HHS

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31 Aug.

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Date: 7 September 1988

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DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Alcohol, Drug Abuse and
Mental Health Administration
Rockville MD 20857

M E M O R A N D U M

DATE: August 31, 1988

FROM: Chairman, Interagency Coordinating Group

SUBJECT: Advisory Memorandum

TO: Tiers I, II, and III Liaisons for a Drug-Free Federal Workplace

As Chairman of the Interagency Coordinating Group (ICG) for the President's drug-free workplace initiative, I am writing to each agency with responsibility for carrying out Executive Order 12564 for the purpose of bringing you up to date on issues concerning Government-wide implementation of Federal Drug-Free Workplace Programs and sharing with you information from the August meeting of the Interagency Coordinating Group.

In the event some of you did not see the July 12 New York Times editorial titled "Yes: Drug Tests for (Some) Officials", I have enclosed it. It adds a rather persuasive voice to the drug testing debate and puts into perspective our work as Federal officials with responsibility for the Federal drug-free workplace programs.

Tier III Plans: As of this writing 56 Tier III agencies have submitted plans which are now moving through the review process in this order:

1. Receipt and review by OWI staff
2. Review by ICG members
3. Consolidation of OWI views by OWI staff and, if OWI determines that negotiation is warranted, negotiation responsibility is assigned to a member of the ICG (DoJ, OPM, or DHHS). After negotiations, any revised plan is sent to all ICG members for their concurrence and recommendation for certification. If no issues or problems call for negotiation, ICG members are asked to concur in a recommendation for certification without any negotiation.
4. Request concurrence of DHHS Advisory Board members in the ICG recommendation for certification by the Secretary.
5. Coordinate with OMB on the cost evaluation and OMB report to Congress.
6. Prepare a report to Congress wherein the Secretary of Health and Human Services certifies the plan as required by Pub. L. 100-71.

Tier III plans are now at various levels in the review process. Since there is no requirement that all Tier III plans be submitted simultaneously, several reports to Congress will transmit the plans in groups as they are completed until all are certified. It is anticipated that at least one such group report to Congress will be submitted by the end of the fiscal year.

Amendment of Certified Plans: As you know, section 503 of Pub. L. 100-71 requires that the Secretary of Health and Human Services certify to certain committees of Congress that each agency plan is in compliance with applicable provisions of law and the Guidelines. Section 503 makes no provision for the ongoing review or continuing certification of plans. If an agency sees a need to change its certified plan, i.e., the plan which the Secretary of Health and Human Services certified to the Congress, it is that agency's responsibility to ensure that any modified plan is in compliance with the Executive Order and Guidelines. Any proposed modifications should be carefully reviewed with the agency's General Counsel. If the changes are major, an agency may decide that they warrant consultation with OWI, DoJ or OPM before amending its plan. Some agencies have deferred any consideration of changes until after they have had a year's experience with the certified plan. If an agency does modify its plan it should notify employees of changes that will affect them and include a copy of the plan as amended in the agency's annual report to Congress required by section 503(f) of Pub. L. 100-71.

Waivers: Requests for waivers from provisions of the Mandatory Guidelines for Federal Workplace Drug Testing Programs as provided at section 1.1(f) of the Guidelines are being considered by the Waivers Committee established by the DHHS. Scientific and technical representatives from relevant Federal departments serve on this committee. In order for consideration to be given to waiving any requirement of the Guidelines, an agency must submit a written request to the Secretary of Health and Human Services describing the rationale for requesting deviation from the specified provision(s).

Privacy Act: Attached for your information and guidance is a summary statement on the Privacy Act prepared by OPM. Some of you have brought to the ICG's attention your concern about Privacy Act implications surrounding the creation of drug test records following implementation of Drug-Free Federal Workplace Programs. In particular, questions have arisen concerning use of existing systems of records and the creation of new systems of records for drug test results. OPM has amended two Government-wide systems of records in which drug test results may be placed.

Agency systems of records (pre-existing or new) may also become the repository for drug test results. When a Privacy Act issue arises, consult your agency's Privacy Act Officer. If you are unable to resolve at the agency level a Privacy Act question which focuses on systems of records for drug test results, also consult OPM's Office of Workforce Information (John Sanet, (202) 632-4455).

Litigation Update: There are more than a dozen pending legal challenges to Federal agency drug testing programs and two broad challenges to the Executive Order. The attached summary of pending cases, prepared by DoJ for the ICG, gives an overview of ongoing litigation surrounding Federal drug testing programs.

