

Ronald Reagan Presidential Library
Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Wallison, Peter J.: Files
Folder Title: Drug Policy Program (Cases, Title X,
Legal Aspects Memo) (3)
Box: OA 14008

To see more digitized collections visit:
<https://reaganlibrary.gov/archives/digital-library>

To see all Ronald Reagan Presidential Library inventories visit:
<https://reaganlibrary.gov/document-collection>

Contact a reference archivist at: reagan.library@nara.gov

Citation Guidelines: <https://reaganlibrary.gov/citing>

National Archives Catalogue: <https://catalog.archives.gov/>

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 FOR THE WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 AMERICAN FEDERATION OF GOVERNMENT)
9 EMPLOYEES, AFL-CIO, et al.,)

10 Plaintiffs,)

11 v.)

12 CASPAR WEINBERGER, Secretary)
13 of Defense, et al.,)

14 Defendants.)
15

Civil Action No.
C86-242T
Judge Tanner

16
17 DEFENDANTS' MOTION TO DISMISS OR, IN THE
18 ALTERNATIVE, FOR SUMMARY JUDGMENT
19

20 Defendants hereby move this Court to dismiss the above titled
21 action for lack of subject matter jurisdiction pursuant to
22 Federal Rule of Civil Procedure 12(b)(1), or in the alternative
23 to grant summary judgment in favor of the defendants pursuant to
24 Federal Rule of Civil Procedure 56(b). In support of this
25 motion, defendants respectfully refer the Court to the Memorandum
26 of Law filed herewith.
27

28 Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

DEFS' MOTION TO DISMISS
OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT/1

1
2 GENE S. ANDERSON
United States Attorney

3
4 
5 JUDITH F. LEDBETTER

6
7 
8 JEFFREY S. PAULSEN

9 Of Counsel:
10 MAJOR VINCENT E. REILLY
Office of the Judge
11 Advocate General
The Pentagon, Rm. 2D437
12 Department of the Army
Washington, D.C. 20310
Tel. (202) 697-7956

13
14 
15 ROBERT C. CHESNUT

16 Attorneys, Department of Justice
17 10th & Pennsylvania Ave., N.W.
Room 3738
18 Washington, D.C. 20530
19 Tel: (202) 633-3378

20 Attorneys for the Defendants

21
22
23
24
25
26
27 DEFS' MOTION TO DISMISS
28 OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT/2

1
2 UNITED STATES DISTRICT COURT
3 FOR THE WESTERN DISTRICT OF WASHINGTON
4 AT TACOMA

5 AMERICAN FEDERATION OF GOVERNMENT)
6 EMPLOYEES, AFL-CIO, et al.,)

7 Plaintiffs,)

8 v.)

9 CASPAR WEINBERGER, Secretary)
10 of Defense, et al.,)

11 Defendants.)
12 _____)

Civil Action No.
C86-242T
Judge Tanner

13 ORDER

14 This matter comes before the Court on plaintiffs' motion for
15 a preliminary injunction and defendants' motion to dismiss.
16 Having considered all of the memoranda of law and attachments
17 thereto filed by the parties, and the arguments of counsel in
18 open court on July 10, 1986, the Court hereby ORDERS that the
19 motion for a preliminary injunction be DENIED, and the
20 defendants' motion to dismiss be GRANTED.

21 Dated this ____ day of July, 1986.

22 _____
23 UNITED STATES DISTRICT JUDGE
24
25
26
27
28

1
2
3
4
5
6
7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 AMERICAN FEDERATION OF GOVERNMENT)
11 EMPLOYEES, AFL-CIO, et al.,)

12 Plaintiffs,)

13 v.)

14 CASPAR WEINBERGER, Secretary)
of Defense, et al.,)

15 Defendants.)
16

Civil Action
C86-242T
Judge Tanner

17 DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR
18 MOTION TO DISMISS OR, IN THE ALTERNATIVE,
19 FOR SUMMARY JUDGMENT, AND IN OPPOSITION
TO PLAINTIFFS' MOTION FOR A TEMPORARY
RESTRAINING ORDER

20 INTRODUCTION

21 Plaintiffs seek to interfere with the United States Army's
22 exclusive right to determine its internal security practices by
23 attempting to enjoin the Army from implementing a drug screening
24 program for civilian employees in certain critical positions. The
25 Army's program, which affects only about 9500 of the Army's 420,000
26 civilian employees worldwide, requires employees in critical

27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./1

1 positions such as the police positions held by plaintiffs, to
2 participate in periodic urinalysis to insure they are not involved
3 with illegal drugs. Plaintiffs contend this program violates their
4 Fourth and Fifth Amendment rights, and is contrary to several federal
5 statutes.

