

LAW ENFORCEMENT MANAGEMENT INSTITUTE

DRUG TESTING OF POLICE OFFICERS

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BY
MICHAEL TATUM

VICTORIA POLICE DEPARTMENT

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INTRODUCTION

A growing concern of administrators in the fields of public transportation and public safety is the use of drugs by their employees. Drug abuse by personnel in these fields not only presents a danger to citizens using these services but also to the other employees working around them.

The problem of public service employee drug abuse has become public knowledge since the late 1970's and early 1980's. One of the most widely reported incidents was the collision of an Amtrack passenger train with a slower freight train in the northeastern United States. Several passengers were killed and several were severely injured in this accident in which the Amtrack engineer was alleged to have been using marijuana prior to the collision.

Since this collision seldom a week goes by without a story in the news about accidents allegedly caused by some type of drug abuse. The public safety field has also come under press scrutiny with even stories of alleged drug abuse by law enforcement officers.

Law enforcement administrators should, therefore, be aware of this growing problem and the related costs resulting from manpower losses. The drug abuser may call in sick, or actually become killed or injured on the job due to his or her mental state. Abuser's may also cause fellow

officers to become injured when they fail to perform effectively.

Another major concern is departmental liability should an innocent citizen become injured or killed due to abuser negligence. Such circumstances can and have resulted in large liability suits being filed and won in the courts.

Statistical Evidence

The law enforcement function places stress on the police officer who may look to alcohol (which is a drug) to relieve this stress. The police officer is expected to solve problems instantly, whether it be dealing with a family dispute, apprehending a suspected criminal, consoling a crime victim, or dealing with an alcohol or drug abuser. The police officer is supposed to cope - to restore order!¹

Unfortunately, this expectation often causes people to forget that police officers are human beings with the same kinds of problems experienced by others in society. They have job, family, financial, and in some cases alcohol and drug abuse problems.

According to Dr. Geraldine Nagy, estimates are that among workers in the United States approximately 10% suffer from alcohol abuse to the degree that they are unable to do their jobs. Approximately 3% suffer from drug abuse to the degree they are unable to function in their jobs. Approximately 10 to 23% use drugs (illicit or prescription on the job), and as many as 65% of young people coming into

the American work force have used some form of illegal drug.²

Although these statistics describe the American work force as a whole, Dr. Nagy reports they are probably very good indicators of the problem of alcohol and drug abuse in law enforcement. Of the studies that have been done on law enforcement, most suggest that alcohol and drug abuse is as frequent, or more frequent, than in the general population. In a survey of 2,200 officers on twenty-nine police departments across the United States it was found that 23% of the officers had serious alcohol problems and 10% had serious drug problems.³

A questionnaire administered to police officers in Chicago revealed that 40% drank while on duty. Another study done on officers in major mid-western states revealed that 53% of the officers had come to work with a hangover, and that an average officer drank some alcohol on the job about eight days every six months.⁴

After reviewing the findings of these studies it is difficult to deny that there is a drug problem in law enforcement. While the studies were of departments outside of Texas, it would be unlikely that the results in Texas would be much different.

Consequences of Drug Abuse in Law Enforcement

Administrators should recognize that there will be serious problems associated with officers that abuse drugs.

One problem will be reduced job performance as the drugs affect both the mental and physical performance of officers. Officers will be less alert and less capable of handling a crisis or dealing with stress.⁵

Absenteeism among drug abusing officers is above that of non-drug abusing officers. Studies show that abusing officers have an average of 2.5 as many absences of eight consecutive days or more per year.⁶ Along with absenteeism is tardiness. Abusing officers are late three times more often than non-abusing employees. The drug abusing officer will also abuse his sick leave time. They may use three times the normal level of sick leave.⁷

The abusing officer is more likely to get hurt and studies have shown that these officers are five times more likely to file a workers compensation claim.⁸

