IV.

FIFTH AMENDMENT

A. URINALYSIS TESTING DOES NOT VIOLATE THE PROHIBITION AGAINST COMPELLING SELF-INCRIMINATION

One of the first challenges that should be expected to the urinalysis testing program is a claim that the Fifth Amendment prohibition against self-incrimination__/ prevents the Department of the Navy from compelling an employee to submit to such testing. When ordered to report for urinalysis testing some employees will likely refuse, claiming that they would thereby be compelled to produce evidence against themselves. Furthermore, employees can be expected to rely on Garrity v. New Jersey, 385 U.S. 493 (1967) for the proposition that if they refuse to submit to urinalysis testing they may not be disciplined for their refusal since they would then be disciplined for asserting their constitutional right against self-incrimination. Both of these claims should be rejected out of hand.

The Supreme Court long ago laid to rest the contention that the taking of bodily fluids, such as urine, violates the Fifth Amendment's prohibition against self-incrimination. In Schmerber v. California, 384 U.S. 757 (1966), the Court considered whether the non-consensual taking of a blood sample from a person suspected of driving while intoxicated, and the subsequent use of the chemical analysis of the blood in a criminal prosecution, violated the privilege against self-incrimination. The Court

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__/ The pertinent part of the Fifth Amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

acknowledged that the evidence, the blood sample, had been obtained by compulsion, but held that the Fifth Amendment was not violated because the compelled evidence was not testimonial or communicative in nature:

> Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test which depend on chemical analysis and on that alone. Since the blood test evidence although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

Schmerber, 384 U.S. at 765 (footnote omitted) (Emphasis added). See also Andresen v. Maryland, 427 U.S. 463 (1976).

The Schmerber case has been applied in many contexts where real evidence is obtained from an individual by compulsion. See, e.g., United States v. Dionisio, 410 U.S. 1, 7 (1973) (compelled voice exemplars "to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said"); Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplar); United States v. Wade, 388 U.S. 218 (1967) (suspect in line up compelled to utter words used by robber). Courts throughout the country have held the Schmerber precludes Fifth Amendment challenges to breathalyser tests of drunk drivers. Most significantly, of course, Schmerber has been used to reject a Fifth Amendment challenge to a urinaly

testing program. Storms v. Coughlin, 600 F. Supp. 1314, 1217 n.2 (S.D.N.Y. 1984). Schmerber remains good law today, see South Dakota v. Neville, 459 U.S. 553 (1983), and it conclusively forecloses a Fifth Amendment self-incrimination challenge to the Department of the Navy's urinalysis testing program.__/

Since the privilege against self incrimination is not implicated in the compelled production of urine, Garrity v. New Jersey, supra does not preclude the disciplining of employees who refuse to submit urinalysis. The evil found by the Court in Garrity v. New Jersey, was coercing a choice between self-incrimination and job forfeiture. That evil is absent in the context of urinalysis testing because there is no Fifth Amendment right to relinquish. Accordingly, the coercion present in Garrity v. New Jersey is absent in urinalysis testing program.__/ Furthermore, although the refusal to submit to urinalysis testing may result in a severe

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__/ Even though Schmerber employees might not be able to mount a Fifth Amendment challenge to the urinalysis testing program because the program does not contemplate criminal prosecutions: "The right to remain silent attaches only where there is a reasonable belief that elicited statements will be used in a criminal proceeding." Presley v. Veterans Adminstration, 15 M.S.P.R. 555, 561 (1983)

__/ Even if the coercive choice were present, removal for refusal to submit to urinalysis testing would not be foreclosed. Employees have a duty to account to the public regarding their performance of duty. See Gardner v. Broderick, 392 U.S. 273 (1968). They may be disciplined for failing to make an accounting to their employer as long as they are not required to relinquish the benefits of the privilege against self-incrimination. Id. at 278; Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York, 392 U.S. 280, 284 (1968). Employees are not required to sign waivers regarding their privilege against self-incrimination. The duty to submit to urinalysis can readily be analogized to a duty to account regarding the employee's safety on the job. Accordingly, they may be disciplined for failure so to account. Id.

penalty such as removal from the Federal service, the imposition of such a penalty for refusing urinalysis "is unquestionably legitimate." See Neville v. South Dakota, 459 U.S. at 560. __/

B. THE URINALYSIS TESTING PROGRAM INVOLVES NO DENIAL OF DUE PROCESS.

1. Urinalysis Testing Does Not Deny Employees Substantive Due Process

Employees may claim that aspects of the urinalysis testing program deny them their rights to constitutional "substantive due process." For the reasons set forth below, however, such claims are ill founded.

a. The Government Action Is Not Arbitrary

The concept of constitutional "substantive due process" is not easily defined, and, indeed it may be incapable of precise definition. See Lassiter v. Department of Social Services, 452 U.S. 18, 24 (1981); Moore v. East Cleveland, 431 U.S. 404, 501-502 (1977). About the best that can be said about it is that the phrase "substantive due process" "expresses the requirement of 'fundamental fairness', a requirement whose meaning can be as opaque as its importance is lofty." Lassiter v. Department of Social Services, 452 U.S. at 24. In essence, it is "right to freedom from arbitrary governmental action." Ingraham v. Wright, 525 F.2d 909, 915 (5th Cir. 1976) aff'd, 430 U.S. 651 (1977).

__/ Indeed, the employee's refusal to submit to urinalysis could actually be used as evidence in support of a charge of use of a controlled substance. See South Dakota v. Neville, 459 U.S. at 562-64.

It is just as difficult to apply the concept of substantive due process to a given case, as it is to define it. As the Supreme Court has stated, "[a]pplying the Due Process Clause is, therefore, an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interest that are at stake." Lassiter v. Department of Social Services, 452 U.S. at 24-25. In considering precedent and assessing the competing interests, "[t]he basic test of substantive due process is whether the Government can justify the infringement of its legislative activity upon the rights and liberties of the aggrieved parties. Michigan Meat Association v. Block, 514 F. Supp. 560, 564 (W.D. Mi. 1981). In this regard, the level of scrutiny of the justification for the governmental activity will vary according to the nature of the rights and liberties infringed by that activity. See Beller v. Middendorf, 632 F.2d. 788, 807 (9th Cir. 1980) cert. denied, 452 U.S. 905 (1981). At one extreme, when the governmental action infringes on interests which do not derive from the constitution, the action will be justified if it bears a "rational relation" to a legitimate governmental interest. Id. at 808. At the other exteme, when the governmental action infringes upon interests

which lie at the core of the Constitution,__/ then there must be a compelling government interest which justifies the intrusion, and the intrusion must be as narrowly circumscribed as possible. See Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Beller v. Middendorf, 632 F.2d at 808.

Under these principles, employees may attempt to argue that they are subjected to arbitrary government action in violation of their substantive due process rights because the government relies on inaccurate, unconfirmed initial urinalysis test results to take temporary administrative actions such as reassignment

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__/ These interests are commonly called "fundamental" and they arise specifically or by implication from the Constitution. As one court has stated:

> These rights have been found either specifically or by implication in the Bill of Rights and the 'privileges and immunities' clause of the Fourteenth Amendment. For example, as citizens, we enjoy a substantive right to pass from state to state, to carry on interstate commerce, to contract, to own property, to engage in life's common occupations, to acquire useful knowledge, to worship God according to the dictates of conscience, to be free from illegal searches and seizures of our persons, and to be free from unnecessary violence at the hands of law enforcement officers. The due process clause has been found to protect the sanctity of the person and the family from arbitrary and irrational state actions which abridge those fundamental rights and "shock the conscience."