Conference: "Drugs in the Workplace: Research and Evaluation Data": On September 14-16, 1988, the National Institute on Drug Abuse (NIDA) is sponsoring a conference titled "Drugs in the Workplace: Research and Evaluation Data." The conference, which will be held in Washington, D. C., will provide current information on the prevalence, impact, and treatment of drug use in the work force. Such information is essential to the design, implementation, and evaluation of drug programs in industry. Through the sharing of information by members of the business and research communities, NIDA hopes to encourage joint research and evaluation projects related to issues of drugs in the workplace. Registration information and other details can be obtained from Ms. Loraine Price at the TRITON Corporation, 1010 Wayne Avenue, Suite 300, Silver Spring, Maryland 20910, (301) 565-4020.

DHHS Collection Contract: Although negotiations are in final stages, no award has been made as of the date of this memorandum.

MRO Manual: This manual has been submitted to the printer. As soon as it arrives from the printer, several copies will be mailed to your agency. Additional copies will be available for purchase from the Government Printing Office.

National Laboratory Certification Program: The applicant laboratories are currently undergoing the required performance tests and inspection visits in order to be recommended for certification. DHHS anticipates releasing the initial list of certified laboratories in October and plans to transmit it to your agency as soon as it is available.

Videotapes: You should have already received complimentary copies of the first two tapes in the four-part videotape series developed by NIDA on the topics of drugs in the workplace and the role of EAPs. Later this year the two remaining tapes on education/prevention and drug testing will be furnished to you. Additional copies will be available for loan from the National Clearinghouse for Alcohol and Drug Information (NCADI) through its video loan program ((301) 468-2600) and the entire series will be available for purchase from National Audio Visual Center, Customer Services Section, 8700 Edgeworth Drive, Capitol Heights, MD 20043-3701, phone (301) 763-1896.

J. Michael Walsh, Ph. D.

Enclosures

The New York Times

Founded in 1851

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7/12/88

Yes: Drug Tests for (Some) Officials

Does the Federal Government have the right "to seize at random the bodily fluids of hundreds of thousands of its employees and search those fluids by urinalysis for evidence of drug abuse?" That's what the American Civil Liberties Union and other critics of the Reagan Administration's random drug testing program are asking.

In due course, they'll get an answer from the Supreme Court. The right answer is yes: if limited to cases of demonstrated need, such testing can be conducted with decent regard for privacy.

President Reagan is entitled to some latitude to fight the drug war on his own turf. Government has made the sale and use of certain substances illegal. Government need not hire drug users or keep them on the public payroll. But it's crucial that Government use its power sensibly and sensitively.

Law and public perceptions have come a long way since the Plainfield, N.J., fire department raided its own fire station two years ago, roused sleeping firefighters and demanded urine samples on the spot. The Reagan program addresses the need for fair warning to employees and job applicants, dignified yet reliable collection of samples, safeguards against false results and considerate behavior toward users willing to accept help.

The Civil Liberties Union argues that urine testing is a search. That's correct, but the next question is whether such a search is reasonable under the Fourth Amendment without a warrant based on reasonable suspicion of criminal conduct. The Government makes a plausible case when it compares drug testing to administrative health and building inspections, for which the Court has not demanded probable cause that there's evidence of crime.

The random drug testing program also asserts plausible Federal interests. In one case before the Court, a Customs Service regulation requires testing for any employee seeking a transfer to a position involving interdiction of narcotics, carrying firearms or handling classified material. In the other case, the Transportation Department mandates testing of railroad employees who are involved in train accidents.

It seems absurd, at least for personnel who enforce the law and have heavy responsibility for public safety, to insist that authorities must harbor strong suspicions before testing them. Random testing does not cast a net of suspicion over all employees in sensitive positions.

Despite court challenges, including a lawsuit filed by 42 Justice Department employees, the basic programs on their face are not excessively sweeping. The Justice plan, which conceivably can cover anyone connected with law enforcement, is prudently limited to employees with grand jury responsibility or access to classified information.

Even if the Supreme Court gives broad approval to the Reagan testing programs, the need will remain to administer them compassionately. But to tolerate drug abuse among pivotal public servants is to abuse the public they serve.

A Fair and Practical Plant-Closings Bill

The House is scheduled to vote this week on the controversial plant-closings bill, which would require businesses to give 60 days' notice when planning large layoffs or a complete shutdown. The Senate passed it by a surprisingly large 72-to-23 margin, but the bill needs veto-proof House approval, too. It is an overdue act of social justice.

year's foreign trade bill, which President Reagan singled out as his main reason for vetoing that bill. The House voted to override, but the veto was sustained in the Senate. The strategy of Congress's Democratic leadership now is to send the President a free-standing plant-closings bill with such strong support that a veto would be seen as proof that Re-

