

Random Drug Testing of Police Officers: A Proposed Procedure Which Satisfies Fourth Amendment Requirements

“[F]or nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power.”¹

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INTRODUCTION

The problem of illegal drug use in the work place has received considerable attention in recent years.² The public now considers drug abuse more threatening than even real war.³ In response to this increased awareness, many employers, both public and private, have begun testing for illegal drug use among their employees.⁴ In the public sector, the

1. *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936).

2. See Weisman, *48 Hours on Crack Street: I Was A Drug-Hype Junkie*, NEW REPUBLIC, Oct. 6, 1986, at 14, 15 (article discusses the vast number of stories on drug abuse).

3. See *America's Crusade: What is Behind the Latest War on Drugs*, TIME, Sept. 15, 1986, at 60; *Presidential Debate* (network television broadcast, Sept. 25, 1988). Illegal drug use is the most important public problem today. *Id.*

4. Stille, *Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, NAT'L L.J., Apr. 7, 1986, at 1, col. 1. In 1986 about one-fourth of the leading industrial companies conducted drug testing. *Id.* Almost five million Americans were tested for drug use in 1985. *Id.* Fifty percent of Fortune 500 companies now have testing programs. 134 CONG. REC. S7811 (daily ed. June 14, 1988).

military was the first to test on a significant basis.⁵ In 1987, the Reagan Administration accelerated the assault on drug use in the work place when the President signed Executive Order 12,564.⁶ This executive order implemented drug testing in the federal executive branch.⁷ Based on this order, many police departments began testing their members.

Since drug testing of police officers began, the question as to the proper standards required, in terms of inception of testing and scope of testing, has been examined by many courts.⁸ Until recently, the courts have consistently required some basis for suspecting that the police officer was using illegal drugs before upholding the legality of the testing procedure.⁹ In *Policemen's Benevolent Association v. Washington Township*,¹⁰ a court for the first time failed to require reasonable suspicion before testing police officers.¹¹ This case is in direct conflict with other recent cases which require reasonable suspicion.¹²

This note will examine the fourth amendment issues encountered in the mandatory¹³ drug testing of police officers. Particular emphasis will be paid to the recent case of *Policemen's Benevolent Association*.¹⁴ Part I gives an overview of the drug problem and discusses the goals of any

5. Stille, *supra* note 4, at 1, col. 1. The military now conducts about half of all drug tests performed in the nation. *Id.* at 22, col. 2.

6. Exec. Order No. 12,564, 3 C.F.R. 224 (1987).

7. *Id.* Testing is limited to federal employees holding sensitive positions. *Id.* at 226. The executive order defines sensitive position based on the agency's mission, the employee's duties, and the potential danger to the public health, safety, or national security. *Id.*

8. See *infra* notes 89-170 and accompanying text for a discussion of the principal cases.

9. *Lovvorn v. Chattanooga*, 647 F. Supp. 875, 881 (E.D. Tenn. 1986), 846 F.2d 1539 (6th Cir. 1988). See *infra* notes 90-136 and accompanying text.

10. 850 F.2d 133 (3d Cir. 1988). This case is titled *Policemen's Benevolent Ass'n v. Washington Township* in the District Court decision. 672 F. Supp. 779 (D.N.J. 1987). It is titled *Policeman's Benevolent Ass'n v. Washington Township* in the Court of Appeals decision. 850 F.2d 133 (3d Cir. 1988). However, the Court of Appeals refers to *Policemen's Benevolent Association* in the text. *Id.* at 134. Therefore, this author will use *Policemen's Benevolent Association* throughout this Note when referring to either the opinion of the District Court or Court of Appeals.

11. *Id.* at 141.

12. See *infra* notes 90-136 and accompanying text.

13. In this note the terms random and mandatory drug testing are used interchangeably. Random or mandatory testing refers to any testing where the degree of suspicion is general to the group rather than specific to the individual. Random testing involves selecting persons to be tested by random methods, while mandatory testing involves testing the entire police force. The terms are used interchangeably because the issues involved are identical. See Ayers, *Constitutional Issues Implicated by Public Employee Drug Testing*, 14 WM. MITCHELL L. REV. 337, 340-41 (1988).

14. 850 F.2d 133 (3d Cir. 1988).

drug testing program. Part II explores the various testing procedures. Fourth amendment issues are discussed in Part III. Part IV provides an analysis of the recent cases. A sample drug testing procedure which would meet all the fourth amendment constraints is provided in Part V. Finally, Part VI concludes with the assertion that mandatory drug testing of police officers is constitutionally permissible without individualized reasonable suspicion.

I. OVERVIEW OF THE DRUG PROBLEM

A. *Drug Abuse as an Immense National Problem*

Although illegal drug use has been a part of American life for a long time, the problem has increased dramatically in the last twenty years.¹⁵ Reportedly, a quarter of the American population use, either regularly or occasionally, some kind of illegal drug.¹⁶ Drug use in the work place can lead to an increase in property damage, tardiness, absenteeism, employee theft, health care costs, workers' compensation costs, and the number and severity of accidents while decreasing the productivity and workmanship of the employees.¹⁷ American business loses an estimated sixty billion a year because of employee drug use.¹⁸

Drug use in the public sector is even more problematic than drug use in the private sector. The government has an obligation to the

15. ADAMS, BLANKEN, FERGUSON & REZNIKOV, OVERVIEW OF SELECTED DRUG TRENDS 1 (1985)(available from the National Institute on Drug Abuse). An estimated fifty-six million Americans have used marijuana, twenty million are current users. *Id.* at 11. Twenty-two million Americans have tried cocaine, four million of whom are current users. *Id.* at 7.

16. Stille, *supra* note 4, at 1, col. 1.

17. See Geidt, *Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights*, 11 EMP. REL. L.J. 181, 181 (1985); Stille, *supra* note 4, at 1, col. 2; 134 CONG. REC. S7811 (daily ed. June 14, 1988).

18. 134 CONG. REC. S7811 (daily ed. June 14, 1988). Employees with drugs in their systems are:

two and one-half times more likely to have absences of eight days or more;

three and six-tenths times more likely to injure themselves or another person in a work place accident;

five times more likely to be involved in an accident off the job, which, in turn, affects attendance or performance on the job;

five times more likely to file a workers' compensation claim;

one-third less productive; and,

incur 300 percent higher medical costs and benefits.