6 Plaintiffs' motion for preliminary injunctive relief should be
7 denied and this case should be dismissed. Reviewing an identical
8 challenge to the same Army program at issue here, the United States
9 District Court for the District of Columbia last week ruled that it
10 lacked jurisdiction because the plaintiffs had not pursued their
11 exclusive administrative remedies under the Civil Service Reform Act.
12 National Federation of Federal Employees v. Weinberger ("NFFE"),
13 Civil 86-681, slip op. (D.D.C. June 23, 1986) (copy attached as
14 Exhibit G). As the district court held, the Civil Service Reform Act
15 ("CSRA") provides a fully adequate administrative forum for
16 plaintiffs to present their constitutional and statutory claims, with
17 ultimate judicial review by the appropriate federal circuit court of
18 appeals. Because the plaintiffs in this case have not attempted to
19 avail themselves of these existing administrative remedies, this case
20 must be dismissed.

21 Even if the Court had jurisdiction, this case still should be
22 dismissed on the merits. The Fourth Amendment is not implicated
23 because testing is conducted only with the consent of the employee.
24 In any event, the government's interest in insuring a drug-free
25 police force far outweighs any minimal intrusion on plaintiffs'
26 privacy interests. The Army's program also satisfies the

27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./2

1 requirements of due process. The testing methods that will be used
2 are highly reliable. All positive field test results must be
3 confirmed, and any employee subject to an adverse action based on a
4 confirmed positive test result will have a full array of
5 administrative and judicial remedies available to contest that
6 action. Plaintiffs' statutory claims are similarly without merit.

7 Nor can plaintiffs demonstrate an entitlement to a preliminary
8 injunction. Not only are they unlikely to succeed on the merits, but
9 they also can show absolutely no threat of irreparable harm, as the
10 District of Columbia Circuit ruled in denying the NFFE plaintiffs'
11 emergency motion for an injunction pending appeal. Slip op. (Exhibit
12 H). Plaintiffs are not required to participate in the urinalysis
13 program and may be reassigned to available noncritical positions for
14 which drug testing is not required, with no loss of pay or benefits,
15 if they decline to participate. Any action taken as a result of an
16 employee's refusal to participate in urinalysis testing easily could
17 be undone if the program ultimately were held to be invalid, negating
18 any claim of irreparable injury.

19 Finally, the public interest weighs heavily in favor of
20 permitting the Army to use the most reliable, least intrusive methods
21 available to insure that its civilian police force -- which is
22 responsible for protecting the lives and safety of thousands of
23 civilian and military personnel -- is drug free.

24 STATEMENT OF THE CASE

25 The Department of Defense Civilian Employees Drug Abuse Testing

26
27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./3

1 Program was established by Directive Number 1010.9, issued on April
2 8, 1985. (Exhibit A). The purpose of the program is to:

- 3 1. Assist in determining fitness for appointment
4 or assignment to, or retention in, a critical job.
- 5 2. Identify drug abusers and notify them of the
6 availability of appropriate counseling, referral,
7 rehabilitation, or other medical treatment.
- 8 3. Assist in maintaining the national security and the
9 internal security of the Department of Defense by
10 identifying persons whose drug abuse could cause disruption
11 of operations, destruction of property, threats to the
12 safety of themselves and others, or the potential for
13 unwarranted disclosure of classified information through
14 drug-related blackmail.

15 (Exhibit A, ¶ D).¹

16 Directive 1010.9 further provides that for a position to be
17 designated as critical, and thus subject to urinalysis testing, it
18 must fall within one or more of the following categories:

- 19 (1) Law enforcement;
- 20 (2) Positions involving the national security of the
21 Department of Defense in which drug abuse could cause
22 disruption of operations, destruction of property, threats
23 to the safety of personnel, or the potential for
24 unwarranted disclosure of classified information;
- 25 (3) Jobs involving protection of property or persons
26 from harm.