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PRIVACY ACT UPDATE

OPM published amendments to two existing systems of records: "Recruiting, Examining, and Placement Records" (OPM/GOVT-5) and "Employee Medical File System Records" (OPM/GOVT-10), in the Federal Register on June 12, 1987, 52 FR 22564. Each system notice contains a list of routine uses to which the records may be put and provided, in pertinent part, as follows:

> d. To disclose information to the Department of Justice, or in a proceeding before a court, adjudicative body, or other administrative body before which the agency is authorized to appear, when:
>
> 1. The agency, or any component thereof; or
> 2. Any employee of the agency in his or her official capacity; or
> 3. Any employee of the agency in his or her individual capacity where the Department of Justice or the agency has agreed to represent the employee; or
> 4. The United States, where the agency determines that litigation is likely to affect the agency or any of its components,
>
> is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice or the agency is deemed by the agency to be relevant and necessary to the litigation, provided, however, that in each case it has been determined that the disclosure is compatible with the purpose for which the records where collected.

After the publication of the amended system of records notices in the Federal Register, Congress passed Pub. L. 100-71 which contains provisions at section 503 that provided for strictly circumscribed disclosure of drug test results. It provides, in pertinent part, as follows:

> (e) The results of a drug test of a Federal employee may not be disclosed without the prior written consent of such employee, unless the disclosure would be --
>
> (1) to the employee's medical review official (as defined in the scientific and technical guidelines referred to in subsection (a)(1)(A)(ii));
> (2) to the administrator of any Employee Assistance Program in which the employee is receiving counseling or treatment or is otherwise participating;
> (3) to any supervisory or management official within the employee's agency having authority to take adverse personnel action against such employee; or

(4) pursuant to the order to a court of competent jurisdiction where required by the United States Government to defend against any challenge against any adverse personnel action.

In order to conform the two previously amended systems of records notices to provisions of Pub. L. 100-71 concerning disclosure pursuant to a court order, OPM published a new set of amendments to those two systems of records on January 26, 1988, 53 FR 2118. Those amendments, which brought the systems notices into strict conformity with section 503, became effective on March 28, 1988.

OPM has made these changes to the two Government-wide systems of records in which drug test results could be placed. Indeed, it is anticipated that drug test results will be placed in "Employee Medical File System Records" (OPM/GOVT-10) by the Medical Review Officers when received from the laboratory. Other pre-existing or new agency systems of records may also become the repository for drug test results. Drug test results will stay in OPM/GOVT-10 until such time as they may be used for an authorized purpose; for example, as support for an adverse disciplinary action.

To the extent that an agency has a previously established system of records for that type of record, it may amend it to provide for inclusion of drug test results. Any such amendment should include the disclosure prohibitions contained in section 503. In addition, new systems of records may be established by agencies as the need arises. Agencies may consult with the Office of Management and Budget (OMB), as the agency tasked with oversight responsibilities under the Privacy Act, concerning the amendment or creation of systems of records for those purposes. OMB is considering the issuance of a model systems notice for agencies to use when amending or establishing systems of records that will contain drug test results. The ICG will continue to monitor recordkeeping issues as agencies move toward implementation of the program.

STATUS OF FEDERAL DRUG-TESTING CASES

August 12, 1988

BROAD CHALLENGES TO THE EXECUTIVE ORDER:

NTEU v. Reagan, Civil No. 86-4058 (E.D. La). On April 29, 1988, the Court dismissed the challenge to the Executive Order, holding that it was not ripe for review. The Court also held that the FPM letter concerning drug testing was procedurally invalid. Motions to reopen the case and amend the opinion by both sides were argued on June 1, 1988.

AFGE v. Reagan, No. C-88-1697-AJZ (N.D. Cal.), is a broad-based challenge to the Constitutionality of the Executive Order, which is nearly identical to that filed by the National Treasury Employees Union in the Eastern District of Louisiana.

U.S. CUSTOMS SERVICE:

National Treasury Employees Union v. von Raab, 816 F.2d 170 (5th Cir. 1987), stay denied, 55 U.S.L.W. 1879 (U. S. June 1, 1987) is a challenge to the Customs Service policy of testing applicants for sensitive positions. The Supreme Court has accepted certiorari on this case. 56 U.S.L.W. 3590 (February 29, 1988). Government's brief was filed on June 17; argument is expected in October.

DEPARTMENT OF THE ARMY:

The Army's civilian drug testing program, implemented in 1986, was upheld by a federal district court in Virginia. Mulholland v. Department of the Army, 660 F. Supp. 1565 (E.D. Va. 1987) and the appeal dismissed. In Thomson v. Weinberger, 1988 U.S. Dist. LEXIS 2560 (D. Md. March 28, 1988), the court permanently enjoined random testing of a civilian biologist and pipefitter at the Aberdeen Proving Grounds.