In 1988, Congress projected that the federal government would spend more than \$2.5 billion in 1988 on interdiction, investigation, prosecution, correction, enforcement, and assistance to state and local governments. *Id.* Congress further projected that local police departments would spend another \$861 million. *Id.*

community. Drug use among its employees hinders the satisfaction of this obligation.¹⁹ This duty to the public is particularly critical when the government employee is charged with protecting the public's safety. Police are entrusted with the unusual authority to use force. The potential for disastrous results is obvious if policemen are under the influence of drugs.

The police officer's duties render him especially susceptible to illegal drug use.²⁰ Many police officers are in constant contact with drug users and suppliers. Most police officers know how to obtain illegal drugs. Another important contributing factor to a police officer's susceptibility to use illegal drugs is the high stress involved in the job. It has even been stated that it would be an anomaly if drug abuse was not a problem among police officers.²¹ One author outlines seven reasons to test police officers.²² The reasons are public safety, public trust, potential for corruption, presentation of credible testimony, morale in the force, loss of productivity, and civil liability.²³

B. Criticisms of Drug Testing

Even though there are many strong reasons to test for illegal drug use among police officers, many problems are associated with testing. Critics of drug testing claim that drug testing does not significantly increase the safety of the work place and that testing programs have revealed a rather low level of illegal drug use.²⁴ Proponents point to several incidences where drug use has significantly declined after testing had begun.²⁵ Clearly drug testing can reduce the negative effects of illegal

19. See *supra* note 17 and accompanying text.

20. Dunham, Lewis & Alpert, *Law Enforcement: Testing the Police for Drugs*, 24 CRIM. L. BULL. 155 (1988).

21. *Id.* (citing G. ALPERT & R. DUNHAM, *POLICING URBAN AMERICA* (1988)).

22. Higginbotham, *Urinalysis Drug Testing Programs for Law Enforcement (Part I)*, 55 FBI L. ENF. BULL. 25 (Oct. 1986).

23. *Id.* See Dunham, Lewis & Alpert, *supra* note 20, at 156-58 for a discussion of these seven reasons to test police officers.

24. Of 5,300 people tested by the Customs Service, only six had positive results, about 0.1 percent. Neal, *Mandatory Drug Testing*, 74 A.B.A. J. 58, 63 (Oct. 1988). Out of 1508 railroad workers tested, ten tested positive for alcohol and sixty-six tested positive for drugs, approximately 5.8 percent. *Id.*

25. Within two years of beginning drug testing, the Southern Pacific Railroad experienced a decrease in accidents of seventy-two percent. After instituting a testing program, Armco National Supply Company's plant in Houston experienced a two-thirds reduction in its accident rate, a fifteen percent increase in productivity, an increase in product quality, and a decrease in turnover. The United States Navy's positive rate for sailors was reduced from forty-seven percent to four percent in just three years. The Navy reported a significant increase in battle readiness. 134 CONG. REC. S7812 (daily ed. June 14, 1988).

drug use if conducted properly. Critics also challenge the reliability of the drug tests and predict that false positive results will ruin the careers of tens of thousands of innocent people.²⁶ These criticisms are not without merit and must be addressed before random drug testing is allowable. This note proposes a procedure that will provide nearly one hundred percent reliability.²⁷

Other potential problems, besides reliability of the actual chemical test, must be addressed in a comprehensive urinalysis procedure. Drug testing is considered to be embarrassing and degrading.²⁸ Although courts have differed on the level of embarrassment created by drug testing,²⁹ any embarrassment must be minimized. Another problem is that tests for illegal drugs do not determine the level of impairment at the time of testing.³⁰ Evidence of the drug use may appear in a urine sample for weeks after taking the drug.³¹ The root question is whether an officer can be disciplined for off duty illegal drug use. This question is less difficult to answer with regard to police officers than for other public employees for two reasons. First, impairment can last long after the drug is ingested, and long after the user notices the impairment.³² Second, the actions of off duty police officers are already regulated by their departments. Police department procedures require that off duty police officers conduct their private lives so as to not bring the department into disrepute.³³ They must carry their revolver and badge at all times.³⁴

26. Stille, *supra* note 4, at 1, col. 2. See *infra* notes 36-51 and accompanying text.

27. See *infra* notes 171-178 and accompanying text.

28. See, e.g., *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part*, 109 S. Ct. 1384 (1989); *Capua v. City of Plainfield*, 643 F.Supp. 1507, 1514 (D.N.J. 1986).

29. "A urine test done under close surveillance of a government representative, regardless of how professionally or courteously conducted, is likely to be a very embarrassing and humiliating experience." *Capua*, 643 F. Supp. at 1514. Some courts compare a urinalysis to a body cavity search. *Tucker v. Dickey*, 613 F. Supp. 1124, 1129-30 (W.D. Wis. 1985). Another court stated that a urinalysis "is even less intrusive than a fingerprint which requires that one's fingers be smeared with black grease." *Mack v. United States, Fed. Bureau of Investigation*, 653 F. Supp. 70, 75 (S.D.N.Y. 1986).

30. The level of impairment has not been correlated with specific concentrations of drug metabolites. See NATIONAL INSTITUTE ON DRUG ABUSE, Q & A, DETECTION OF DRUG USE BY URINALYSIS 13 (1986).

31. A urine test for marijuana can detect casual use for up to two weeks and even longer for a chronic user. See Centers for Disease Control, *infra* note 43, at 469-70.

32. A study completed on pilots using a flight simulator showed impairment even twenty-four hours after smoking marijuana. One pilot, who reported no awareness of any intoxication, completely missed the runway. Yesavage, Leirer, Denari & Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 AM. J. PSYCHIATRY 1325, 1328 (1985).

33. *Policemen's Benevolent Ass'n v. Washington Township*, 850 F.2d 133, 138 (3d Cir. 1988).

34. *Id.* at 139-40.

Therefore, level of impairment at the time of testing is not as important as would be true for other public employees because the actions of police officers can be regulated even if they are off duty. Many opponents of drug testing point out that over-the-counter medications can affect the results.³⁵ This must be considered in developing a sound testing procedure. Due to these problems, courts have been reluctant to allow police departments to freely test their officers.

II. CURRENT DRUG TESTING METHODS

One of the basic assumptions of any drug testing program is that the individuals who test positive have actually used illegal drugs. Considering the seriousness it is imperative that the results be accurate.

