DATE: December 7, 1988

TO: Gary Easton, Deputy Chief, Director of
Personnel and Training, Fire Department
FROM: City Attorney
SUBJECT: Drug Testing Policy

In response to your memorandum of November 4, 1988, we have reviewed Standard Instruction No. 3, Section 3.3.2(Q), concerning a broadening of the circumstances under which employee drug testing could be undertaken.

The third unnumbered paragraph of subsection Q currently states the law accurately with respect to urinalysis testing of fire safety personnel. Broader drug urinalysis testing may be permissible only when there is a widespread or significant drug problem within a department. We attach a memorandum of law dated December 24, 1986 which states this proposition. That memorandum remains an accurate statement of the law. Lovvorn v. City of Chattanooga, Tenn., 846 F.2d 1539, (6th Cir. 1988). Thus, in the absence of known facts to show a greater problem, no expansion would be legally permissible.

In light of the foregoing, we recommend that only the first two paragraphs of subsection Q need be modified so as to restate a clear sense of prohibition. We suggest the following:

> Employees shall not possess, use, introduce or transfer any alcoholic beverage without authorization, nor any controlled substance the possession of which is prohibited by law, within or upon any premises or equipment of the Fire Department or of the City of San Diego.
>
> Employees shall not be under the influence of any intoxicating liquor or alcoholic beverage or controlled substance when reporting for duty at their place of assignment, while on duty, while in uniform off duty, or while on board or within any equipment or premises of the City of San Diego.

If you should wish to restate the third paragraph so as to give guidance to your supervisors, the following language would be a legally acceptable restatement regarding standards for urinalysis testing, based on the current law. However, it should be coordinated with the Manager's office for organizational consistency.

When reasonable suspicion exists that an employee is under the influence of any intoxicating liquor, alcoholic beverage or controlled substance while on duty, while in uniform off duty, or while on board or within any equipment or premises of the City of San Diego, the employee shall be required to submit to a physical examination, to include appropriate chemical testing of the blood, breath or urine to be administered by the department physician or by any other authorized agency when ordered by a division fire chief. Refusal of an employee to submit to such physical medical examination or chemical testing shall be deemed a violation of a direct order.

"Reasonable suspicion" means an articulable belief based on specific facts and reasonable inferences drawn from those facts that any employee is under the influence of drugs or alcohol. Circumstances which constitute a basis for determining "reasonable suspicion" may include, but are not limited to:

a. a pattern of abnormal or erratic behavior;
b. information provided by a reliable and credible source;
c. a work-related accident;
d. direct observation of drug or alcohol use; or
e. presence of the physical symptoms of drug or alcohol use (i.e., glassy or bloodshot eyes, alcohol odor on breath, slurred speech, poor coordination and/or reflexes).

Supervisors shall detail in writing the specific facts, symptoms, or observations which formed the basis for their determination that reasonable suspicion existed to warrant the testing of an employee. This documentation shall be forwarded to the appropriate department head or designee.

Should you elect to implement these recommendations, we would

finally observe that you should also consider this within the context of a "meet and confer" issue.

JOHN W. WITT, City Attorney
By
Rudolf Hradecky
Deputy City Attorney

RH:mrh:516(x043.2)
Attachment
cc Rich Snapper
Liz Fort
Bob Ferrier
ML-88-104