Drug abusing officers have a tendency to increase cost of health benefits to all employees. These officers tend to use health benefits more frequently than non-abusing employees. Some of the health problems incurred by the abusing officer are a direct consequence of the drug abuse, while others are caused by neglect of physical needs, such as poor nutrition or lack of sleep. Also, coverage for direct treatment of drug addiction is now provided by 60% of all work place based insurance policies. State legislators are beginning to raise legal minimums of such coverage to encourage treatment of substance abuse. The result has been

increased cost to employers and all their employees.⁹

The final problem, and the one with the most serious consequences, is the safety and welfare of co-workers and the public. Abusing officers are involved in accidents 3.6 times more often than other employees. The impact of alcohol/drug abuse on safety is especially disturbing to law enforcement because of the responsibility that each officer has for the safety of his fellow officers and the public.¹⁰

Drug Testing and the Courts

In establishing a drug testing program the law enforcement administrator should first insure that the program being considered does not violate the officer's rights under the Fourth Amendment of the United States Constitution. This amendment protects citizens; which also includes police officers, from unreasonable searches.

While all citizens have a right to privacy under this amendment, the courts have acknowledged that certain professions require a more liberal interpretation of the Fourth Amendment. Those professions are public transportation and law enforcement which deal directly with "public trust". The courts have ruled that these professions provide a service to the public unique from other professions, so the public has a right to expect these groups to be drug free. Therefore, the courts have decided that public safety personnel can be held to a stricter standard in this regard, a position which has

implications for right to privacy issues.

Recent Court Cases

In the case of Carberry v New Jersey 556 A.2d 314 (NJ 1989) Carberry was a thirteen year veteran New Jersey State Trooper. The New Jersey State Police instituted a "well trooper program" as a form of preventive medicine which was designed to detect cardiac deficiencies and required troopers to undergo various medical tests including urinalysis. The announcement of the program did not indicate that urine samples would be screened for controlled substances.¹¹

When Carberry reported for his physical examination, a sample of urine was tested for drugs without his knowledge. The sample proved positive for marijuana on the initial test but no confirmatory, more specific test, was run on the sample. Instead, Carberry was ordered to report to the state police laboratory for a second urine test. The second sample was also confirmed positive for marijuana.¹²

Carberry was not told that he could retain a portion of the specimen for independent testing, nor did the police laboratory preserve any of his specimen. Carberry explained that he had never smoked marijuana, but had in the course of his duties handled marijuana seeds and a few days earlier had been in a van where others had been smoking marijuana.¹³

Based on the test results and his admitted failure to take any action against those smoking marijuana in the van,

the superintendent of police suspended Carberry. He was formally charged with failing to take proper police action constituting neglective duty and behaving in a manner to bring discredit to the state police.¹⁴

At his hearing before the superintendent of police, Carberry contended that the test for drugs was unreliable. The superintendent of police, however, concluded that the first and second urine tests indicated continued use of marijuana and concluded this to be a violation of department policy. The superintendant likewise concluded that Carberry failed to take appropriate action regarding the van incident. He upheld Carberry's suspension.¹⁵

Carberry appealed the suspension, and while the case was on appeal the state attorney general issued drug screening guidelines for all state agencies. At the appeal Carberry claimed his procedural due process rights had been violated because the superintendent who had established the rules also conducted the hearing and found him guilty of the rules violations.¹⁶

The appellate court agreed that the superintendent was an inappropriate person to hear the matter, and ordered the case remanded for a hearing before an administrative law judge who should apply the new attorney general's guidelines on drug screening. The state then appealed.¹⁷

In the appeal the court held that Carberry, as a veteran state trooper, has a protective property interest in his employment and such an interest can only be deprived

consistent with due process of law. Administrative due process requires a fair hearing before a neutral and unbiased decision maker. The fact that an agency head adopts administrative rules, and then serves as the hearing officer for a violation of those rules, does not automatically mean the hearing is biased. To assume such bias would severely undermine the function of administrative agencies. The fact that the superintendent accepted the drug screening procedures before hearing Carberry's case is not enough to overcome the presumption of honesty and integrity in policy makers with decision making power. The facts reveal, however, that Carberry's first urine sample was not subject to a confirmatory test. When the superintendent concluded that both tests indicated continued use of marijuana, this was an error. The superintendent should not have relied on the initial test to establish the continued use since it was not confirmed. The case was remanded for a rehearing at which time the police superintendent was required to disregard the first presumptive drug screening and determine whether Carberry voluntarily consented to the second drug test. The finding that the trooper failed to take appropriate action in the van incident is supported by sufficient evidence. The case, then, was reversed for Carberry.¹⁸