Bullard v. Valentine, 592 F. Supp. 774, 775-76 (E.D. Tn. 1984).

pending confirmation of the initial results.__/ See Storms v. Coughlin, 600 F. Supp. at 1221-22. Those arguments, however, cannot be supported when the precedent is properly applied.

To demonstrate that the government's temporary actions do not deny substantive due process to employees under those circumstances, it is necessary first to identify the competing interests at stake. On the one hand, the government interest here is the protection of public safety and property. Clearly, that interest is recognized as a legitimate one, and, indeed it must be considered compelling. See Delaware v. Prouse, 440 U.S. at 658 (state interest in protecting the public safety on the highways is "vital"). See also Turner v. FOP, 500 A.2d at 1008. Balanced against that compelling interest are the individual's interests in remaining in his position and in avoiding harm to his reputation. Those interests, however, cannot be considered fundamental under the circumstances.

A person may have a cognizable property interest in continued employment, but that interest cannot be considered so broad as to include a property interest in remaining in a particular position. An employee has no expectation that the government will not reassign him absent just cause. Cf. Beller v. Middendorf, 632 F.2d at 805 (Navy regulations created no reasonable expectation of continued employment for homosexuals so they had no property right).

__/ Due process arguments related to disciplinary actions based on confirmed urinalysis tests would be frivolous. Not only are such tests accurate, but employees have ample opportunity to challenge them.

Similarly, the interest of the employees in their reputations does not rise to a level of cognizable protection under the Constitution in these circumstances. Employees may attempt to argue that the Supreme Court has recognized that an employee's reputation is a liberty interest which requires protection against arbitrary government. In doing so they will undoubtedly cite this language from the decision of Wisconsin v. Constantineau, 400 U.S. 433 (1971): "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id. at 437.

However, the Supreme Court has specifically rejected such an argument in Paul v. Davis, 424 U.S. 693 (1976). There, the Court held that a government defamation would not impinge upon any protected liberty interest in the absence of the termination of employment. Id. at 708-10. See also Hester v. City of Milledgeville, 598 F. Supp. 1456, 1473 (M.D. Ga. 1984) ("The Supreme Court has ruled that an injury to one's 'good name and reputation' normally does not give rise to a cause of action under the Fourteenth Amendement for a deprivation of 'liberty.'"). No liberty interest of an individual is at stake, regardless of any harm to the person's reputation, if the person continues to be an employee. Id. at 710.

Since the individual interest at stake is not a "fundamental" one, the government's policy of reassigning employees in critical jobs who test positive on initial tests pending confirmation of the results will be upheld if the action is rationally related

to the public interest being served. Under this standard there can be no doubt that this aspect of the urinalysis testing program will be upheld. There clearly is a rational relation between the interest of protecting public safety and property and the reassignment of an employee when there is a legitimate question as to the employee's ability to do the job safely.

b. Urinalysis Testing Is Not Conducted So As To Offend Notions Of Decency.

There is another aspect of substantive due process which must be considered. The due process clause, in addition to precluding arbitrary government action, has been viewed as a prohibition against government acts which "'offend those canons of decency and fairness which the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" Rochin v. California, 342 U.S. 165, 169 (1952), quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945).

In order to prevail on such a due process claim, however, an employee would have to show that the method of collecting urine is "conduct that shocks the conscience" or "methods that offend 'a sense of justice'". Id. at 172-73. Under the Department of the Navy urinalysis testing program, such a showing would be very unlikely. In the first place, the act of producing urine is a natural, safe and simple procedure of the sort found within acceptable limits by the Supreme Court. See Schmerber, 384 U.S. at 759-60 (extraction of blood "was made by a physician in a simple, medically acceptable manner"); Breithaupt v. Abram, 352 U.S. 432 (1957) (nothing "brutal" or "offensive" in the taking

of blood sample). Secondly, the threatened or actual use of some degree of force to obtain a urine sample would not "shock the conscience" in every circumstance. See Yanez v. Romero, 619 F.2d 851, 854 (10th Cir. 1980), cert. denied, 449 U.S. 876 (1980) (the threatened or actual use of catheter to obtain a urine sample does not violate the Rochin standand, especially where there was probable cause to suspect the individual of illegal drug use). However, regardless of that fact, the urinalysis program itself precludes the application of any force to require production of urine. The individual must provide a sample voluntarily. Accordingly, such Fifth Amendment Due Process claims should not be considered substantial.

2. The Urinalysis Testing Program Does Not Deny Procedural Due Process.

Employees may also raise Fifth Amendment due process claims regarding denial of procedural protections prior to the time they are either temporarily removed from their critical jobs pending confirmation of urinalysis results or removed from the Federal service on the basis of a confirmed test result. The bases for such a claim most likely would be that urinalysis test results are inaccurate and that employees are disciplined, with resultant loss of property or liberty interests, without first being accorded a hearing in which they may challenge the accuracy of the urinalysis test. As explained below, however, these claims find no support whatsoever in the law.

In order to claim the protections of procedural due process, an individual must be able to establish a deprivation of a constitutionally cognizable liberty or property interest. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Clearly, given the limitation that they may be removed "only for such cause as will promote the efficiency of the service", 5 U.S.C. § 7513(a), Federal employees have property interests in continued federal employment sufficient to claim the protections of procedural due process. Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1491-93 (1985). Similarly since damage to an employee's good name or reputation which could result when an employee is removed from the Federal service based on the urinalysis testing, there may be liberty interests which also invoke procedural due process protections. See Paul v. Davis, 424 U.S. 708-710; Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). However, to conclude that there are cognizable interest merely begins the inquiry as to what procedures are necessary. "Once it is determined that due process applies, the questions remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

The determination of what process is due depends upon the particular circumstances involved because the concept of due process is flexible. The Supreme Court, however, has established principles for judging the adequacy of procedures in a given situation. In this regard it has stated

> that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of

> an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitution procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The Supreme Court, in Loudermill v. Cleveland Board of Education, supra, weighed these consideration as they applied to the question of whether public employees are entitled to a pretermination hearing. There, the Court held that an employee is entitled to an opportunity to respond prior to termination. Loudermill, 105 S. Ct. at 1494-95. However, a full evidentiary hearing prior to termination was not required in light of the fact that although the full evidentiary hearing was not accorded until after termination, it was nevertheless "at a meaningful time." Id. at 1495-96.

In the context of a removal based on urinalysis, Loudermill must control so as to defeat a procedural due process challenge because the circumstances of Loudermill are indistinguishable from those presented in a urinalysis based removal. Here, as in Loudermill, the employee is afforded notice and an opportunity to respond prior to the termination or other adverse aciton. Moreover, as in Loudermill, employees ar given a full evidentiary hearing after termination, but "at a meaningful time" at which they may challenge the urinalysis test results through confrontation, cross-examination and presentation of their own witnesses.

Cf. Hester v. City of Milledgeville, 598 F. Supp. at 1475 (use of polygraph results in the absence of an opportunity to test their correctness denied due process). No more are they due.__/ Loudermill. See also Allen v. City of Marietta, 601 F. Supp. 482, 492-94 (N.D. Ga 1985); Storms v. Coughlin, 600 F. Supp. 1214, 1225-26 (S.D.N.Y. 1984). Accordingly, the fact that an employee is not given a full evidentiary hearing in which to challenge urinalysis test results prior to termination does not deny the employee procedural due process.

__/ The situation would be different if the employees were not entitled to a post termination evidentiary hearing. See Jones v. McKenzie, C.A. No. 85-1624, slip op. at 16, (D.D.C. Feb. 25, 1986).

V.

TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS REGARDING URINALYSIS TESTING

A. The Standards For Determining Whether A TRO Or Preliminary Injunction Should Issue

Employees who will be, or have been, subjected to urinalysis may attempt to prevent the government from conducting urinalysis testing altogether. The mechanism for accomplishing that is to seek a permanent injuction against the government. A permanent injunction will be granted if the federal court rules in favor of the employees on the merits of a suit after a hearing and consideration of briefs and arguments. Since the actual litigation on the merits may take a considerable period of time, employees may seek to preclude the government from conducting urinalysis testing until a decision on the merits is reached. In order to accomplish this, they will seek either a Temporary Restraining Order (TRO) or a Preliminary Injunction.

A Temporary Restraining Order (TRO) is a judicial order the purpose of which is to maintain the status quo until there is a decision on a Preliminary Injunction. Rule 65(b), Federal Rules of Civil Procedure (F.R.C.P.). See United Mine Workers of America, 330 U.S. 258, 290, 293 (1947) (a District Court has the power to preserve existing conditions pending a decision whether to grant injunctive relief); Houghton v. Meyer, 208 U.S. 149, 155-56 (1908) (a temporary restraining order is intended "to preserve the status quo when there is danger of irreparable injury from delay" in seeking an injunction). The duration of a TRO is limited. It lasts only for 10 days, although it may be extended for an

additional 10 days. Rule 65(b), F.R.C.P. A TRO may be issued ex parte, without notice being given to the government prior to its issuance. Id.

In contrast, a Preliminary Injunction may not be issued without notice to the government. Rule 65(a)(1), F.R.C.P. Its purpose is to maintain the status quo until there is a final determination on the merits of the case. Rule 65(a), F.R.C.P. Accordingly, its duration is indefinite.

The factors which courts will consider in determining whether to grant a TRO or a preliminary injunction are the same. They are:

a. Whether the petitioner has made a strong showing that he or she is likely to prevail on the merits;

b. Whether the petitioner has shown that in the absence of a TRO, he or she will suffer irreparable injury;

c. Whether issuance of the TRO would substantially harm other parties interested in the proceedings; and

d. Whether the public interest favors the relief sought. Sampson v. Murray, 415 U.S. 61 (1974); Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977) [WMATC v. Holiday Tours]; Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958).

In giving consideration to these factors, no single one is viewed as determinative. Rather, the courts give weight to them all, and they will generally issue a TRO or preliminary injuncti

> upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions goint to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief.

Dataphone Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109, 112 (8th Cir. 1981), quoting Fennell v. Butler, 570 F.2d 263, 264 (8th Cir. 1978), cert. denied, 437 U.S. 906 (1978); WMATC v. Holiday Tours, 559 F.2d at 844. The burden to show entitlement to the TRO or preliminary injunction is on the party seeking it. United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983). Under these standards, employees should fail to obtain TROs or preliminary injunctions against the urinalysis testing program.

B. Employees Will Be Unable To Show Probable Success On The Merits And Irreparable Injury

Generally, courts will require a showing of a better than 50% chance of prevailing on the merits where there is possible irreparable injury and the other factors do not tip one way or the other. See Abdul Wali v. Coughlin, 754 F.2d 1015, 1025, (2d Cir. 1985). See also WMATC v. Holiday Tours, 559 F.2d at 843. Under this standard, it is unlikely that employees could meet their burden of persuasion to require issuance of a TRO or preliminary injunction. As discussed above, there are sound legal arguments in support of the Navy's urinalysis program. These arguments diminish considerably the likelihood that employees will eventually succeed on the merits, and, indeed, they demonstrate that the government will likely prevail. In the absence

Fourth Amendment rights to be free from unreasonable searches and seizures, violations of their right to privacy, and violations of their Fifth Amendment rights to substantive due process.

Under this standard, employee claims regarding loss of employment, financial loss, and drug abuse discrimination could not be considered to be irreparable because adequate make whole remedies could ultimately be fashioned. Id. at 91; Harris v. United States, 745 F.2d 535, 536 (11th Cir. 1984) (a court could "order reinstatement to former rank, correction of records, and an award of full backpay" to an Air Force officer asserting he was being removed improperly from the service). Similarly, the claim of stigmatization is not something which should be viewed as irreparable. See Sampson v. Murray, 415 U.S. at 91 (damage to reputation could be fully corrected); Chilcott v. Orr, 747 F.2d 29, 33-34 (1st Cir. 1984) (stigma from a general discharge is not irreparable injury). See also Kaplan v. Board of Education of the City School District of the City of New York, 759 F.2d 256, 260 (2d Cir. 1985) (injurious effect of financial disclosure was limited by restrictions on dissemination of the information.)

The Constitutional claims, however, present a different story. Generally, a claim of a deprivation of a constitutional right constitutes injury sufficient to meet the irreparable injury standard. See Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."); Greater Baltimore Board of Realtors v. Hughes, 596 F. Supp. 906, 924 (D. Md. 1984) and cases cited therein, 11 C. Wright and A. Miller, Federal Practice and

Procedure (1973) § 2948. Specifically, invasions upon the constitutional right to privacy have been held to constitute irreparable injury. See Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981); Planned Parenthood v. Citizens for Community Action, 558 F.2d 861, 866-67, (7th Cir. 1977). See also Cerro Metal Products v. Marshall, 620 F.2d 964-974 (3d Cir. 1980).__/ The same holds for denials of due process, See Greater Baltimore Board of Realtors v. Hughes, 596 F. Supp. at 924, although a constitutional claim may be too tenuous to support a finding or irreparable injury. See Lydo Enterprises, Inc. v. City of Las Vegas, 746 F.2d 1211, 1214 (9th Cir. 1984); Goldie's Bookstore, Inc. v. The Superior Court of the State of California, 739 F.2d 466, 472 (9th Cir. 1984). Fourth Amendment violations similarly have been found to constitute the requisite irreparable injury. See McDonnell v. Hunter, 746 F.2d 785, 787 (8th Cir. 1984) ("The violation of privacy in being subjected to . . . [urinalysis] tests . . . is an irreparable harm."); National Organization for the Reform of Marijuana Laws v. Muller, 608 F. Supp. 945, 972 (N.D. Ca. 1985).

However, employees would not be able to show that constitutional deprivations would inevitably occur. This is because employees are uniquely in a position themselves to prevent any injury to their constitutional rights. They have the power to

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__/ The Court in Cerro, however, suggested that injury from a Fourth Amendment violation might be redressed, to some extent, by restitution, citing Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), or by application of the exclusionary rule. Cerro, 620 F.2d at 974, 974 n.2[illegible].

refuse to submit to urinalysis testing, and, by doing so, they avoid all possible deprivations of constitutional dimension. To be sure, by refusing to submit to urinalysis testing employees may suffer other injuries, such as removal from the federal service. But, those injuries may be recompensed through reinstatement and backpay, and, therefore, they are not irreparable. Consequently, the absence of irreparable injury should prevent the issuance of TROs or preliminary injunctions.__/

C. Employees Will Be Unable To Show A Balance Of Hardships Tipping Decidedly Towards Them.

Under the alternative standard regarding the weighing of the four factors, the party seeking a TRO or preliminary injunction need not show a mathematical probability of prevailing on the merits. Rather, such a party "must show the 'irreducible minimum' of some chance of success on the merits." See Wilson v. Watt, 703 F.2d 395, 399 (9th Cir. 1983). Usually this is when the "movant has raised questions so serious and difficult as to call for deliberate investigation." Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d at 113. See also General Leaseways, Inc. v. National Truck Leasing Association, 744 F.2d 588, 591 (7th Cir. 1984). As one court has stated:

> When all other prerequisites to injunctive relief have been established, plaintiff need only raise "questions going to the merits so serious, substantial, difficult

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__/ Even if, however, employees constitutional claims are considered as fulfilling the irreparable injury standard, a TRO or Preliminary Injunction is not necessarily required. The competing interests must still be weighed. See Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). As demonstrated below, the balancing favors not granting TRO's or Preliminary Injunctions.

program or agency administration of it, potential harm to the public pendente lite must be considered, though it may not necessarily be determinative."). The harm to the government, employees, and public is severe and is directly proportional to the dangerous nature of the jobs involved.