A. *The EMIT Test*

The most common urinalysis test is the enzyme multiplied immunoassay technique (EMIT).³⁶ The EMIT test can be used to test for marijuana, cocaine, barbiturates, amphetamines, phencyclidine (PCP), and opiates (including heroin).³⁷

The EMIT test is the most popular because it is inexpensive,³⁸ requires little formal training to administer, has a short analysis time, can detect a wide range of drugs, and is promoted by its manufacturer as being ninety-five percent accurate.³⁹ The EMIT test is also popular because it may be performed at the workplace.⁴⁰

The EMIT test has been criticized because it has a tendency to yield false positive results when legitimate drugs are mixed with certain foods.⁴¹

35. See *infra* note 41 and accompanying text.

36. L. DOGOLOFF & R. ANGAROLA, URINE TESTING IN THE WORKPLACE 11 (1985); M. HOUTS, R. BASELT & R. CRAVEN, COURTROOM TOXICOLOGY §§ 30.01-30.06 (1986).

37. L. DOGOLOFF & R. ANGAROLA, *supra* note 36, at 21.

38. The cost of an EMIT is approximately \$5. The cost of a gas chromatography/mass spectrometry (GC/MS) test is between \$25 and \$35. Note, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U. CHI. L. REV. 1335, 1338 n.11 (1987). Confirmation tests can cost up to eighty dollars apiece. Stille, *supra* note 4, at 23, col. 4.

39. *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 565 (1988).

40. Morgan, *Problems of Mass Urine Screening for Misused Drugs*, 16 J. PSYCHOACTIVE DRUGS 305, 306 (1984).

41. See *Grapevine*, TIME, Oct. 3, 1988, at 25. A study of how over-the-counter medications can affect the results of a urinalysis found that "Advil can produce a positive reading for marijuana; swallowing Alka-Seltzer can lead to a positive verdict of amphetamines; ingesting Vicks cough medicine or Robitussin-DM can yield a positive indication of morphine." *Id.* See also Budiansky, *Busting the Drug Testers*, U.S. NEWS & WORLD REPORT, Oct. 20, 1986, at 70 (reporting that a poppyseed bagel triggered a positive result

Also, the EMIT test has been criticized because passively inhaled marijuana smoke could register as a positive result.⁴² Some experts claim that the EMIT gives inaccurate results sixty percent of the time.⁴³ Because of the limitations of the test, a manufacturer of the EMIT test has recommended that a positive test result be confirmed using another testing method.⁴⁴

B. The GC/MS Test

The most conclusive confirmation test is the gas chromatography/mass spectrometry test (GC/MS).⁴⁵ The GC/MS test is not used as an initial screening device due to its cost⁴⁶ and must be performed in a laboratory by trained technicians.⁴⁷ The GC/MS test requires more equipment and takes longer than the EMIT test. But the GC/MS test has the advantage of producing a graphic record that an individual expert can review.⁴⁸ Since a GC/MS test requires a high level of training to perform,⁴⁹ a poorly trained technician could misinterpret the results. But if a GC/MS test is performed carefully by an adequately trained technician, it is almost always accurate.⁵⁰

for cocaine); Zeese, *infra* note 42, at 26 (Syva Company, the manufacturer of EMIT, has reported that aspirin, amphetamine, amitriptyline, benzocyclogonine, diazepam, meperidine, methaqualone, morphine, phencyclidine, propoxyphene, and secobarbital may create false positive results).

42. See Zeese, *Marijuana Urinalysis Tests*, 1 DRUG L. REP. 25, 28 (1983) (reporting a study conducted by the *American Journal of Psychiatry* in 1977 that found positive test results after passive inhalation of marijuana smoke).

43. Hansen, Caudill & Boone, *Crisis in Drug Testing*, 253 J. A.M.A. 2382, 2386 (1985). *But see*, Centers for Disease Control, *Urine Testing for Detection of Marijuana Use: An Advisory*, 32 MORBIDITY & MORTALITY WEEKLY REP. 469 (1987) (urinalysis only four percent inaccurate).

44. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 205 (1986). Stille, *supra* note 4, at 23, col. 4. Several courts have found that double EMIT testing is adequate to satisfy the due process clause of the Constitution. *See*, *Wykoff v. Resig*, 613 F. Supp. 1504 (N.D. Ind. 1985); *Peranzo v. Coughlin*, 608 F. Supp. 1504 (S.D.N.Y. 1985); *Spence v. Farrier*, 807 F.2d 753 (8th Cir. 1986). Some courts even allow reliance on a single EMIT test. *See* *Jensen v. Lick*, 589 F. Supp. 35 (D.N.D. 1984)(prison officials could impose sanctions on prisoners based on an unconfirmed EMIT test); *Smith v. State*, 250 Ga. 438, 298 S.E.2d 482 (1983)(the EMIT test is sufficiently reliable to stand as the only evidence in a parole revocation hearing).

45. Schwartz & Hawks, *Laboratory Detection of Marijuana Use*, 254 J. A.M.A. 788, 790 (1985).

46. *See supra* note 38.

47. L. DOGOLOFF & R. ANGAROLA, *supra* note 36, at 22.

48. McBay, *Problems in Testing for Abused Drugs*, 255 J. A.M.A. 39, 40 (1986).

49. L. DOGOLOFF & R. ANGAROLA, *supra* note 36, at 22.

50. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 181 (5th Cir. 1987), *aff'd in part*, 109 S. Ct. 1384 (1989).

Since the tests themselves are nearly one hundred percent accurate, the real potential for error is with the administration of the tests.⁵¹ Sloppy laboratory practices, such as failure to clean the equipment properly, will cause erroneous results. Therefore, a strict chain of custody must be developed.

III. FOURTH AMENDMENT ANALYSIS

The fourth amendment protects people from unreasonable searches and seizures undertaken by either federal or state governments.⁵² The purpose of the fourth amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by government officials."⁵³ To analyze drug testing under the fourth amendment, two issues must be addressed. First, is urinalysis a search under the fourth amendment? If so, is that search reasonable and thus exempt from the warrant requirement?⁵⁴

A. *Is Urine Testing a Search?*

An overwhelming number of federal district courts and federal courts of appeal have held that mandatory taking of urine constitutes a search

51. Since laboratories are unregulated, the level of quality varies enormously. Studies have set the error rate at between three and twenty percent. Stille, *supra* note 4, at 24, col. 3.

52. The fourth amendment to the Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. See *Smith v. White*, 666 F. Supp. 1085, 1089 (E.D. Tenn. 1987).

53. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

54. On November 2, 1988, the United States Supreme Court heard arguments on two cases concerning drug testing by the public sector. Legal experts noted that the Court stepped in rather quickly to reconcile the lower courts. The Court considered *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part*, 109 S. Ct. 1384 (1989), and *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *rev'd sub nom.*, *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989).

National Treasury involved the testing of Customs Service employees when they applied for specific sensitive positions. *Burnley* challenged the constitutionality of administering drug tests to all crew members of a train involved in an accident that results in property damage or personal injury. Neither case involved random drug testing.

In both cases, the Supreme Court held that a urinalysis is a search under the fourth amendment. *National Treasury*, 109 S. Ct. at 1390; *Railway Labor Executives*, 109 S. Ct. at 1413. Also, in both cases the Supreme Court held that the search was reasonable and thus exempt from the warrant requirement. *National Treasury*, 109 S. Ct. at 1397; *Railway Labor Executives*, 109 S. Ct. at 1422. Since neither case involved random drug testing, the constitutionality of this procedure has not been established.

and seizure under the fourth amendment.⁵⁵ Courts consider urinalysis a search because of the information about a person's personal life which may be determined.⁵⁶ It can be determined whether a person is diabetic, whether a woman is pregnant, and whether a person is taking any prescription drugs.⁵⁷ While the Supreme Court has not decided whether the mandatory taking of a public employee's urine constitutes a search and seizure, the Court has held that most bodily intrusions, such as involuntary blood test, are a search and seizure under the fourth amendment.⁵⁸ The Court determined that the drawing of blood was a minor intrusion.⁵⁹ If the Supreme Court ever considers this issue, the Court will likely hold that mandatory production of urine is a search and seizure under the fourth amendment.⁶⁰

B. *The Reasonable Suspicion Standard*

Generally, probable cause is required before a search or seizure is considered reasonable.⁶¹ However, courts have held that searches based on a lesser showing can still be reasonable.⁶² For a search to be reasonable

55. Neal, *supra* note 24, at 60. See, e.g., National Fed'n of Fed. Employees v. Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987); National Treasury Employees Union v. Von Raab, 816 F.2d 170, 176 (5th Cir. 1987), *aff'd in part*, 109 S. Ct. 1384 (1989); McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987); Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986); Jones v. McKenzie, 628 F. Supp. 1500, 1508-09 (D.D.C. 1986), *rev'd*, 833 F.2d 335 (D.C. Cir. 1987); Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); Storms v. Coughlin, 600 F. Supp. 1214, 1217 (S.D.N.Y. 1984); Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888, 889 (1986); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1325-27 (Fla. Dist. Ct. App. 1985).

56. McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985).

57. Stille, *supra* note 4, at 22, col. 1. A urinalysis also can determine whether one is being treated for a heart condition, manic-depression, epilepsy, or schizophrenia. *Id.*

58. Schmerber v. California, 384 U.S. 757, 767 (1966). Recently, the Supreme Court has held that a mandatory urinalysis is a search under the fourth amendment. See *supra* note 54.

59. *Id.* at 771-72. See also Winston v. Lee, 470 U.S. 753, 759 (1985) (a compelled surgical procedure is a major intrusion "of such magnitude that the intrusion may be 'unreasonable,' even if likely to produce evidence of a crime."); Cupp v. Murphy, 412 U.S. 291, 296 (1973) (the taking of scrapings from a murder suspect's fingernails was a minor intrusion).

60. "If at one time it might have been possible to argue that urinalysis does not constitute a search or seizure, such an argument is now entirely untenable." American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 732 (S.D. Ga. 1986).

61. O'Connor v. Ortega, 107 S. Ct. 1492, 1501 (1987). See Coolidge v. New Hampshire, 403 U.S. 443, 449-50 (1971); United States v. Harris, 403 U.S. 573, 577 (1971); Aguilar v. Texas, 378 U.S. 108, 115 (1964).

62. See cases cited *infra* note 72.

with less than probable cause, there must be reasonable ground to believe that the search will result in evidence of drug use and the method must not be excessively intrusive.⁶³ “[W]hat is reasonable depends on the context within which a search takes place.”⁶⁴

The Supreme Court employed a balancing test in *O'Connor v. Ortega*.⁶⁵ The Court stated that “[i]n the case of searches conducted by a public employer, we must balance the invasion of the employees’ legitimate expectations of privacy against the government’s need for supervision, control and efficient operation of the workplace.”⁶⁶ The Court said a public employer need not have probable cause to conduct such a search, but merely “reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty.”⁶⁷

It is difficult to develop a set of rules to determine what is reasonable under the fourth amendment. Justice Scalia, concurring in *O'Connor*, stated that a review of fourth amendment constraints on employer searches provides “a standard so devoid of content that it produces rather than eliminates uncertainty.”⁶⁸ In each case, a balancing of the necessity of a particular search must be weighed against the invasion of an individual’s personal rights.⁶⁹ Courts analyze administrative searches different from criminal investigation searches.⁷⁰ Administrative searches generally require only the lesser standard of reasonable suspicion. Courts have consistently held that urine testing of public employees falls within the administrative search category.⁷¹ Most of these courts addressing the issue have applied a reasonable suspicion standard to searches that fall under the administrative search exception.⁷² Though reasonable suspicion

63. *Taylor v. O’Grady*, 669 F. Supp. 1422, 1436 (N.D. Ill. 1987).

64. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

65. 107 S. Ct. 1492 (1987).

66. *Id.* at 1499.

67. *Id.* at 1503. The Supreme Court did not decide whether individual suspicion is an essential element of the standard of reasonableness. *Id.* This failure to require individualized suspicion leaves open the question of the constitutionality of random drug testing under the balancing test. See *infra* text accompanying notes 164-168.

68. *O’Connor v. Ortega*, 107 S. Ct. 1492, 1505 (1987)(Scalia, J., concurring).

69. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

70. *O’Connor*, 107 S. Ct. at 1501-02.

71. See *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986); *Allen v. City of Marietta*, 601 F. Supp. 482, 489 (N.D. Ga. 1985); cases cited *infra* note 72.

