DATE: August 1, 1990

TO: Richard Snapper, Personnel Director
FROM: City Attorney
SUBJECT: Medical Examinations for Sworn Fire Department Personnel

INTRODUCTION

On May 29, 1990, your office requested the City Attorney to respond to various questions regarding the implementation of mandatory medical examinations, including urine testing for drugs, for sworn fire personnel. The following are the legal analyses and proposed answers to those questions.

1. Is it mandatory pursuant to Federal law, State law, or both, for sworn Fire Department personnel to undergo these medical examinations, which would include urine drug testing?

Currently, there is no federal or state law that requires Fire Department personnel to submit to medical examinations that include urine drug testing. However, federal law requires baseline, annual, and exit medical examinations, not necessarily including drug testing of certain fire department personnel. 29 C.F.R. section 1910.120(f) requires the following employees to submit to these examinations:

(a) All employees who are or may be exposed to hazardous substances or health hazards at or above the established permissible exposure limits for these substances, without regard to the use of respirators, for 30 days or more a year;
(b) All employees who wear a respirator for 30 days or more per year;
(c) Members of HAZMAT teams.

We understand from conversations with your department that all active fire-fighting personnel would come under (b) above, due to their frequent use of respirators, and that these employees are required to submit to an annual physical examination. The question, then, is whether the City may include drug testing as part of those examinations.

The City Attorney has considered this issue twice, in 1985 and 1986. (See attached Memoranda of Law by John M. Kaheny.) In 1989, the United States Supreme Court addressed the issue directly in two opinions, Skinner v. Railway Labor Executives' Assn., 489 U.S. ; 103 L.Ed 2d 639 (1989) and National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 103 L.Ed 2d 685

(1989).

In Skinner, the Court held that the U.S. Constitution did not prohibit the Federal Railroad Administration from requiring employees of private railroads who were involved in certain accidents to produce urine samples for drug testing; in Von Raab, the Court held that the United States Customs Service could require urine tests of employees who sought transfer or promotion to positions which directly involved the interdiction of drugs, or which required the carrying of a firearm.

In both cases, the Court found that a urine test constitutes a search, therefore invoking the fourth amendment (and, in our case, the due process clause of the fourteenth amendment). Skinner at 660; Von Raab at 701-702. Generally, a search must be supported by a warrant issued upon probable cause. Von Raab at 702. However, neither a warrant nor probable cause, nor even any measure of individualized suspicion, is necessary in every circumstance. Id. If the search serves special governmental needs, beyond the normal need for law enforcement, these special needs must be balanced against the individual's expectations of privacy to determine whether either a warrant or some level of individualized suspicion should be required in the particular context. Id. If, under the circumstances, the special needs outweigh the privacy interests of the individual, the search may be conducted with neither a warrant nor any individualized suspicion.

In addition to the fourth amendment concerns addressed by the United States Supreme Court in the cases discussed above, The City of San Diego must consider whether the proposed program violates any provision of the California Constitution. Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty,

acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy."

Even if an employer's conduct has some impact on the employee's right to privacy, unless the conduct substantially burdens or affects that right, justification by a compelling interest is not required. Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 1047 (1989), citing Schmidt v. Superior Court, 48 Cal. 3d 370 (1989). Instead, the operative question is whether the employer's conduct is reasonable. Id. That is, a rational basis test applies.

There is no doubt that the collection and testing of an employee's urine implicates the employee's privacy rights. Id.

at 1048, citing Skinner and Von Raab. However, in order to determine which standard applies, one must first determine whether the employees' privacy rights are substantially burdened or affected by the particular testing program. In upholding a mandatory drug testing program for prospective employees, the California Court of Appeal in Wilkinson noted that any person who chooses to seek employment necessarily also chooses to disclose certain personal information to their prospective employers. Wilkinson at 1049. These applicants necessarily had to anticipate being asked to submit to a pre-employment physical examination, which ordinarily includes a urinalysis. Id. Subjecting the urine samples to drug testing is only slightly more intrusive than the procedures which the applicants must reasonably have expected. Id.

