MEMORANDUM OF LAW

DATE: June 13, 1990

TO: Bill Howell, Lieutenant, via Bob Burgreen,
Chief, San Diego Police Department

FROM: City Attorney

SUBJECT: San Diego Police Academy Locker Searches

By recent, undated memorandum, you asked what expectation if any, students in the police academy have in the privacy of their assigned lockers. You asked particularly whether students could lawfully refuse to permit searches of their lockers, what reasonable expectation of privacy attaches to the lockers, and whether students could be required to sign an agreement to allow carte blanche inspection of their lockers. The following responds.

Searches of lockers assigned to "public safety officers" are governed in identical language by the Memorandum of Understanding (MOU), By and Between The City of San Diego and San Diego Police Officers Association (POA), and by the Public Safety Officers Procedural Bill of Rights, Government Code section 3300 et seq.

> XI. Inspections
>
> No public safety officer shall have his locker, or other space for storage that may be assigned to him searched, except in his presence, or with his consent, or unless a valid search warrant has been obtained or where he has been notified that a search will be conducted. This section shall apply only to lockers or other space for storage that are owned or leased by the employing agency.

MOU, art. 41, section XI. See also Government Code section 3309. The phrase "public safety officer" has a particular meaning. "[T]he term public safety officer means all peace officers specified in sections 830.1 . . . of the Penal Code." Government Code section 3301. "Any . . . police officer of a city . . . is a peace officer." Penal Code section 830.1(a).

As you know, students become sworn police officers after completing eight weeks of instruction within the police academy, thereby becoming peace officers and "public safety officers" as well. It would appear from the definitions above therefore, that the locker inspection procedures described in the MOU and Government Code are not applicable to students within the first

eight weeks of instruction, as they are not yet "public safety officers." As explained in the following however, I believe that the procedures are applicable to all students.

The MOU applies to police recruits without qualification. MOU, art. 2. This "extended coverage" brings recruits within the ambit of art. 41, section XI, from the day they first enter the academy. Provision for inclusion of recruits within the MOU is provided within the Government Code. "Any public agency which has adopted, through action of its governing body or its official designee, any procedure which at a minimum provides to peace officers the same rights or protections as provided pursuant to this chapter shall not be subject to this chapter with regard to such a procedure." Government Code section 3310. The City of San Diego has chosen to extend to recruits the rights and protections provided "public safety officers." Those rights and provisions include identical provisions for locker searches.

I would reach the same conclusion, even assuming arguendo, that art. 41, section XI, did not apply to non-sworn students. Public employees are generally protected from "unreasonable searches and seizures" of their personal property by employers through the Fourth Amendment of the United States Constitution and by the California Constitution, article I, section 13. In O'Connor v. Ortega, 480 U.S. 709, 715 (1987), the U.S. Supreme Court stated specifically that, "╒searches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment." The court found thereafter that, "╒in the case of searches conducted by a public employer, we must balance the invasion of the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace . . . ." Id. at 719. Moreover, "╒public employees' expectations of privacy . . . may be reduced by virtue of actual office practices, and procedures, or by legitimate regulations." Id. at 717. "The employees' expectations of privacy must be assessed in the context of the employment relation" and "the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." Id. at 717, 718.

Considerations in determining the "expectation of privacy" include ownership of the property to be searched, the variety and volume of material contained within the desk, file or locker, and the length of time that the container has been assigned to a person. As an example, the search in Ortega involved several file cabinets within a doctor's private office which he had

occupied for seventeen (17) years. As you would imagine, those factors were found by the court to have created a heightened "expectation of privacy" in the contents of the cabinets.

Your situation is different. Non-sworn students are assigned lockers in which to place limited quantities of material, for relatively brief periods of time. As the lockers of sworn peace officers may be searched under the terms described earlier, there is moreover no reason to believe that identically situated non-sworn students have a greater expectation of privacy in their lockers. I believe therefore that non-sworn students are subject to the provisions of the MOU, art. 41, section X1, under either theory of inclusion.

In specific answer to your questions, you may search a student's locker with or without the student's permission; the MOU and Peace Officers Bill of Rights both recognize your right to do so. There is moreover, no "reasonable expectation of privacy" to prevent your searching, regardless of whether the locker is occupied by a sworn or non-sworn student. You must however, at least tell the student that the locker is to be searched. An unnoticed inspection could be conducted only with a search warrant. In that vein, you could not obtain a waiver for "unannounced inspections," if by "unannounced" you mean unnoticed. Such an inspection would violate the Peace Officers Bill of Rights and MOU. But if by "unannounced" you mean informing the student of the inspection with little or no advance notice, I believe that you have that authority now, and do not require a waiver in order to conduct the search.

If you have any questions regarding the above, do not hesitate to contact me.

JOHN W. WITT, City Attorney
By
John Vanderslice
Deputy City Attorney

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