In a 1988 case Ford v Dowd, 697 F. Supp. 1085 (1988), the courts ruled that reasonable suspicion justified a drug

test.

Ford was a police officer for the Pagedale Police Department. He had been an officer since 1980, and for a period of time had served as acting police chief. Dowd served as mayor of Pagedale.¹⁹ Officer Ford and Mayor Dowd did not get along, and on numerous occasions Dowd tried to have Ford fired. At one point Ford believed he had been promoted to lieutenant, but Dowd would not promote him to the position.²⁰

In January 1989 the mayor announced that she wanted a urinalysis ordered for Ford. Dowd claimed that she had heard rumors that Ford was involved with drugs. She refused to present any evidence, but claimed to have witnesses who would come forward. Ford submitted to the test which proved negative.²¹

Ford then filed a civil rights action, alleging that the drug testing program was unreasonably applied to him. He claimed that he was stigmatized by having to take the examination. Dowd moved to have the suit dismissed.²²

The court dismissed the suit stating that the urinalysis was reasonable because Dowd had heard rumors accusing Ford of drug use. The mere fact that an employee is in such a highly regulated occupation as police work may provide the reasonable suspicion justifying a drug test.²³

In the case of Fraternal Order of Police Lodge No. 5 v Tucker 868 F.2d 74 (1989), the Philadelphia Police

Department received an anonymous telephone call on February 26, 1986 that stated numerous residents had observed police officers behaving in an unusual manner behind some tennis courts. The department set up surveillance of the area the next day. Four officers were observed spending a substantial amount of time behind the tennis courts. The surveillance team could not determine specifically what the officers were doing. They recovered a burned police report, a burned bottle cap, and a straw from the site. The narcotics unit determined that the items were consistent with "crack" use.²⁴

The officers were asked to submit to urinalysis tests. When they refused, the commissioner ordered them to submit to the test. After they again refused, the officers were suspended for thirty days without pay pending dismissal. A press release was made including photographs and statements that the officers had been suspended for refusing an order to submit to urinalysis based on suspected drug use. The officers were later formally dismissed. The officers then filed a grievance challenging their suspension and dismissal.²⁵

The matter was submitted to binding arbitration after the grievance was denied by the police commissioner. The arbitrator ruled that the city had no authority under the collective bargaining agreement to order the officers to submit to urinalysis. The arbitrator's decision was affirmed on appeal.²⁶

The officers and the union then filed suit alleging that the order to submit to urinalysis violated their Fourth Amendment and due process rights. The district court granted the city summary judgement on their Fourth Amendment claims. After trial, judgement was entered for the city on the due process claims. The officers and the union then appealed.²⁷

In the appeal the court ruled that the surveillance team had enough reasonable suspicion of on-duty drug use to support the urinalysis order. The surveillance corroborated that the officers were congregating on the tennis court and engaging in suspicious behavior. The officers were not told anything specific about the drug use allegations or the evidence recovered from the site prior to their termination. Failure to provide a meaningful pre-termination hearing before depriving the officers of their property interest in their jobs violated due process. Declaratory judgement should be entered stating the officers procedural due process rights were violated. The press release was not shown to be false or misleading, and did not violate the officers' due process liberty interest.²⁸

In a more recent case Brown v City of Detroit, 715 F. Supp. 832 (1989), four Detroit police officers challenged a drug testing program run by the Detroit Police Department, claiming the random drug testing of sworn police officers violated the Fourth Amendment rights against unreasonable

searches and seizures.