Under the Fire Department's proposed drug testing program, the urine test would be but one part of a scheduled, and statutorily required, annual physical examination. This examination is conducted to determine the employee's fitness to perform the duties of his or her position. As part of this examination, a Fire Department employee should reasonably expect a urinalysis to be conducted. See Wilkinson at 1049. Therefore, subjecting the urine samples to drug analysis is only slightly more intrusive on the employee's privacy rights than the procedures already expected by, and required for, sworn Fire Department personnel. This, coupled with the proposed program's procedures, discussed below, mitigates the overall intrusiveness of the proposed drug screening program.

It is apparent that the proposed urine test would not substantially burden or affect the privacy rights of the Fire Department employees. Therefore, the proposed testing program is justified under the California Constitution as long as it is reasonable.1

Before subjecting Fire Department personnel to a medical examination that includes drug testing, the City must consider the standards adopted by the courts which are discussed above. There is little difficulty identifying a special need that such a program would serve. The City of San Diego and its residents have a very strong interest in being served by Fire Department personnel who have both the acuity and the physical dexterity necessary to safely and successfully perform their duties. A firefighter's duties are so filled with risks of injury to others, that even a momentary lapse of attention can have disastrous consequences. There is no doubt that a firefighter who performs his duties while under the influence of drugs unduly

endangers both himself and those whose safety depends on him. In addition, there have been problems in the past relating to drug use by several employees of the Fire Department, including firefighters. This, too, aggravates the City's special need.

Although The City of San Diego's special need might support the implementation of the proposed testing program, this interest must be balanced with the privacy interests of those who will be subjected to the tests. In order to mitigate the affect of the tests on these privacy interests, The City of San Diego should consider the following when developing the content and procedures of the program:

(a) Advance Notice of Test. A court will likely find a urine test less intrusive on an individual's privacy rights if the individual is given advance notice of the test. The United States Supreme Court has found that this would not defeat the purpose of the testing. Von Raab at 709. Addicts may be unable to abstain even for a limited period of time, or may be unaware

1In Luck v. Southern Pacific Transportation Co., 218 Cal. App. 3d 1 (1990), the California Court of Appeal, 1st District Division 4, applied a "compelling interest" standard in striking down a private employer's mandatory drug testing program. In that case, however, the program included random testing of employees who did not hold safety-sensitive positions. Moreover, the urine tests were not part of an otherwise required medical examination. Under these circumstances, the intrusion on the employees' privacy rights were sufficiently substantial to warrant a "compelling interest" standard. Id.

of the "fade-away effect" of certain drugs. Id. In addition, some drugs may stay in a person's system for up to a few weeks. Id. Moreover, any attempt at adulterating one's urine sample would be so difficult and full of risk, most employees, even drug users, would probably not attempt it. Id.

The fact that the urine tests in the proposed program are to be part of a scheduled physical examination will further lessen the impact of the testing on the individual's privacy, making it more likely that these searches will be found to be reasonable. Amalgamated Transit Union v.Cambria Co. Trans. Auth., 691 F. Supp. 898, 904 (W.D. PA 1988).

(b) Test Observation. Passing urine is obviously a very personal activity. Therefore, a testing procedure that involves the visual or aural monitoring of this activity will likely be found very intrusive on the individual's expectations of privacy. A testing procedure which provides for the collection of urine samples in a medical environment by personnel unrelated to the

City of San Diego, and which does not require direct observation, should assist in protecting the privacy interests of the test subjects. Skinner at 666.

(c) Use of Test Results. If the urine test results are used to serve the ordinary needs of law enforcement, a court might find that the claimed special need was merely a pretext to the prosecutorial interests. The City would then have to meet a much heavier burden of reasonableness. Capua v. Plainfield, 643 F. Supp. 1507, 1520 (D.C. N.J. 1986). In short, any use of the test results for the furtherance of a criminal investigation or prosecution would likely put the City in a position of having to prove some level of individualized suspicion - the special interests discussed earlier might not suffice.