The harm to defendant and the public is inextricably intertwined with the public interest in conducting urinalysis. Since the decision to conduct urinalysis testing involves "important public issues which implicate significant policy considerations," it is appropriate to give weight to the public interest. Punnett v. Carter, 621 F.2d 578, 587 (3d Cir. 1980). The public interest involved in urinalysis testing, the protection of public safety and property, has been recognized as compelling interest. See, e.g., Amalgamated Transit Union v. Suscy, 538 F.2d at 1267 (the government "has a paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs"). There is also present here the public interests "weighing against judicial interference in the internal affairs of the armed forces." See Hartiffa v. United States, 754 F.2d 1516, 1518 (9th Cir. 1985).__/ Accordingly, the public interest does not favor granting a TRO or Preliminary Injunction.

While these two factors favor allowing urinalysis testing, the interests of the employees are not sufficient to tip the balance the other way. Indeed, as explained above, employees

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__/ Of course, employees might argue that there is a "strong interest in following constitutional procedures, which themselves balance the private and state interests at stake." Mayhew v. Cohen, 604 F. Supp. 850, 860 (E.D. Pa. 1984)

will suffer no irreparable injury as a result of urinalysis testing. Accordingly, since the balance of the factors favors allowing urinalysis testing a TRO or preliminary injunction would be inappropriate notwithstanding that serious questions regarding the testing program would be present.__/

__/ The courts have generally denied injunctive relief regarding urinalysis programs. See Turner v. FOP, 500 A.2d at 1009; Shoemaker v. Handel I, 608 F. Supp. at 1161. Some courts have refused to enjoin urinlaysis programs while enjoining certain aspects of them. See McDonnell v. Hunter, 612 F. Supp. at 1131-33; Storms v. Coughlin, 600 F. Supp. at 1226. But see Local 1900, IBEW v. PEPCO, supra.

VI.

MISCELLANEOUS LEGAL ISSUES

This section will discuss miscellaneous legal issues which may arise during litigation concerning the urinalysis testing program.

A. THE URINALYSIS TESTING PROGRAM COMPORTS WITH THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURES ACT.

Employees may attempt to argue that the decision to implement the urinalysis testing program is violative of the Administrative Procedures Act (APA), 5 U.S.C. § 553 et seq., because of a lack of a factual basis supporting the need to test for drug usage among civilian employees. However, as explained below, such claims are not well founded.

1. The Standard Of Review

The Congress in the APA has established the scope of review to be employed by a court considering a challenge to agency actions. The APA provides, inter alia, that:

> The reviewing court shall --
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .

5 U.S.C. § 706(2)(A). This standard of review applies when an agency acts in a quasi-legislative way to promulgate "substantive" rules.__/ See Citizens To Save Spencer County v. United States

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__/ Substantive rules are rules which represent the creation of new law and which affect individual rights. They are accorded the "force of law." See Hadden v. Township Board of Education v. New Jersey Board of Education, 476 F. Supp. 681, 691-92 (D.N.J. 1979). The regulations implementing the urinalysis testing program are substantive.

Environmental Protection Agency, 600 F.2d 844, 889 (D.D. Cir. 1979); American Medical Association v. Mathews, 429 F. Supp. 1179, 1204 (N.D. Ill. 1977).

This standard of review is a "highly deferential one." Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 33-34 (D.D.C. 1976), cert. denied 426 U.S. 941 (1976). Under it, an agency's rules are "entitled to a presumption of regularity," although "that presumption is not to shield [the rules] from a thorough, probing, in-depth review." Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). However, this review does not allow the court to conduct a wide ranging review. As the Supreme Court has stated:

> [s]ection 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement. . . . Although this inquiry into the facts is to be searching and careful the ultimate standard of review is a narrow one. The court is not enpowered to substitute its judgement for that of the agency.

Id. at 416. "[T]he essential function of judicial review . . . is to ensure that the agency engaged in 'reasoned decision-making.'" United States v. Garner, 767 F.2d 104, 116 (5th Cir. 1985). An agency will be held to have engaged in reasoned decision-making unless

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id., quoting Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983).

Finally, the rationality of the agency's fule making will be upheld on the basis of the explanation offered by the agency at the time it promulgated the rule. Id. at 116-17. In this regard, one court has explained that

> [t]he agency is not required to supply specific and detailed findings and conclusions, but need only "incorporate in the rules a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). National Nutritional Food Ass'n v. Weinberger, 512 F.2d 688, 701 (2d Cir. 1975). The Agency need not discuss every item of fact or opinion included in the written comments submitted to it. The "basis and purpose" statement must, however, identify "what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." Automotive Parts & Accessories Ass'n v. Boyd, 132 U.S. App. D.C. 200, 407 F.2d 330, 338 (1968).

American Medical Association v. Mathews, 429 F. Supp. at 1204.

Under these principles, it is clear that the Navy's urinalysis testing will withstand an APA "arbitrary and capricious" challenge.

2. The Navy's Implementing Instruction Identifies The Purpose And Basis Of The Program

The Navy Instruction which implements the urinalysis testing program states both its basis and purpose. The purpose is succintly stated as:

> The purpose of these policies and procedures is to focus enforcement and personnel resources and the attention of managers and supervisors on those aspects of the civilian drug and alcohol abuse program which affect military personnel, readiness and mission performance, and to ensure in every instance that strong corrective measures are taken to promote the efficiency of the service.

SECNAVINST 5300.28B. Accordingly, it is clear that the intent of the program is to avoid the ill effects of drug use on the Navy's ability to carry out it mission.

To determine the rationality of the decision to implement urinalysis testing to serve the identified purposes, it is necessary only to refer to the statement in the instruction as to the basis for the program. There, the Navy refers to several important facts and circumstances.

First, reference is made to the fact that medical evidence establishes the adverse effects of drug use on the psychological and physical health of the user. This clearly is a relevant factor in determining to subject to urinalysis employees whose jobs involve safety risks.

Next, the instruction refers to the detrimental impact that drug use has on mission capability and accomplishment. This also is a relevant consideration. It is also a factor for which documentation may exist in records of safety and mishap investigations.

Moreover, the Navy has a wealth of experience in dealing with military and civilian employees whose drug use has had an adverse effect on their performance and that experience will surely support the rationality of its program.

Then, the instruction states that personnel surveys show the widespread nature of drug use among, inter alia, civilian employees. Again, this is a relevant factor supported by objective evidence. Consequently, it supports the reasoned nature of the Navy's decision.

Finally, the instruction concludes that the risks arising out of drug use are particularly acute in connection with "critical jobs." This is another relevant factor which is not implausible or counter to the evidence. Indeed, it demonstrates the reasoned nature of the decision to require urinalysis only of those who pose the greatest risks to public safety and property.

Since the Navy has identified the relevant factors on which it relied in determining to implement urinalysis testing, even a probing review of its action would be compelled to conclude that is not arbitrary or capricious.

B. THE URINALYSIS TESTING PROGRAM DOES NOT VIOLATE FEDERAL STATUTES PROHIBITING DISCRIMINATION AGAINST DRUG ABUSERS.

There are two Federal statutes, 42 U.S.C. § 290ee-1 and 29 U.S.C. § 791, which place limitations on the actions the government may take against civilian employees who abuse drugs. This section will discuss how the urinalysis testing program conforms to the requirements of those statutes.