The courts ruling was against the officers citing urinalysis, if compelled by the government, is a "search" subject to the restrictions of the Fourth Amendment. The court position further explained that at times a Fourth Amendment intrusion serves specific governmental needs beyond the normal need for law enforcement. When that happens, an individual's privacy expectations must be balanced against the government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the practical context.²⁹

On its face, the Detroit testing program did not violate the Fourth Amendment. The government's interest in public safety justified such random testing.³⁰

In the case of Kinter v Board of Fire and Police Commissioners, 550 N.E. 2d 1126 (Ill, App. 1 Dist 1990), Kinter argued that he was improperly terminated for refusing to take a urinalysis test. Kinter had responded to a nuisance call about a party and upon arrival observed two males in a vehicle acting suspiciously. On investigating he found a packet of white powder-like substance, which one of the males told him was cocaine. After Kinter inspected the substance he concluded it was not cocaine. Kinter made a note of the males names but did not arrest them. After leaving the location, Kinter allegedly threw the substance out the window.

Several days later Kinter was notified by his chief that written charges had been preferred against him; one of the charges being that he had used a controlled substance. An administrative search of his police locker revealed a controlled substance pill. Kinter was asked to submit to a urinalysis test which he refused on advise of his attorney.

Following a hearing, Kinter was terminated from his job as a police officer, primarily on the grounds of insubordination, in that he failed to submit to a urinalysis. Kinter appealed the termination but the trial court upheld the termination.³¹

Kinter appealed this decision arguing that he should not have been sanctioned for his refusal to submit to a urine sample, as he was under no obligation to provide such a sample. The former officer argued that he was suspended at the time of the request and, therefore, had no legal duty to obey an order for the urine specimen.³²

The court ruled that a suspension is a temporary cutting off of one's professional privileges and does not relieve the suspended person of any duty to obey. Rather, he is relieved of the power associated with the position. Kinter was removed from his duty, but prior to the hearing of the charges he remained a police officer and continued to receive full pay. Thus, he was obligated to obey a direct order under the circumstances. Given the facts, the demands to provide a sample for urinalysis was reasonable. The dismissal was upheld.³³

Methods of Testing

Basically, there are three methods currently being used throughout the United States for drug testing of police officers.

The first type is a mandatory test which most departments are going to, mainly in hiring new officers. Mandatory tests should identify problems before they move into the system.

The second method is random testing in which current officers are randomly selected at varying times to submit to urinalysis tests. Frequently, this random selection is made by a computer program in an effort to eliminate the human element in selection, and to insure that the process is fairly administered. This process is also being followed in the private sector to promote fair testing.

The third type of testing is the voluntary test. When this approach is used all the officers are asked to submit to a test and only the timing of the test is selected randomly.

Advantages and Disadvantages of the Methods

The advantages of the mandatory testing method, as stated above, would be that it tends to block a potential problem applicant from entering the department. It may also act as a deterrent for officers already with the department in that they would know testing is being done and the department is serious about the drug use issue.

Disadvantages of this method are mainly that applicants know when the testing would be done and could refrain from using drugs with the hope of passing the test. Mandatory testing could also prove to be a costly method to the department if it is applied to all current officers as this could strain budgets of some departments.

A variation of mandatory testing being used by a large number of departments for existing officers is a policy that is usually worded in such a way that if there is reasonable suspicion that an officer is using drugs illegally he can be ordered to submit to a test. If the officer refuses, he faces a suspension or possibly termination. This variation is most cost-effective in that only officers suspected of drug use are required to be tested.

In the random testing method the advantages are that only a selected few are tested at one time which puts less strain on budgets.

Random testing would also act as a "surprise inspection" in that officers would not have time to prepare for it. A disadvantage to this method could be that there might be long periods of time between the tests administered to each officer.