In addition, because the chemical analysis of urine can reveal myriad private medical facts about an employee, such as whether that employee is epileptic, pregnant or diabetic, the United States Supreme Court has held that this chemical analysis, in and of itself, constitutes a search under the fourth amendment. Skinner, at 659. The drug testing program in Skinner did not allow the urine tests to be used to discover private facts unrelated to alcohol or drug use. Skinner at 665-666. Although employees were asked to complete a form stating whether they have taken any medications during the preceding 30 days, this information was kept confidential, and was only used to ascertain whether a positive test result could be explained by the employee's lawful use of medication. Skinner at 666 n. 7. The Court found that this limitation on the use of the tests had a mitigating affect on the level of intrusion on the employee's privacy rights. The City of San Diego should consider this type of limitation for any drug testing program it decides to implement.

2. Which job classifications would be covered by the legislation? Could unrepresented or unclassified employees be scheduled for these medical examinations, including urine drug testing?

We understand from conversations with your department that virtually all Fire Department personnel involved in fire suppression come under 29 C.F.R. section 1910.120(f)(1)(ii), and are thereby required to submit to baseline, annual and exit physical examinations. In addition, these employees' duties are of the type upon which public safety depends. If the proposed program is applied to employees who fit neither of these categories, the City would have a more difficult time justifying the program; its special needs would be less persuasive when

balanced against the privacy interests of these individuals. For example, a Battalion Chief might not be as involved in actual fire suppression as some firefighters, but he or she must have both clear, quick judgment capabilities and the ability to meet whatever physical requirements arise in the field. A Battalion Chief, therefore, would seem to be a reasonable subject of a physical examination, including a drug test. On the other hand, a member of the support staff, such as clerical worker or another non-emergency employee, probably does not perform duties that require the same level of physical dexterity as those of a firefighter. In addition, although all employees will better serve their employer if their minds are unaffected by drugs, public safety does not necessarily depend on this. As a result, the City's claim of a special need diminishes as to the testing of those employees' urine.

In short, in determining which employees may be subject to the physical examinations, including a urine test for drugs, one must apply the balancing test discussed in (1) above. If the City has a special need that would be served by the mandatory testing of a certain class of employee, and that testing is tailored to be as unintrusive as is practicable, then a court would likely find the required testing to be reasonable.

3. Do employees undergoing these medical examinations have to sign a release to authorize the results of the examinations to be released to the City?

California Civil Code section 56.10(a) and (c)(8)(B) states in pertinent part the following:

> (a) No provider of health care shall disclose medical information regarding a patient of the provider without first obtaining an authorization, except as provided in subdivision (b) or (c).
>
> (c) A provider of health care may disclose medical information as follows:
>
> (8) A provider of health care that has created medical information as a result of employment-related health care services to an employee conducted at the specific prior written request and expense of the employer may disclose to the employee's employer that part of the information which:
>
> (B) Describes functional limitations of the patient that may entitle the patient to leave from work for medical

> reasons or limit the patient's fitness to perform his or her present employment, provided that no statement of medical cause is included in the information disclosed.

Unless the employee authorizes the medical examiner to disclose the results of the physical examination to The City of San Diego, the medical examiner may only disclose that part of the information that describes functional limitations of the employee's fitness to perform his or her employment duties. He may not disclose the medical cause of any functional limitation without an authorization. (See California Civil Code section 56.11 (Deering 1981)).

Therefore, without an authorization, if an employee fails the physical examination for any reason, including as a result of drug use, the examining doctor may only disclose what functional limitations the employee suffers from (e.g., slow reflexes), but not what caused those limitations (e.g., drug use).