1. The Urinalysis Testing Program Conforms To The Requirements Of The Drug Abuse Office And Treatment Act of 1972.

a. The Provisions Of The Law.

In the Drug Abuse Office and Treatment Act of 1972, the Congress established its policy regarding civilian employees of the government who had abused drugs. Pertinent provisions of that Act, now codified at 42 U.S.C. § 290ee-1, provide:

> (c) . . .
>
> (1) No person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the ground of prior drug abuse.
>
> (2) This subsection shall not apply to employment (A) in the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, or any other department or agency of the Federal Government designated for purposes of national security by the President, or (B) in any position in any department or agency of the Federal Government, not referred to in clause (A), which position is determined pursuant to regulations prescribed by the head of such department or agency to be a sensitive position.
>
> (d) This section shall not be construed to prohibit the dismissal from employment of a Federal civilian employee who cannot properly function in his employment.

42 U.S.C. §§ 290ee-1(c) and (d).

b. By Its Terms This Statute Does Not Apply To Positions Designated As "Critical Jobs".

In section (c)(2) of 42 U.S.C. § 290ee-1, Congress has granted discretion to agency heads to designate "sensitive" positions which, upon such designation, are exempted from the prohibition

against depriving Federal employment on the basis of prior drug abuse.__/ By defining and designating certain positions as "critical jobs", the Secretary of the Navy has exercised the discretion granted by that section.__/ Consequently, the conclusion is compelled that 42 U.S.C. § 290ee-1 does not apply to those subject to urinalysis testing.

c. Assuming Arguendo 29 U.S.C. § 290ee-1 Applies To Employees In Critical Jobs, It Does Not Prohibit The Removal Of An Employee For Current Drug Use.

An essential fact to be considered regarding urinalysis testing is that it tests for drug usage which is current. Positive readings will occur only when there are metabolites of

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__/ The statute does not define the term "sensitive." There is passing reference in the legislative history to "sensitive agencies and sensitive positions" being excluded from coverage by teh statute. From this reference it could possibly be argued that Congress wanted to exclude only positions limited to national security since the agencies excluded primarily are concerned with that area. However, such an argument is too speculative to place definite limits on the discretion of agency heads, and it ignores the fact that the FBI has many functions not directly related to national security.

__/ It has been suggested that since the Office of Personnel Management (OPM) is responsible "for developing and maintaining . . . appropriate prevention, treatment, and rehabilitation programs and services for drug abuse among Federal civilian employees," 42 U.S.C. § 290ee-1(a), it is responsible for designating "sensitive" positions. Therefore, the argument runs, since OPM has limited the designation of "sensitive" positions to those involving national security information, Federal Personnel Manual (FPM) Chapter 732, the Secretary of the Navy may not designate as "sensitive" positions critical jobs outside of OPM's designation. However, such an argument ignores the structure and plain intent of the statute. Although OPM was given general responsibilities in 42 U.S.C. § 290ee-1, the heads of Federal agencies were specifically given authority to designate sensitive positions within their own agencies. Consequently, it would be illogical to suggest that OPM designates "sensitive" positions. Furthermore, it would be similarly illogical to suggest that by defining "sensitive positions" in a certain way OPM has limited the discretion granted to agency heads by Congress.

the controlled substances within the body, and those metabolites are present only for short periods, during a period of not more than about 30 days. An employee disciplined with removal from the Federal service on the basis of positive urinalysis test results, therefore, will have been disciplined for "current", rather than "prior" drug use. Since the statute prohibits removal only for prior drug abuse, there would appear to be no impediment posed by this statute to the actions contemplated by the urinalysis testing program. This conclusion is borne out by the legislative history and judicial interpretation of the statute and the parallel statute regarding alcoholism and alcohol abuse, 42 U.S.C. § 2290dd-1.__/

While the legislative history of this statute is not very illuminating, it does state that "an employee may not be dismissed solely because of prior drug use." (emphasis added). H.R. Rep. No. 775, 92d Cong. 2d Sess., reprinted in U.S. Code Cong. and Admin. News 2045, 2067 (1972). Although there is no guidance in the legislative history as to meaning of the term "prior," it is important to realize that this legislation and the alcohol abuse legislation were passed at a time when societal views towards alcohol and drug abuse were changing. Alcohol or drug

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__/ It is appropriate to look to interpretation of 42 U.S.C. § 290dd-1 regarding alcohol abuse to determine the requirements of 42 U.S.C. § 290ee-1 regarding drug abuse because Congress stated in the legislative history of Public Law 92-255, section 201 of which is now 42 U.S.C. § 290ee-1, that the "provision is almost identical to section 201 of the Alcohol and Alcohol Abuse Prevention and Treatment Act of 1970, and should be administered in a similar manner." H.R. Rep. No. 775, 92d Cong., 2d Sess., reprinted in U.S. Code Cong. and Ad. News 2045, 2067 (1972).

abuse had previously been seen as resulting from character flaws or other similar causes, but by the early 1970's there was widespread recognition that alcoholism and addiction to drugs were medical problems. See Id.; H.R. Rep. No. 1663, 91st Cong., 2d Sess., reprinted in U.S. Code Cong. and Ad. News 5719, 5720 (1970). Consequently, the removal of an employee based on his status as a prior alcoholic or drug addict might have been societally acceptable before these laws were enacted because that individual would be viewed as irredeemable. However, by the time these laws were enacted, society recognized that it was too harsh forever to condemn a person based on past medical problems with alcohol or drugs. Accordingly, the intent of these laws was to prohibit taking action against individuals on the basis of a history of such medical problems. See Jensen v. Aministrator of Federal Aviation Administration, 641 F.2d 797, 799-800 (9th Cir. 1981), vacated as moot, 680 F.2d 593 (9th Cir. 1982) (the court concluded that the promulgation of standards to certify recovered alcoholics as airmen based on abstemsion and lack of ill effects from previous alcohol use would "comply with the Alcoholism Act because it will not deny jobs and privileges solely because of their history of alcoholism." (emphasis supplied)).

Significantly, however, there is no suggestion in the statute or legislative history that an agency would be prohibited from removing an employee for current drug use which affects the employee's ability to do the job. Id. (Federal Aviation Administration could deny airman's certification on the basis

of active alcoholism). See also Johnson v. National Transportation Safety Board, Federal Aviation Administration, 707 F.2d 402 (9th Cir. 1983). Spragg v. Campbell, 466 F. Supp. 658 (D.S.D. 1979). Indeed, the statute specifically permits it. 42 U.S.C. § 290ee-1(d). And, Congress contemplated that employees would be dismissed for failure to perform their jobs due to drug abuse. See H.R. Rep. No. 775, U.S. Code Cong. and Ad. News at 2067-68 (1972) ("Federal employees may have their employment terminated only for failure to perform their jobs," but those dismissed are to retain collateral benefits retained by employees "who have lost their jobs due to other medical disabilities.").

Since the statute does not prohibit removals based on current drug use, it is clear the Navy's urinalysis testing program comports with its requirements. The urinalysis testing program contemplates no action whatsoever based on a person's history of prior drug abuse. Rather, it concerns itself solely with the present, continuing effects on the employee of current drug usage. In this regard, it is also important to note that, because of the "critical" nature and safety aspects of the jobs subject to the testing requirement, an employee cannot "properly function" in such jobs while currently using drugs. Accordingly, the removal of such employees comports with 42 U.S.C.

§ 290ee-1 and, indeed, was within the contemplation of the Congress in enacting this statute._/

2. The Urinalysis Testing Program Conforms To The Requirements Of The Rehabilitation Act of 1973.

Section 501(b) of the Rehabilitation Act of 1973, currently codified at 29 U.S.C. § 791(b), provides in pertinent part:

> Each . . . agency . . . in the executing branch shall . . . submit to the Civil Service Commission . . . an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such . . . agency . . . .