72. See, e.g., *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989); *Skinner v. Railway Labor Executives’ Ass’n*, 109 S. Ct. 1402 (1989); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *American Fed’n of Gov’t Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986), *rev’d*, 833 F.2d 335 (D.C. Cir. 1987);

is a lesser standard than probable cause, individualized suspicion is still required.⁷³

Courts are split on the level of intrusiveness inherent in a urinalysis. Some courts compare the procedure to body cavity searches⁷⁴ while other courts equate the intrusiveness of a urinalysis to that of a blood test.⁷⁵ Still other courts hold that a urinalysis is less intrusive than a blood test.⁷⁶ The Supreme Court, in *Schmerber v. California*,⁷⁷ used a medical procedure's risk, trauma, and pain to judge the intrusiveness of a blood test.⁷⁸

C. Heavily Regulated Industries

Generally a warrant is necessary for a search to be considered reasonable under the fourth amendment.⁷⁹ Courts have granted an exception to the general warrant requirement when the search involves a heavily regulated industry pursuant to an administrative inspection scheme.⁸⁰ These courts have found a diminished expectation of privacy due to the nature of the employee's job.⁸¹ An employee of a heavily regulated industry is used to having his behavior controlled by regulations.⁸² Therefore, an additional requirement that the employee submit to a urine test would be less intrusive than for an employee of an unregulated industry. A strong state interest in drug testing is still required.⁸³ In *Shoemaker v. Handel*⁸⁴ the United States Court of Appeals

City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985). See also Ayers, *Constitutional Issues Implicated by Public Employee Drug Testing*, 14 WM. MITCHELL L. REV. 337, 345 n.34 (1988).

73. Note, *Drug Testing of Government Employees and the Fourth Amendment: The Need for a Reasonable Suspicion Standard*, 64 NOTRE DAME L. REV. 1063, 1073 (1987).

74. See, e.g., *Tucker v. Dickey*, 613 F. Supp. 1124 (D. Wis. 1985).

75. See, e.g., *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), cert. denied, 479 U.S. 986 (1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Storms v. Coughlin*, 600 F. Supp. 1214 (S.D.N.Y. 1984).

76. See, e.g., *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985).

77. 384 U.S. 757 (1966).

78. *Id.* at 771. In *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989), the Supreme Court failed to define the intrusiveness of a mandatory urinalysis.

79. *O'Connor v. Ortega*, 107 S. Ct. 1492, 1499-1501 (1987).

80. See, e.g., *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986), cert. denied, 479 U.S. 986 (1986); *Donovan v. Dewey*, 452 U.S. 594 (1981) (warrantless inspection of coal mines); *United States v. Biswell*, 406 U.S. 311 (1972) (gun selling); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor industry).

81. See *Shoemaker*, 795 F.2d at 1142.

82. *Id.*

83. *Id.*

84. 795 F.2d 1136 (3d Cir. 1986), cert. denied, 479 U.S. 986 (1986).

for the Third Circuit allowed the drug testing of jockeys without individual reasonable suspicion under the heavily regulated industry exception.⁸⁵ The court held that the heavy regulation of horse racing in New Jersey diminished the jockey's reasonable expectations of privacy and justified a random testing program.⁸⁶ *Shoemaker* has been somewhat controversial. Some courts have called it an enigma⁸⁷ while other courts have cited it favorably.⁸⁸ The next section will analyze recent cases which involve the constitutionality of random drug testing of police officers.

IV. ANALYSIS OF CASE LAW

A. Reasonable Suspicion Required

Until recently, in all cases where courts have ruled on the validity of urine tests for police officers, the courts have used a reasonable suspicion standard as an exception to the warrant requirement, and thus, required individual reasonable suspicion of illegal drug use prior to testing.⁸⁹ A thorough analysis of these cases requires an understanding of the particular facts. These facts will be used to analyze other decisions.

In *Capua v. City of Plainfield*⁹⁰ the Federal District Court, District of New Jersey, held mass drug testing of police officers to be an unreasonable search and seizure in violation of the fourth amendment.⁹¹ The court balanced the government's interest in a drug-free police department against the intrusiveness of the urine testing procedure.⁹² In this case the police officers had no prior notice of the city's intent to conduct mass drug testing.⁹³ There was no written directive or regulation establishing the basis for testing and defining the testing procedures.⁹⁴ A female police employee was tested under the surveillance of a testing

85. *Id.* at 1142.

86. *Id.*

87. *See, e.g., American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 734 (S.D. Ga. 1986).

88. *See, e.g., McDonell v. Hunter*, 809 F.2d 1302, 1308 (8th Cir. 1987).

89. *See supra* notes 61-78 and accompanying text.

90. 643 F. Supp. 1507 (D.N.J. 1986).

91. *Id.* at 1520. The action in *Capua* was instituted by the City of Plainfield Fire Department and a separate action was instituted by a single female police officer of the City of Plainfield Police Department. *Id.* at 1512. Both the Plainfield Police Department and the Plainfield Fire Department were subjected to similar urine testing at approximately the same time. *Id.* Therefore, the court in *Capua* considered the separate actions jointly. *Id.* Accordingly, the opinion is applicable to both police and fire departments.

92. *Id.* at 1513-20.

93. *Id.* at 1511-12.

94. *Id.* at 1511.

agent of the same sex.⁹⁵ After testing positive, a police officer was informed that she could resign without charges being brought or she would be immediately suspended.⁹⁶ The court first determined the taking of a urine specimen constitutes a search and seizure within the meaning of the fourth amendment because "each individual has a reasonable expectation of privacy in the personal 'information' bodily fluids contain."⁹⁷ The court then examined the unreasonableness of the search. While granting that the city has a legitimate concern with the ability of the police officers to do their duties, the court determined that the tests were intrusive.⁹⁸ The court specifically condemned surveillance during collection,⁹⁹ the failure to establish procedures to protect the collateral private personal medical information divulged,¹⁰⁰ the lack of confidentiality of the test results,¹⁰¹ and the lack of prior warning before testing.¹⁰² Lastly, the court held that the fourth amendment allows testing only on a basis of individual reasonable suspicion, not mere suspicion, predicated upon specific facts.¹⁰³

In *Penny v. Kennedy*¹⁰⁴ department-wide urine tests were administered to all members of the police force after four to six days prior notice.¹⁰⁵ Police department officials did not witness the donations of the first half of the tests, but did witness the last half of the tests.¹⁰⁶ The urine tests were initiated based on rumors of switched urine samples in a previous test, an unconfirmed tip from the Federal Bureau of Investigation that an officer had been in contact with a drug dealer, and a statement by an officer that several officers used marijuana.¹⁰⁷ Citing *Lovvorn*, the court required individual reasonable suspicion before the testing of police officers for illegal drugs.¹⁰⁸ Based on the facts presented, the court found "no reasonable suspicion which would justify the administration of these tests at this time."¹⁰⁹ Therefore, the tests constituted

95. *Id.* at 1512.

