D.C.N.J. 1985), aff'd, 795 F.2d 1136 (3rd Cir. 1986), cert. denied, U.S. , L.Ed.2d , S.Ct. (1986) which had upheld the random drug testing of jockeys, the court in Capua indicated there was a distinct difference between the highly regulated horse racing industry and public employment. Most recently, the random drug screening programs of the Chattanooga police and fire departments were struck down. Lovvorn v. City of Chattanooga, F.Supp. , U.S.D.C. E.Tenn. No. Civ-1-86-389, Nov. 13, 1986; Penney v. Kennedy, F.Supp. U.S.D.C. E.Tenn. No. Civ-1-86-417, Nov. 13, 1986.

The above cases reinforce our previously held belief (indicated in the attached Memorandum of Law to Rich Snapper, Personnel Director, dated May 7, 1985) that random screening of City employees for drug usage is not legally permissible except

when based upon a reasonable suspicion of current drug usage or during a regularly scheduled medical examination. While, as we have previously indicated, testing individuals for illegal drug usage under the previously described circumstances may be appropriate, no court has yet authorized continual drug screening

of employees during the probationary period as part of the selection process. In the future, however, as society's concern over drug and alcohol abuse in the workplace grows, it may be possible that the courts will take a different position on this issue, but the above cases clearly indicate that that time has not yet come. In fact, because of the current status of the case law on this subject, even an amendment to the Police Officers Association's Memorandum of Understanding, permitting drug screening of probationary employees, as part of a continuing selection process, might be challenged on legal grounds. Any individual affected by such a policy could make a strong argument that such an amendment to the Memorandum of Understanding is invalid because it is against public policy for the reasons stated above. Taylor v. Crane, 24 Cal.3d 442, 595 P.2d 129, 155 Cal.Rptr. 695 (1979); Los Angeles Police Protective League v. City of Los Angeles, 163 Cal.App.3d 1141, 209 Cal.Rptr. 890 (1985).

In summary, we believe that the proposed drug screening program for probationary police officers is overly broad and, if subject to a legal challenge, would arguably be declared invalid.

JOHN W. WITT, City Attorney
By
John M. Kaheny
Deputy City Attorney

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Attachment
ML-86-129