29 U.S.C. § 791(b). To give effect to this statute, regulations implementing it provide that "[t]he Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person." 29 C.F.R. § 1613.703.__/ In turn, the regulations give effect to this policy by requiring that

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__/ It might be suggested that since the purpose of 42 U.S.C. § 290ee-1 was to encourage rehabilitation that it requires the Navy to provide for rehabilitation before it may remove an employee for current drug use. See Walker v. Weinberger, 600 F. Supp. 757, 761 (D.D.C. 1985); Whitlock v. Donovan, 598 F. Supp. 126, 131 (D.D.C. 1984). The statute, however, imposes no such requirement on its face. Moreover, since Congress has enacted another statute specifically dealing with the government's obligation to accommodate handicapping conditions, it is more appropriate to discuss rehabilitation requirements in connection with that statute. Finally, the rehabilitation requirements under both statutes most likely are coextensive. Id. See also Spragg v. Campbell, 466 F. Supp. at 661.

__/ A qualified handicapped individual is a person (1) who has, has a record of, or is regarded as having a physical or mental impairment which substantially limits one or more of such person's major life activities, and (2) who, with or without reasonable accommodation, can perform the essential functions of the positi in question without endangering the health and safety of the individual or others. 29 C.F.R. § 1613.702(a) and (f). A drug abuser meets the first part of this text. See Whitlock v. Donovan, 598 F. Supp. at 129 n.3.

> [a]n agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

29 C.F.R. § 1613.704(a).

With regard to drug abusers, the requirement to provide reasonable accommodation normally equates to a requirement to provide counseling and "a 'firm choice' between treatment and discipline." Whitlock v. Donovan, 598 F. Supp. at 134. If the employee accepts treatment, he must be allowed to complete it and be returned to his job. Id. However, there are limits on this requirement. An agency is not required to lower or effect substantial modifications to its standards--including those relating to safety--in order to provide accommodation. See Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979); Doe v. New York University, 666 F.2d 761, 775 (2d Cir. 1981).

The Navy's urinalysis testing program entirely comports with the requirements imposed by the Rehabilitation Act of 1973 to provide reasonable accommodation. For those employees who demonstrate they are entitled to accommodation,__/ the program contemplates that before an adverse action is initiated such employees will be counseled and offered the opportunity for rehabilitation.__/ At the same time, Navy activities properly

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__/ The burden in this regard is on the employee. Doe v. New York University, 666 F.2d at 774.

__/ Upon a second offense removal from the Federal service is mandatory. However, this does not violate the duty to provide accommodation since an agency is not required to give more than one opportunity for rehabilitation.

may continue to enforce and uphold their safety standards by administratively removing drug abusing employees from their critical jobs and giving them other duties.__/ See Southeastern Community College v. Davis, 42 U.S. at 413, Doe v. New York University, 666 F.2d at 775. Only those employees who are not entitled to accommodation and those who reject the choice of treatment will be subjected to disciplinary action.__/

__/ If it is not feasible to assign other duties, other actions such as placing the employee in administrative leave will be used.

__/ Of course, there may be circumstances where, even though an employee is entitled to accommodation, the opportunity for rehabilitation would create an undue risk of danger for the agency. In such cases removal without rehabilitation would be allowable. Such cases would be rare. Another consideration in this context is whether other accommodation in lieu of discipline, such as reassignments to another position, should be accorded to those testing positive but who cannot be accommodated through rehabilitation. See Ignacio v. United States Postal Service, Special Panel No. 1, 86 FMSR ¶ 7026 (1986) (holding that reassignment must be considered for a qualified handicapped individual). Reassignment in the place of discipline where rehabilitation cannot be given, however, is not required because it would place undue hardship on the Navy's drug abuse prevention programs and because it would effectively substantially modify the Navy's standards in this area. See Southeastern Community College v. Davis, 442 U.S. at 413; Doe v. New York University, 666 F.2d at 775. This does not mean that the possibility of reassignment may be completely disregarded. In such circumstances, reassignment would have to be considered in the context of selecting the penalty. Ingacio, 86 FMSR ¶ 7026.

VII.

URINALYSIS AND THE MERIT SYSTEMS PROTECTION BOARD

A. INTRODUCTION

Since the Navy's urinalysis program contemplates that employees may be removed on the basis of a positive test result or on the basis of a refusal to submit to testing, it is reasonably anticipated that employees so removed will challenge their removals and various aspects of the urinalysis testing program before the Merit Systems Protection Board. In order to sustain removals premised on urinalysis testing, agency representatives must be thoroughly familiar with the proof requirements applicable to all adverse action cases. Those proof requirements may briefly be summarized as follows.

In general, an agency must establish three things when it takes an adverse action against an employee. First, it must prove by a preponderance of the evidence that certain alleged misconduct occurred. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(a)(1)(ii); Lovshin v. Department of the Navy, 767 F.2d 826, 844 (Fed. Cir. 1985). Next, the agency must establish that there is a causal connection, a nexus, between the employee's misconduct and the efficiency of the service. 5 U.S.C. § 7513(a); Hayes v. Department of the Navy, 727 F.2d 1535 (Fed. Cir. 1984). Finally, the agency must show that the penalty imposed on the employee was reasonable in light of all the circumstances. Douglas v. Veterans Administration, 5 MSPB 313 (1981). While an appellant bears no burden of proof regarding agency's case in chief, he or she does bear the burden of establishing affirmative defenses to the

adverse action. Nordell v. Department of Health and Human Services, 15 M.S.P.R. 37, 41 (1983). Discrimination on the basis of a handicapping condition, such as addiction to drugs, may constitute an affirmative defense. See Ruzek v. General Services Administration, 7 MSPB 307 (1981).

This section will discuss the specific application of these principles to a removal based on the urinalysis testing program. It will also discuss various other legal issues which may arise in such actions.

B. PROVING THE MISCONDUCT

1. How To Frame The Allegation

Before explaining how to prove that positive urinalysis test results establish misconduct, it will be well to consider how the charge against the employee should be framed when the evidence of employee misconduct consists principally of a positive urinalysis test result. Although the MSPB has not addressed this question directly, it has given indications that a charge of "use of a controlled substance" is appropriate and sustainable when the agency seeks to rely on urinalysis results for proof of misconduct. See Robertson v. Department of the Navy, 29 M.S.P.R. 466, 469, 85 FMSR ¶ 5500 (1985) (the agency "could have charged appellant with the use of marijuana as shown by its presence in his urine"); Kulling v. Federal Aviation Administration, 24 M.S.P.R. 56, 84 FMSR ¶ 5888 (1984) (removal for use of cocaine upheld on the basis of urinalysis results and admission of use). In the absence of special circumstances, a charge of "under the influence of a controlled substance" should be avoided because a positive

urinalysis test result gives no indication as to the level of intoxication at the time the urine sample was taken, or at any prior time. See Robertson v. Department of the Navy, 29 M.S.P.R. at 469 (in reversing a charge of being "under the influence of a controlled substance", the Board considered expert testimony to the effect "that the presence of marijuana in appellant's urine did not necessarily mean he was 'intoxicated' on that day.").

2. Attempts To Exclude Urinalysis Test Results From Evidence

Before your agency representative has an opportunity to present evidence to prove the charge of "use of controlled substance", he or she may be faced with an attempt by the appellant to preclude the use of your principal evidence, the results of the urinalysis test. This attempt will likely take the form of a motion to exclude that evidence on the basis that the employee's constitutional Fourth Amendment rights were abridged by the taking of the urine sample. Of course, the agency representative should meet appellant's arguments in this regard by adopting the position set forth above regarding the reasonableness of urinalysis testing, but, before making those arguments, the agency representative should assert that the Fourth Amendment cannot be applied to exclude evidence from an MSPB hearing.