In a decision regarding three consolidated cases, a federal district court for the District of Columbia (Judge Hogan) held the random testing portion of the Army's program was unconstitutional, National Federation of Federal Employees v. Carlucci, 680 F. Supp. 416 (D.D.C. 1988). The United States Court of Appeals for the District of Columbia granted the government's motion to stay that decision, pending appeal, and the Army has resumed all forms of civilian drug testing, No. 87-1797 (D.C. Cir. March 30, 1988). Our appellate brief is due on August 11, Appellees' brief due on September 13, and oral argument scheduled October 18, 1988 before Chief Judge Wald, Circuit Judges Mikva and Sentelle. Oral argument is consolidated with American Federation of Government Employees v. Dole, No. 87-5417.

DEPARTMENT OF TRANSPORTATION:

American Federation of Government Employees v. Dole, 670 F. Supp 445 (D.D.C. 1987) upheld all of the Department's program. That case is currently on appeal. Appellant's brief is due July 22, amicus curia's brief due August 11, and our brief is due September 13. Oral argument is consolidated with National Federation of Federal Employees v. Carlucci, No. 88-5080 on October 18 before the same panel: Chief Judge Wald, Circuit Judges Mivka and Sentelle.

DOT's post-accident testing program for the railroad industry is being separately challenged in Railway Labor Executives' Association v. Burnley, 839 F.2d 575 (9th Cir. 1988). In this case, a divided panel of the Ninth Circuit held that the Federal Railway Association's (FRA) post-accident testing program violated the Fourth Amendment. The Ninth Circuit has stayed its decision pending a ruling from the Supreme Court. Accordingly, the FRA continues to test under its three-year old program. The Supreme Court granted certiorari in this case, 56 U.S.L.W. 3831 (U.S. June 6, 1988) and will combine this case with the Customs program for oral argument.

DOT's post-accident testing program is also being challenged in Nat'l Air Traffic Controllers Ass'n v. Burnley, No. C-88-2028-JPV (N.D. Cal.). On June 6, 1988, the District Court denied plaintiff's motion for a temporary restraining order, and on July 19, the Court granted the government's motion for summary judgment. The plaintiffs plan to appeal.

BUREAU OF PRISONS:

AFGE v. Meese, No. C-88-1419-SAW (N.D. Cal.), is a challenge by the American Federation of Government Employees Union against the Bureau of Prison's Drug-Free Workplace Plan. Following a Temporary Restraining Order issued on May 20, 1988, Judge Stanley Weigel preliminarily enjoined all but the applicant testing program of the Bureau on June 16. A request to stay the decision was denied by a two member panel of the 9th Circuit on June 29, 1988, and by U.S. Supreme Court Justice Sandra Day O'Connor on July 25, 1988. Plaintiffs are currently engaged in discovery.

DEPARTMENT OF JUSTICE (OFFICES, BOARDS & LITIGATING DIVISIONS):

Harmon v. Meese, No. 88-1766 (D.D.C.), is a challenge by 41 DOJ employees against the DOJ Drug-Free Workplace Plan, contesting random testing of DOJ employees in "sensitive"

positions. On July 29, 1988, Judge George H. Revercomb preliminarily enjoined the DOJ Plan. At DOJ's request, the injunction was made permanent the following day.

DEPARTMENT OF COMMERCE (NATIONAL WEATHER SERVICE):

Quadros v. Reagan, No C-88-1764-RHS (N.D. Cal.), is a challenge by the National Weather Service Employee's Union against the U.S. Department of Commerce Drug-Free Workplace Plan in the context of random testing of meteorlogists, meteorological technicians, hydrologists, and hydrological technicians. On August 12, 1988, Judge Robert H. Schnacke preliminarily enjoined the testing of those four positions under the DOC plan.

VETERANS ADMINISTRATION:

AFGE v. Turnage, No. C88-20357 WAI (N.D. Cal.), is a challenge by the American Federation of Government Employees Union of the drug testing plan of the Veterans Administration which issued its 60-day notice on May 25.

Hansen et al. v. Turnage, No. C88-20361 RPA (N.D. Cal.), is a challenge filed by the ACLU to the drug testing plan of the Veterans Administration which issued its 60-day notice on May 25. The complaint alleges a class of VA employees, not covered in a union bargaining unit. On July 28, 1988, Judge Robert P. Aquilar preliminarily enjoined the program.

DEPARTMENT OF DEFENSE (DEPENDENTS SCHOOLS):

Ahlisten v. Reagan, No. C-88-2007-BLJ (N.D. Cal.), is a challenge by the Oversees Education Association against the Department of Defense Dependents Schools Drug-Free Workplace Program, specifically contesting random testing of oversees school teachers. The case is currently pending on a motion for summary judgment filed by the Association.