96. *Id.*

97. *Id.* at 1513.

98. *Id.* at 1516.

99. *Id.* at 1514.

100. *Id.* at 1515.

101. *Id.*

102. *Id.*

103. *Id.* at 1517-18.

104. 648 F. Supp. 815 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1563 (1988). See *Lovvorn v. Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1539 (1988). *Lovvorn* opinion attached as an appendix to the *Penny* opinion.

105. 648 F. Supp. at 816.

106. *Id.*

107. *Id.*

108. *Id.* at 817.

109. *Id.*

an illegal search and seizure in violation of the fourth amendment.¹¹⁰ The court emphasized that drug testing of police officers was possible, but the tests "must be given on reasonable suspicion, their scope must be related to their objective, and they must not be excessively intrusive."¹¹¹

In *Bostic v. McClendon*¹¹² the police chief was informed by a fellow officer that some members of the police force were smoking marijuana.¹¹³ Without prior notice a urinalysis test was conducted on all members of the police force.¹¹⁴ The officers were told to submit to the test or be terminated.¹¹⁵ The urinalysis was to detect marijuana use and not other drugs.¹¹⁶ The court first held that the taking of a urine specimen is a seizure within the meaning of the fourth amendment.¹¹⁷ After noting that a search conducted after voluntary consent does not violate the fourth amendment,¹¹⁸ the court found that where employment would have been terminated if the officers did not participate in the testing, the consent was not voluntary, but was the result of coercion.¹¹⁹ Therefore, the search and seizure must pass the balancing test to be constitutional. In conducting the balancing test, the court stated that the police officers "do have a significant expectation of privacy which has been infringed upon by the government conduct at issue"¹²⁰ while recognizing the strong interest of the police department in protecting the public.¹²¹ The court stressed the authority and discretion provided each officer and the inherently dangerous environment in which they work.¹²² The court held that "the [f]ourth [a]mendment allows the [police department] to demand a urine sample from an employee for chemical analysis only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences from those facts in the light of experience, that a urinalysis will produce evidence of illegal drug use by that particular employee."¹²³

In *City of Palm Bay v. Bauman*¹²⁴ the police department notified all officers that consumption of non-prescribed drugs at any time is

110. *Id.*

111. *Id.*

112. 650 F. Supp. 245 (N.D. Ga. 1986).

113. *Id.* at 247.

114. *Id.* at 248.

115. *Id.*

116. *Id.*

117. *Id.* at 249.

118. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973)).

119. *Id.*

120. *Id.* at 250.

121. *Id.*

122. *Id.*

123. *Id.*

124. 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985).

strictly prohibited and that urine samples may be required on a random basis.¹²⁵ Officers who tested positive would be subject to discipline or discharge.¹²⁶ Officers were required to sign this notice.¹²⁷ All members of the police department were instructed to submit to urine tests to determine if they had used marijuana.¹²⁸ Failure to submit to testing would result in discipline up to and including termination.¹²⁹ In determining the reasonableness of the search, the court concluded that police officers, because of the nature of their jobs, should have a diminished expectation of privacy.¹³⁰ Police officers must reasonably expect their employer to have a legitimate concern that their ability to discharge their responsibilities is not compromised by drug use because they use weapons, drive vehicles and make instant life and death judgments.¹³¹ Credibility and public confidence is necessary to complete their duty to the public. In balancing the intrusiveness of the search against the public interest, the court considered that the Chief of Police had received no information that any member of the department had used marijuana.¹³² The department policy did not articulate any standards for the implementation of the testing program.¹³³ After considering these facts, the court held that the search and seizure was constitutionally unreasonable and that the police officer's signing of the notice did not constitute consent because the signatures were coerced.¹³⁴ The court stated that a city has the right to prohibit police officers from using controlled substances at any time, whether such use is on or off the job.¹³⁵ In order to test police officers, the city must have an individual reasonable suspicion based on "specific objective facts and rational inferences that they are entitled to draw from these facts in the light of their experience."¹³⁶

B. Reasonable Suspicion Not Required

The federal district courts and state courts have consistently struck down ill-conceived, reactionary drug testing plans instituted due to the

125. *Id.* at 1323.

126. *Id.*

127. *Id.* at 1324.

128. *Id.* at 1323.

129. *Id.*

130. *Id.* at 1324.

131. *Id.*

132. *Id.* at 1325.

133. *Id.*

134. *Id.*

135. *Id.* at 1326.

136. *Id.*

public awareness of illegal drug use.¹³⁷ Consequently, many public employers have revised their drug testing procedures to include constitutional safeguards.¹³⁸ The courts now must determine whether the revised procedures are adequate.

In *Policemen's Benevolent Association v. Washington Township*,¹³⁹ the United States Court of Appeals for the Third Circuit became the first court not to require reasonable suspicion under the fourth amendment before random drug testing police officers.¹⁴⁰

In *Policemen's Benevolent Association* the mayor notified the police officers that the township would begin a mandatory drug testing program.¹⁴¹ This announcement contained no details of the proposed plan.¹⁴² Based on this notice, the police officers filed a lawsuit challenging the constitutionality of mandatory drug testing.¹⁴³ Thereafter, the township formulated a drug testing procedure.¹⁴⁴ This procedure called for both testing based on reasonable suspicion and random testing.¹⁴⁵ The plan also required an annual medical examination, including a urinalysis drug test.¹⁴⁶ The plan provided that urination would take place in private, unless there was reasonable suspicion that the testee would tamper with the sample.¹⁴⁷ Further, the officers would be notified sixty days in advance of testing and strict testing procedures would be followed to protect the confidentiality of the results.¹⁴⁸ This plan also provided for a drug abuse education program.¹⁴⁹ The police officers then challenged the constitutionality of that plan.¹⁵⁰ The court held that, based on these facts, random drug testing fell within the heavily regulated industry exception to the fourth amendment warrant requirement because the pervasive regulation of the police department reduced the expectation of privacy.¹⁵¹

The court based its decision on *Shoemaker v. Handel*.¹⁵² In *Shoemaker*, the Third Circuit Court of Appeals held that the administrative

137. See *supra* notes 89-136 and accompanying text.

138. See, e.g., *Policemen's Benevolent Ass'n v. Washington Township*, 850 F.2d 133, 134 (3d Cir. 1988).

139. 850 F.2d 133 (3d Cir. 1988).