To attempt to exclude urinalysis test results on the basis of a Fourth Amendment violation, appellants will argue that the "exclusionary rule," which prevents use of illegally obtained evidence in criminal proceedings, applies in the context of civil proceedings such as MSPB hearings. In support of this argument, they may point to a line of cases in which the exclusionary has

been applied to civil administrative hearings. The seminal case of this line, Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966), involved a hearing accorded to a Veterans Preference employee being removed from the Federal civil service. There, the Court of Appeals stated: "It would seem wholly at odds with our traditions to allow the admission of evidence illegally seized by Government agents in discharge proceedings, which the Court has analogized to proceedings that 'involve the imposition of criminal sanctions . . . .'" Id. at 640. Other courts have followed Powell v. Zuckert. See United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1163 (2d Cir. 1970); Jones v. Latexo Independent School District, 499 F. Supp. 223, 238-39 (E.D. Tx. 1980); Denton v. Seamans, 315 F. Supp. 279, 286 (N.D. Calif. 1970). The U.S. Court of Claims, whose whose decisions are binding on the Federal Circuit, South Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982), has also followed the holding of Powell v. Zuckert. See Saylor v. United States, 374 F.2d 894, 898 (Ct. Cl. 1967).

While these cases may have some surface appeal, they must not be viewed as requiring the application of the exclusionary rule to MSPB hearings in light of the Supreme Court's holdings in other cases which indicate that it is inappropriate to apply the exclusionary rule in such a context. In Immigration and Naturalization Service v. Lopez-Mendoza, 104 S. Ct. 3479 (1984) (INS v. Lopez-Mendoza), the Court explained that the principles it set forth in United States v. Janis, 428 U.S. 433 (1976) established the proper framework for deciding "in what types

of proceeding application of the exclusionary rule is appropriate." INS v. Lopez-Mendoza, 104 S. Ct. 15 3486.__/

> Imprecise as the exercise may be, the Court recognized in Janis that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. On the benefit side of the balance "the 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.'" Id., at 446, 96 S. Ct., at 3028, citing United States v. Calandra, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). On the cost side there is the loss of other probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.

Id. An application of these principles demonstrates that it is inappropriate to apply the exclusionary rule to the MSBP hearings.

On the benefit side of applying the exclusionary rule, it must be recognized that its application would serve to deter, to some extent, illegal conduct on the part of Navy officials. Unlike the situation in Janis where there was no deterrence value because the authorities attempting to use the evidence were different from the searching authorities, in the urinalysis testing context it would be the same officials involved at both stages.__/ Consequently, "the exclusionary rule is likely to be

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__/ INS v. Lopez-Mendoza held that the exclusionary rule does not apply in deportation hearings.

__/ In Janis state authorities conducted the search while Federal authorities attempted to use the illegally obtained evidence in a Federal prosecution. In the urinalysis context Federal authorities would be involved at both stages.

most effective" in such circumstances. INS v. Lopez-Mendoza, 104 S. Ct. at 3486.

Notwithstanding this fact, however, there are factors which diminish the deterrent value of the exclusionary rule in the context of MSPB hearings. First, the exclusionary rule would continue to apply to any criminal proceedings which might arise out of the urinalysis testing, and its continued availability "undoubtedly supplies some residual deterrent to unlawful conduct" by Navy officials. Id. Cf. United States v. Calandra, 414 U.S. 347 (availability of the exclusionary rule in later criminal proceedings rendered the rule inapplicable to earlier Grand Jury proceedings). Next, and "perhaps most important" in this regard, is the fact that there is already a comprehensive scheme for deterring Fourth Amendment violations by Navy officials. See INS v. Lopez-Mendoza, 104 S. Ct. at 3487-88. Not only are such officials subject to direct discipline for such delicts, but they may be also be prosecuted by the Office of Special Counsel under charges of of prohibited personnel practices. The Supreme Court has recognized that the availability of such a scheme significantly decreases the marginal deterrence value of applying the exclusionary rule. Id.

On the other side of the scale, there are significant costs. In INS v. Lopez-Mendoza, the Court recognized that where the intent of the civil proceedings is not to punish past transgressions but "to prevent their continuance or renewal," application of the exclusionary rule would effectively condone ongoing violations of the law. Id. The Court explained its reasoning thusly:

> [p]resumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained, or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized.

Id.

That reasoning applies with special force with regard to urinalysis testing. To be sure, MSPB proceedings are intended to punish breaches of discipline, but they also serve to deter others from engaging in the same conduct. Were the exclusionary rule applied to MSPB proceedings, that deterrence effect would be lost, and employees would be given freedom, effectively, to use drugs without threat of sanction. The consequence of such a situation would be drastic. Unlike INS v. Lopez-Mendoza where the consequence of allowing renewed violations is not life threatening, the consequence for the Navy would be just of that character. Employees would pose significant threats to their own safety and the safety of others. Under those circumstances, the balance of the scale must favor the inappropriateness of using the exclusionary rule in MSPB hearings._/

__/ The MSPB itself has not settled the question of whether the exclusionary rule applies in its proceedings. The Board seemingly has considered claims regarding unconstitutional searches. See McClain v. Department of the Navy, 20 M.S.P.R. 464, 465 (1984) (Board upheld presiding official's determination the seaach was constitutional because of consent to it); Janis v. Department of the Navy, 7 MSPB 227, 229 (1981) (standard for determining voluntariness of confession is analogous to standard for determining consent to a search); Youraine v. Department of the Navy, 3 MSPB 23, 23-24 (1980) (Board found there was consent to the search). The Board, however, has not squarely addressed the issue of whether

(See Footnote __ on next page)

3. Getting The Urinalysis Test Results Into Evidence

The rules of evidence do not apply in MSPB hearings. See 5 C.F.R. § 1201.62. However, while the rules do not apply, agency representatives will still have to be guided by them in order to assure that urinalysis test results are given sufficient weight to carry the agency's burden of proof. Accordingly, the following comments are made to guide agency representatives in preparing to use test results in evidence.

a. Establish The Chain of Custody

It is fundamental that the urinalysis test results will be useless unless the agency is able to show that they are related to the particular employee who was removed on the basis of the results. The way to establish the relevancy of the results to that employee is to show that the urine which was tested to produce the positive results came from the employee and was not adulterated between the time the employee provided the urine and the point at which the sample was tested. This can be done by putting in evidence of a continuous chain of custody. The failure to establish a chain of custody will be disastrous. You will fail to prove your case. See Moen v. Federal Aviation

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(Footnote __ continued)

__/ the exclusionary rule applies. See Scheurman v. Department of the Army, 85 FMSR ¶ 5464 (November 18, 1985) ("we find that the presiding official's consideration of the merits of the Fourth Amendment issue does not amount to reversible error . . . We do not reach the issue of whether the search and seizure clause of the Fourth Amendment can be applied to exclude evidence from Board proceedings."); Jones v. Department of the Navy, 7 MSPB 227 n.1 (1981) ("Because the Board does not find that there is a violation of the Fourth Amendment, we do not reach the question of whether the exclusionary rule applies to these proceedings.").

areas. First, they will testify as to their scientific credentials so as to demonstrate they are experts in the field of urinalysis testing. Next, they will discuss the scientific acceptability and accuracy of the tests performed on the urine samples. Finally, they will interpret the test results for the particular urine sample at issue. An example of such testimony is provided at Appendix C. Once the expert testifies there will be sufficient evidence to carry the agency burden of proof.