4. What recourse would the City have if an employee refused to release the medical examination results to the City?

The City does not need an authorization or release from the employee in order to get the results of the physical examination. If the City wanted or needed the information leading to the results (e.g., the medical cause of a functional limitation), it would need the employee to authorize the examining doctor to release this information. California Civil Code section 56.20(b) states:

> (b) No employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization . . . . However, nothing in this section shall prohibit an employer from taking such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization under this part.

In addition, California Civil Code sections 56.10 and 56.20 provide several exceptions to the general prohibition on disclosure of medical examination results. Most of these exceptions refer to situations involving judicial or legal proceedings relating to the results or findings of the medical examination.

5. Is such a medical examination, or alternatively, its administrative procedures, subject to meet and confer?

California strongly favors the "peaceful resolution of employment disputes by means of arbitration." Fire Fighters Union v. City of Valejo, 12 Cal. 3d 608, 622 (1974). This labor policy is clearly manifested by the Meyers-Milias-Brown Act ("MMBA"), (Government Code section 3500 et seq.), which affords public employees the right to collectively bargain with their governmental employers.

Pursuant to Government Code section 3504.5, a city must give "reasonable written notice to each recognized employee organization" to be affected by any proposed legislation "directly relating to matters within the scope of representation." Section 3505 further requires a city to "meet and confer in good faith" with representatives of such employee organizations concerning matters within the scope of representation.

The phrase "scope of representation" is defined by section 3504 as:

> ┌Aσll matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

Federal and state law require annual medical examinations for the majority (if not all) of fire personnel, therefore, the City need not meet and confer with Local 145 on such a program. Mandatory drug testing, however, is not mandated by law, and therefore necessitates further analysis.

Case law surrounding the meaning of "terms and conditions of employment" is abundant. For the most part, the courts attempt to distinguish between matters directly affecting working conditions and those including general managerial decisions. While the former have been given broad interpretation, the latter have been strictly construed so that the policy favoring arbitration will not be unduly hindered.

Although compulsory drug testing is a matter that the courts have not yet categorized, the City's proposal is analogous to the situation involved in Fire Fighters Union v. City of Valejo, 12 Cal. 3d 608 (1974). In that case, the City of Valejo sought, among other things, to reduce the number of firefighters without arbitration. Relying on federal authorities, the court held that

while an employer has the "right unilaterally to decide that a layoff is necessary . . . it must bargain about such matters as the timing of the layoffs and the number and identity of employees affected." Id. at 621; Los Angeles County Civil Service Comm'n v. Superior Court, 23 Cal. 3d 55, 63-64 (1978).

Assuming the constitutionality of mandatory drug testing, the City arguably has the right to unilaterally decide that such examinations are necessary. This right would be based presumably on the ground that the public's safety requires the assured sobriety of each of its firefighters. However, as the examination would impose upon the privacy of the employee, the procedures used to conduct the test are most likely matters which impinge on a condition of employment.

It might be contended that the City's plan is similar to a police department's policy governing when a peace officer may discharge his firearm. San Jose Peace Officer's Ass'n v. City of San Jose, 78 Cal. App. 3d 935 (1978) held that the latter was a managerial decision not within the scope of representation. There the court observed that "the protection of society from criminals, the protection of police officers' safety, and the preservation of all human life" were not matters appropriate for collective bargaining. Id. at 948.

This reasoning, however, does not apply with equal force here. Admittedly, decisions such as how to approach a forest fire, or the proper truck to use in a given situation are questions properly left to the management of the Fire Department. But the manner in which an employee is subjected to a supposed violation of his or her privacy is probably a matter in which the employee is entitled to collectively bargain, particularly when refusal to submit to the examination would likely result in dismissal.

Finally, in regard to dismissal, California case law has drawn sustenance from federal decisions which find that the penalties for breaches of employment terms sufficiently affect the conditions of employment to make them mandatory subjects of collective bargaining. See Vernon Fire Fighters v. City of Vernon, 107 Cal. App. 3d 802, 815-17 (1980).