Advantages of voluntary testing are that officers take the test of their own free will. Naturally, if the officers are agreeable there is less departmental friction associated with this approach. The main disadvantage

associated with this method would come from resistance to testing by officer's that are actually using illegal drugs. Officers could use the excuse that they feel the testing was an invasion of their privacy. On the other hand, officers that really feel testing is an invasion of their privacy, and do not test, could be looked upon by others with some degree of suspicion. These officers might be completely drug free, but firm in their convictions about privacy.

Liabilities of Supervisors

There are basically three ways police supervisors can be sued for the actions of subordinates. First, if the supervisor directly participates in the act. Secondly, if the supervisor has established a policy or practice which encourages or supports the action in question. Such action does not have to be formal if a supervisor encourages or knowingly allows certain conduct to take place over time, then that behavior may be viewed by the courts as a practice approved by the supervisor. Finally, if the supervisor fails to perform aspects of the job which then results in a subordinate's misconduct.³⁴

In all areas of supervisory liability the plaintiff must prove that the supervisor knew or should have known about a particular problem with an officer, but did nothing about it. Under these circumstances the supervisor's failure to act may be shown to contribute directly to the officer committing the act in question.³⁵

To prevent liability the supervisor should review the daily activities of subordinates and any unusual occurrences can be identified for follow-up investigation. Any violation of rules of policy noted by the supervisor warrants prompt action to correct the problem. The most important point is that once a supervisor becomes aware of a problem, reasonable action should be taken to correct the matter.³⁶

Therefore, when a supervisor knows or suspects that an officer is abusing drugs he should immediately act to correct the problem. The supervisor may speak with the officer in an attempt to get the officer to accept voluntary help. Or, the supervisor may choose to follow more formal channels in dealing with the officer.

Conclusions and Recommendations

Although drug use presents special detection problems they certainly should not be ignored. This is especially the case in police organizations. Use of drugs, except for those taken for medical purposes, is illegal and has no place within the law enforcement profession.³⁷

Therefore supervisors should remain diligent to the problem as the earlier the use of these drugs is detected the better for everyone involved. Preventing a problem is always less costly than curing a problem that has become entrenched.³⁸

As cited earlier in the statistical evidence, drug

abuse in law enforcement appears to be a growing problem and it is clear that departments and administrators should develop rules and policies that set down the departments standards on this problem. The policies should state guidelines to follow and also offer some type of assistance to officers using drugs in getting treatment if the situation warrants it. However, it appears that this time most departments in Texas have gone with the policy of testing officers only when there is reasonable suspicion to indicate abuse.

NOTES

1. Geraldine Nagy, Ph.D., Alcohol/Drug Awareness for Law Enforcement, Alcohol and Drug Awareness and Prevention, Criminal Justice Center, Sam Houston State University, VI-A-1.
2. Ibid, VI-A-4 - VI-A-5
3. Ibid, VI-A-6
4. Ibid, VI-A-6 - VI-A-7
5. Ibid, VI-A-7
6. Ibid, VI-A-8
7. Ibid.
8. Ibid.
9. Ibid, VI-A-8 - VI-A-9
10. Ibid.
11. Carberry v New Jersey, 556 A.2d 314 (N.J. 1989)
12. Ibid.
13. Ibid.
14. Ibid.
15. Ibid, 315
16. Ibid.
17. Ibid.
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19. Ford v Dowd, 697 F. Supp. 1085 (1988)
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24. Fraternal Order of Police Lodge No. 5 v Tucker, 868 F.2d 74 (1989)
25. Ibid.
26. Ibid.
27. Ibid, 75
28. Ibid.
29. Brown v City of Detroit, 715 F. Supp. 493 (1989)
30. Ibid, 494
31. Kinter v Board of Fire and Police Commissioners, 550 N.E. 2d 1126 (Ill. App. 1 Dist, 1990)
32. Ibid.
33. Ibid, 1127
34. Gerladine Nagy, Ph. D., Alcohol/Drug Awareness for Law Enforcement, Alcohol and Drug Awareness and Prevention, Criminal Justice Center, Sam Houston State University, Handout VI-A-6
35. Ibid.
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38. Ibid, VI-A-48

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