C. PROVING NEXUS

Once the misconduct has been proven, the agency representative must establish a causal connection between the misconduct, use of a controlled substance, and the efficiency of the service. The Board has given guidance how this required nexus may be established in cases involving drugs. In Olson v. Department of the Navy, 25 M.S.P.R. 97, 84 FMSR ¶ 6101 (1984) the Board considered whether there was nexus with regard to off-duty planting, cultivating and processing of marijuana with intent to distribute. The Board found that the Navy had established nexus by evidence regarding the high precision and critical safety aspects of its mission. The Navy showed that the appellant was a jet mechanic responsible for final checking and inspection of aircraft being returned to the fleet for use. These facts warranted a reasonable inference that the Navy's mission was jeopardized because of the possibility that the appellant could distribute marijuana to agency employees who might use it on duty. The Board also favorably noted the Navy's "get tough" policy with respect

to drugs. Although Olson involved sale of marijuana rather than use, the Board's reasoning is also valid in the context of a use case:

> While there is no direct evidence that appellant actually distributed marijuana to employees at the agency, we do not believe that in order to establish nexus the agency should be required to take the risk of awaiting misconduct within the agency on the part of the appellant or of incurring safety problems before it can take action to prevent such occurrences. Borsari v. Federal Aviation Administration, 699 F.2d 106, 110 (2d Cir.), cert. denied, 104 S. Ct. 115 (1983). In removing the appellant, the agency was merely taking action to minimize the possibility of drug use in an employment setting that had an increasing problem of on-the-job marijuana use that threatened the safety requirements attendant to the agency's mission.

Olson, 25 M.S.P.R. at 100. Indeed, in Burkwist v. Department of Transportation, 26 M.S.P.R. 427, 85 FMSR ¶ 5088 (1985), the Board found that off-duty drug related misconduct could be shown to be causally connected to the efficiency of the service where an agency can establish reasonable concerns regarding the effect of drug abuse upon the safety of its operations. See also Franks v. Department of the Air Force, 22 M.S.P.R. 502, 84 FMSR ¶ 5716 (1984) (nexus was proven even in the absence of physical harm because the appellant posed a possible danger to himself and others).

D. THE REASONABLENESS OF THE PENALTY

The MSPB will give careful consideration to whether the sustained charges merit the penalty imposed by the agency. Douglas v. Veterans Administration, 5 MSPB 313, 334 (1981). In cases involving drug offenses, the MSPB will give great weight to agency

concerns over the safety of its operations. Those concerns will generally outweigh favorable information presented by an appellant, and the Board will find that removal is appropriate. For example, in Moore v. Tennessee Valley Authority, 23 M.S.P.R. 357, 84 FMSR ¶ 5819 (1984), the Board considered a challenge to the removal penalty for being under the influence of intoxicants. The appellant argued that his work record and potential for rehabilitation made his removal unreasonable. The Board rejected this challenge. It found that appellant's job required him to drive a 2-ton truck at a nuclear plant construction site. It also found that the agency stressed safety on the job, and that it was not unreasonable for "the agency to have a legitimate concern for the safety of the workforce." In addition, and of great significance in its application to urinalysis based removals, the Board rejected the Appellant's argument that his offense was mitigated by the fact he was able to perform his duties without incident. The Board stated "we find that the agency's concern for what he might have done and the deterrent effect that his removal would have on other employees were not unreasonable under the circumstances." 23 M.S.P.R. at 360. Similarly, in Olson v. Department of the Navy, 25 M.S.P.R. at 100-101, the agency demonstrated the reasonableness of a removal for off-duty drug offenses by presenting evidence concerning its aggressive program to stamp out drug abuse and the adverse effects on safety which the appellant's continued employment would cause. See also Bradley v. Department of the Navy, 21 MSPR 334, 84 FMSR ¶ 5513 (1984) (removal for possession of one marijuana cigarette was reasonable because of the

agency's clear policy regarding drug offenses); Randall v. Department of the Navy, 18 M.S.P.R. 485 (1983) (the offense of reporting to duty under the influence of intoxicants was serious because appellant's "condition, if undetected, would have constituted a danger to himself and other employees.").__/

E. DRUG ABUSE AS A HANDICAPPING CONDITION

In Ruzek v. General Services Administration, 7 MSPB 307 (1981) the Board held that alcoholism is a handicapping condition under section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq. It is now well settled that drug abuse also is such a handicapping condition. Kulling v. FAA, 24 M.S.P.R. at 58. Because of this:

> [t]he Board has held that an agency has an obligation to afford reasonable accommodation to an employee whose use of drugs or alcohol interferes with the safe and efficient performance of his duties; that this accommodation must include an offer to the employee of rehabilitative assistance and permission to take sick leave for any necessary treatment before taking disciplinary action for performance problems related to the use of drugs or alcohol; and that the failure to make this accommodation constitutes discrimination on the basis of handicap under 5 U.S.C. § 2302(b)(1) and 29 U.S.C. § 791.

Mayers v. Government of the District of Columbia, 21 M.S.P.R. 144, 147, 84 FMSR ¶ 5456 (1984) (footnote omitted). This does not

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__/ As noted above, it may be necessary to show that, in selecting the penalty of removal, the Deciding Official gave consideration to the possibility of reassigning the employee to non-critical duties. See Ignacio v. United States Postal Service, 86 FMSR ¶ 7026.

mean, however, that agencies are powerless to take swift disciplinary action in all circumstances.__/

In the first place, the duty to accommodate extends only to drug abusers, and the burden is on the employee to prove that he is handicapped by drug abuse. Robertson v. Department of the Navy 29 M.S.P.R. at 472; Kulling v. FAA, 24 M.S.P.R. at 58. The threshold showing, however, appears to be slight. See Kulling v. FAA, 24 M.S.P.R. at 58 (Board concluded the appellant had shown he was a drug abuser based on evidence the appellant had enrolled in a substance abuse program and the appellant's unspecific testimony "that cocaine use was affecting his life.") Cf. Robertson, 29 M.S.P.R. at 472 (appellant failed to show he was handicapped by drug abuse because he did not consider himself handicapped, was not in a drug abuse treatment program, and did not consider marijuana harmful.) But see Finnegan v. United States Postal Service, 23 M.S.P.R. 94, 84 FMSR ¶ 5769 (1984) (no showing that drug condition was the proximate cause for sale of cocaine).

Even if, however, an appellant is able to make the threshold showing, the defense does not apply when concerns over safety preclude the accommodation. See Cavallaro v. Department of Transportation, 20 M.S.P.R. 701, 84 FMSR ¶ 5394 (1984) (the agency's overriding safety concerns necessitated the employee's removal without an offer of rehabilitation). But see Friel v. Department of the Navy, ___ M.S.P.R. , 85 FMSR ¶ (1985).

__/ As explained above, the situations in which disciplinary action will be taken without rehabilitative efforts will be rare.

As the Board stated in Kulling v. Department of the Navy, 24 M.S.P.R. at 59:

> in the case of an air traffic controller whose handicapping condition is drug abuse, the Board finds that such accommodation is not a prerequisite to taking an adverse action because of the agency's overriding concern for public safety. In matters concerning air trafic control, any additional risk is unwise and unwarranted. The agency's decision to eliminate the perceived danger is well within its discretion . . . . Therefore, the Board will not require the agency to risk whether appellant can ultimately perform the essential functions of an air traffic contoller without endangering the health and safety of himself or others.

As with air traffic controller, the Navy's overriding concern in conducting urinalysis testing is the protection of people and property from the dangers posed by drug usage. Accordingly, accommodation is not required in those rare instances where overriding safety concerns can be shown to preclude any attempt at rehabilitation.

The End