6. If the program is subject to meet and confer and if the City does not reach agreement with Local 145, can the City implement the program regardless?

Should disputed issues remain after the City and Local 145 meet and confer, the parties may attempt to resolve their differences through an impasse meeting pursuant to the Memorandum of Understanding ("MOU"). Article 36, section C of the MOU

states, in relevant part: "If no impasse meeting is held pursuant to B1 above or no agreement is reached at an impasse meeting, impasses shall then be resolved by a determination by . . . the City Council after a hearing on the merits of the dispute."

Judicial authority supports this process. Indeed, the Court of Appeal noted that:

> ╒Aσ governing body has no commitment to accept agreements negotiated by its representatives. The MMBA does not prescribe the manner in which an agreement between a local government and an employee organization should be put into effect--in fact, it is silent as to what occurs after a nonbinding memorandum of
>
> understanding is submitted to the governing body "for determination."

United Public Employees v. City and County of San Francisco, 190 Cal. App. 3d 419, 423 (1987).

Accordingly, if the City Council determines that the examination procedures recommended by the City are appropriate, the plan may be implemented despite disagreement from Local 145. The only precondition is that, when meeting and conferring, "the parties seriously attempt to resolve differences and reach a common ground." People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach, 36 Cal. 3d 591, 597 (1989).

7. As a separate issue, does the City have the authority to impose a mandatory and random drug screening program for sworn members of the Fire Department? If this is allowable, what job classifications would be covered?

As discussed in (1) above, a court would likely find a drug screening program which mandates random testing to be more intrusive on individual privacy rights than one which gives advance notice of the tests to the individual to be tested. The United States Supreme Court, in both Von Raab and Skinner, found that the advance notice given to the test subjects substantially mitigated the tests' impact on the privacy rights of the individuals.

Although advance notice no doubt will make a given testing program more acceptable to the courts, it is not necessarily mandatory. The United States Court of Appeals 4th Cir. has interpreted Von Raab and Skinner as holding that random drug tests do not violate the fourth amendment in limited circumstances where important governmental interests outweigh the individuals' expectations of privacy. Thomson v. Marsh, 884 F.2d

113, 114-115 (4th Cir. 1989). In that case, the court upheld random drug testing of civilian employees of the Army whose work involved chemical weapons; the compelling governmental interest outweighed the intrusion on the individual's privacy rights.

It should be remembered, however, that in order to pass muster in the state courts a drug testing program must meet a higher standard than that set by the federal courts under the fourth amendment. It must be noted, however, that a California state court might apply a stricter standard of review to a drug testing program which imposes random drug testing, particularly if the testing is imposed on employees not holding safety-sensitive positions. Indeed, in Luck v. Southern Pacific

Transportation Co., 218 Cal. App. 3d 1 (1990), the California Court of Appeal concluded that such a program could only be justified if it was necessary to a "compelling governmental interest; as to employees not holding safety-sensitive positions, it was not so justified. (See footnote 1, page 4 of this memorandum.) In addition, the California Court of Appeal 4th District, Division 2, recently appeared to state in dicta that the California Constitution requires that any invasion of privacy by government be necessary to achieve a compelling interest. Semore v. Pool, 217 Cal. App. 3d 1087, 1097-1098 n. 5 (1990). It should be noted that if the annual drug testing reveals a significant amount of drug use by sworn fire personnel, such statistics would further justify a compelling governmental interest.

The message here is that any program implemented by The City of San Diego involving random testing, should be tailored to serve the City's compelling interest without sweeping too broadly. If randomness of the testing is not necessary to the furtherance of the City's compelling interest, a California court might invalidate the testing program.

Please let us know if you would like additional information.

JOHN W. WITT, City Attorney
By
Sharon A. Marshall
Deputy City Attorney

MS:PH:SAM:mrh:506(x043.2)
Attachments
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