140. *Id.*

141. *Id.* at 134.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 135.

146. *Id.*

147. *Policemen's Benevolent Ass'n*, 672 F. Supp. 779, 782 (D.N.J. 1987), *rev'd*, 850 F.2d 133 (1988).

148. *Id.*

149. *Id.*

150. *Policemen's Benevolent Ass'n*, 850 F.2d at 134.

151. *Id.* at 141.

152. 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986). Other courts

search exception to the fourth amendment applies to the warrantless testing of persons engaged in a highly regulated activity.¹⁵³ *Shoemaker* concerned the testing of jockeys.¹⁵⁴ The heavily regulated industry exception has two requirements. First, there must be a strong public interest in conducting a warrantless search, and second, the many regulations of the industry must reduce the justifiable privacy expectation of the individual.¹⁵⁵ The court in *Policemen's Benevolent Association* noted that police officers are probably the most highly regulated of all state employees.¹⁵⁶

C. *Can the Conflicts be Reconciled?*

Upon initial examination of the drug testing cases involving police officers, the cases seem to fall into either of two distinct categories. One category holds that individual reasonable suspicion is required before a mandatory urinalysis can be allowed.¹⁵⁷ The other category relies upon the heavily regulated industry exception to not require prior individual reasonable suspicion.¹⁵⁸ But, upon careful examination of the particular facts in each case, it becomes clear that the courts are not far apart.

The courts which have required individual reasonable suspicion use a balancing test.¹⁵⁹ This test balances the public interest in conducting the search against the intrusiveness of the search.¹⁶⁰ If the intrusiveness is greater than the public good, the search is unreasonable and therefore, unconstitutional under the fourth amendment. The heavily regulated industry exception uses the same two criteria as the balancing test. The heavily regulated industry exception requires that there be a strong public interest in conducting the search and that the individual's expectation of privacy be reduced.¹⁶¹ The "heavily regulated industry exception" courts look at the reduction of the police officer's expectation of privacy

have followed *Shoemaker*: see, e.g., *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987)(custom service officers), *cert. granted*, 108 S. Ct. 1072 (1988); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987)(correctional officers); *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510 (D. Neb. 1987)(nuclear power plant employees).

153. *Shoemaker*, 795 F.2d at 1142.

154. *Id.* at 1137.

155. *Id.* at 1142.

156. *Policemen's Benevolent Ass'n v. Washington Township*, 850 F.2d 133, 141 (3d Cir. 1988).

157. See *supra* notes 89-136 and accompanying text.

158. See *supra* notes 137-154 and accompanying text.

159. See *supra* notes 89-136 and accompanying text.

160. *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987).

161. *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986).

from the objective person and the "reasonable suspicion" courts examine the quantum level of intrusiveness, but both courts are examining privacy.

There are several factors to be considered when examining the privacy concerns. Courts have mentioned that prior notice of the testing policy and procedures are important.¹⁶² The thoroughness of the procedures are considered. The procedures should allow for the protection of the identity of the officer and any collateral private medical information. Generally, courts have found surveillance during collection to be quite intrusive.¹⁶³

Although the court in *Policemen's Benevolent Association* used the heavily regulated industry exception,¹⁶⁴ it could have reached the same result under the balancing test. In *McDonell v. Hunter*,¹⁶⁵ the United States Court of Appeals for the Eighth Circuit used a balancing test to uphold random drug testing of prison employees who have inmate contact.¹⁶⁶ The court balanced the intrusiveness of drug testing against the state's interest in prison security.¹⁶⁷ The court also noted the prison employees' diminished expectations of privacy because of the sensitive nature of their jobs.¹⁶⁸ Since the court noted that the state's interest in prison security was at least as strong as the integrity of the horse racing industry, the *McDonell* court seemed to indicate that it could have reached the same result by applying the heavily regulated industry exception.¹⁶⁹

Of the five principal cases discussed previously,¹⁷⁰ the testing method in *Policemen's Benevolent Association* was the least intrusive. The township had developed a formal testing procedure which protected the privacy of the officers as much as possible.¹⁷¹ The facts of the cases requiring individual reasonable suspicion reveal testing procedures which did not respect the officers' privacy. The importance of the particular facts to the results of the case is revealed in *Capua*. The *Capua* court stated that perhaps the most critical distinction between the search in their case and the search in *Shoemaker* "is the very careful procedural protections built into the *Shoemaker* testing system and the complete absence

162. See *supra* notes 93, 94, 100, 102, 114, and 133 and accompanying text.

163. See *supra* notes 99 and 111 and accompanying text.

164. *Policemen's Benevolent Ass'n v. Washington Township*, 850 F.2d 133, 135-36 (3d Cir. 1988).

165. 809 F.2d 1302 (8th Cir. 1987), *modifying* 612 F. Supp. 1122 (S.D. Iowa 1985).

166. *Id.* at 1308.

167. *Id.*

168. *Id.* at 1306.

169. *Id.* at 1308.

170. See *supra* notes 90-136 and accompanying text.

171. *Policemen's Benevolent Ass'n v. Washington Township*, 672 F. Supp. 779, 781-82 (D.N.J. 1987).

of procedural safeguards in [the *Capua*] urinalysis program. The jockeys in *Shoemaker* were assured that the results of their tests would be published only to a very few Commissioners."¹⁷² From this statement it can be inferred that the *Capua* court may have followed *Shoemaker* if greater procedural safeguards were present.

Since all courts agree that there is a large public interest in testing police officers for illegal drug use, the constitutionality of the search is dependant upon the procedural safeguards present to protect the privacy of the officer. The next section contains a model procedure which attempts to provide protections to the police officers required under the fourth amendment, while still accomplishing the goals of the testing program.

V. MODEL REGULATION & TESTING PROCEDURE

This model regulation and testing procedure attempts to provide adequate safeguards against excessive intrusiveness while still being a reasonably effective testing procedure. The concerns expressed by various courts are addressed in the following model testing procedure.¹⁷³

Model Regulation

1. No officer, employee, or official of the police department shall use any controlled dangerous substance or any prescription drug, unless such substance was obtained directly, or through a valid prescription, from a licensed physician. The term "controlled dangerous substance" shall not include distilled spirits, wine, malt beverages, tobacco, or tobacco products.
2. Upon thirty days notice of the ratification of this procedure, every officer, employee, or official of the police department may be subject to a urine test at the direction of the Chief of Police or his designee based on the selection procedure discussed in section 3. Failure to submit to the test will result in suspension from the police department.

172. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1520 (D.N.J. 1986).

173. These provisions are modeled after the procedures used by the state of New Jersey for testing jockeys. See *Shoemaker v. Handel*, 795 F.2d 1136, 1138 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986). See also Customs Directive 51250-02, Drug Screening Program (August 4, 1986) (testing procedure used by the United States Customs Service. Sample forms are included in this directive). Cf. Note, *Drug Testing in the Workplace: A Legislative Proposal To Protect Privacy*, 13 J. LEGIS. 269, 288 (1986). This note makes a legislative proposal for the drug testing of private sector employees. The procedure allows only very limited testing based on prior individual reasonable suspicion. Random testing is prohibited. It should be noted that the public interest in testing private sector employees is minimal when compared with the public interest in a drug free police force.

3. The Chief of Police or his designee may direct that any officer, employee, or official of the police department be tested if individual reasonable suspicion exists.¹⁷⁴ The Chief of Police or his designee may also direct that up to ten percent of the officers, employees, and officials be tested in any sixty day period. The selection of the ten percent to be tested must be on a random basis.¹⁷⁵ No person shall be tested more than twice in any twelve month period, unless individual reasonable suspicion exists.

4. Any officer, employee, or official who is requested to submit to a urine test shall provide the urine sample, without undue delay, to a professional tester working for the Chief of Police or his designee. The tester may observe the providing of the urine sample only if there is individual reasonable suspicion to believe the person being tested will attempt to switch the sample.¹⁷⁶ A visual observation must be conducted by a person of the same sex as the individual being tested. Individual reasonable suspicion that a person is using illegal drugs is individual reasonable suspicion that a person will attempt to switch the samples.

5. The urine sample shall be immediately sealed and tagged on the form provided. Evidence of such sealing shall be indicated by the signature of the tested individual and the tester. The portion of the form which is provided to the laboratory shall not identify the tested individual by name.

6. Control samples must be intermingled with those of the employees being tested. Results of the tests performed on the control samples must be available to any individual who tested positive.

7. The initial analysis of the urine sample shall be made using an enzyme multiplied immunoassay test (EMIT). If the urine sample tests positive, the urine sample must be reexamined using a gas chromatography/mass spectrometry (GC/MS) test. A positive result based on a GC/MS test constitutes a positive result under this procedure.¹⁷⁷

8. A positive result shall be reported in writing by the testing laboratory directly to the Chief of Police or his designee. The Chief of Police or his assignee will then determine the individual's name by matching the

174. *See supra* notes 61-78 and accompanying text.

175. An example of an acceptable procedure would be to assign a number to each person eligible to be tested and then select the numbers to be tested by a random method. A neutral observer should be present.

176. Protection against substitution of urine samples can be provided through means other than direct visual surveillance. These methods include: (1) checking the temperature of the sample, (2) having the individual provide a second sample (it is unlikely that an individual will carry two substitute samples), (3) testing without warning or opportunity to retrieve a stored substitute sample, and (4) having the tester listen to, but not observe, the providing of the urine sample.

177. *See supra* notes 45-51 and accompanying text.

code to the confidential reference list. After determining the individuals who tested positive, the Chief of Police or his designee shall proceed as follows:

a. He shall, as quickly as possible, in writing notify the individual involved.

b. For an individual's first violation, the Chief of Police or his designee shall issue a written reprimand and the individual shall be required to complete an approved rehabilitation program. The individual must be notified in writing as to the consequences of any further violations.

c. For an individual's second violation, the Chief of Police or his designee shall suspend the individual from the police department. Upon successful completion of an approved rehabilitation program, the individual shall be reinstated. It shall be the individual's responsibility to provide written notice that he has successfully completed the rehabilitation program. Failure to complete the rehabilitation program shall result in the termination of the individual. The individual must be notified in writing as to the consequences of a further violation.

d. For an individual's third violation, the Chief of Police or his designee shall permanently terminate the individual from the police force.

9. Before an individual is terminated, the individual must be notified of the charges against him. The Chief of Police or his designee shall give the individual: (1) opportunity to show any error that may exist; (2) the names and nature of the testimony of witnesses against the individual; (3) a meaningful opportunity to be heard in his own defense; and (4) a hearing before an impartial administrator prior to termination.¹⁷⁸

10. Any information received in the process of testing, including but not limited to medical information, the results of the tests, or any reports or notices filed as a result of these regulations, shall be treated as confidential.¹⁷⁹ Access to the information shall be limited to the Chief of Police or his designee, counsel to the police department, the individual involved, and counsel for the individual involved.¹⁸⁰

11. Any reports or memos prepared under these regulations shall be stored in a secure area for a period of one year. After one year, the reports or memos shall be destroyed. However, the reports or memos on individuals who have violated this regulation may be maintained for

178. See Note, *Yellow Rows of Test Tubes: Due Process Constraints on Discharges of Public Employees Based on Drug Urinalysis Testing*, 135 U. PA. L. REV. 1623, 1650-55 (1987). This article discusses the procedural due process aspects of drug testing. The note focuses on the employer's actions in response to a positive result. Recommendations made in this article have been incorporated into the model regulation.

179. *Id.* at 1650.

180. See *supra* note 176.

the purpose of recording the number of violations and the results of rehabilitation, and for use should future violations occur.

12. The test results may not be used for the purpose of criminal prosecution.

VI. CONCLUSION

Mandatory drug testing of police officers can aid the government in implementing the laudable goals of public safety and confidence in the police force and can enable the government to better fulfill its responsibilities. Since 1987, many police departments have begun mandatory testing programs. Questions developed as to the proper standards for inception of testing and scope of testing.

The early testing programs provided inadequate protection of the police officer's privacy. Due to the lack of responsible testing by the police departments, the programs were determined to be unconstitutional. Individual reasonable suspicion was required before an officer could be tested.

In *Policemen's Benevolent Association v. Washington Township*,¹⁸¹ a court for the first time upheld random drug testing of police officers. The court based its decision, in part on the procedural protections provided in the testing program.

In order to meet their duty to the public, police departments must begin to institute testing procedures. A procedure which will meet fourth amendment requirements is provided in Part V of this note. A properly administered random testing program can pass fourth amendment scrutiny.

DAVID B. BOODT

181. 850 F.2d 133 (3d Cir. 1988).