27 ¹ Relying on a newspaper article, plaintiffs contend that
28 implementation of the Army's program is arbitrary and capricious
because Dr. J. Garrett Clinton, a Defense Department official,
has been quoted as saying the problem with drug abuse among the
Army's civilian employees is "very small." Pls' Brief at 20.
The same argument was made in the NFFE case, and Dr. Clinton
responded by way of declaration, a copy of which is attached as
Exhibit B. Dr. Clinton considers the problem to be small but
nevertheless significant. Id. at ¶ 3. In addition, there has
been at least one instance of drug abuse within the 24'-person
civilian police unit at Fort Lewis within the last 18 months.
Picucci Dec. ¶ 6 (Exhibit R).

Defs' Mem. In Support Of
Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./4

1 Exhibit A, ¶ F(1)).

2 In conformity with Directive 1010.9, the Army's drug abuse
3 testing program was established by Interim Change No. 111 to Army
4 Regulation 600-85. (Exhibit C). It directs that applicants for
5 critical jobs and incumbent employees in critical jobs be screened
6 for drug abuse. The screening is considered a condition of
7 employment, (Exhibit C, ¶ 5-14c), and is implemented by the
8 requirement that both applicants and current employees sign DA Form
9 5019-R, which acknowledges the Army's right to require the applicant
10 or employee to participate in urinalysis. (Exhibit C, ¶ 5-14c(2)).
11 All of the individual plaintiffs in this action have signed the form.
12 Costanti Dec. ¶ 4 (Exhibit J).

13 If an incumbent employee has a confirmed positive urinalysis
14 test result,² or refuses to provide a specimen, the following steps
15 will be taken:

16 The employee will be offered counseling or treatment
17 through the local assistance program in accordance with
18 Federal Personnel Manual Supplement 792-2 and AR 600-85.
19 An employee with a confirmed positive result may be
20 voluntarily or involuntarily reassigned to a non-critical
21 position at the same grade level. There will be no loss of
22 pay or benefits. If there are no non-critical positions
23 available at the same grade level, the employee will be
24 offered a non-critical position in a lower grade if such a

25 ² A confirmed positive urinalysis is the result of a two-
26 step testing procedure. Jewell Dec. ¶ 8 (Exhibit D.) The
27 initial screening is done with a field test known as the EMIT.
28 Id. If a urine sample tests positive for the presence of a drug
by-product, or metabolite, it is submitted to a certified
laboratory for further testing using the gas chromatography/mass
spectrometer, which is considered the best and most reliable
method of detecting controlled substances in urine. Id. ¶ 7. If
the sample again tests positive, it is considered "confirmed".
If it tests negative, any temporary action taken on the basis of
the EMIT positive is rescinded. Sumser Dec. ¶ 2 (Exhibit E).

29 Defs' Mem. In Support Of
30 Mot. To Dismiss And In Opp.
31 To Pls' Mot. For A P.I./5

1 position is available. After the aforementioned actions
2 have been exhausted, an employee with a confirmed positive
3 test result may be separated by termination for failing to
4 meet a condition of employment.

5 Sumser Dec. ¶ 3 (Exhibit E).

6 All action taken against a current employee on the basis of a
7 confirmed positive urinalysis is administrative in nature, and is
8 designed to further the purpose of the drug abuse testing program,
9 which is to protect the national security and public safety. No
10 disciplinary action is taken against an employee solely on the basis
11 of a confirmed positive urinalysis or refusal to provide a specimen.
12 Sumser Dec. ¶ 2; Putman Dec. ¶ 5 (Exhibit F).

13 ARGUMENT

14 I. THIS ACTION, WHICH IS IDENTICAL TO AN ACTION
15 PENDING IN THE DISTRICT OF COLUMBIA, SHOULD
16 BE DISMISSED IN THE INTEREST OF COMITY AND
17 JUDICIAL ECONOMY

18 This is the second of two identical challenges to the Army's
19 civilian drug testing program. The first case, NFFE v. Weinberger,
20 Civil 86-681, slip op. (D.D.C. June 23, 1986) (Exhibit G), already
21 has been dismissed by the district court for lack of subject matter
22 jurisdiction, and plaintiffs' appeal to the District of Columbia
23 Circuit is pending. The pendency of the NFFE case requires dismissal
24 of this action.

25 In order to promote the efficient, comprehensive
26 disposition of cases and avoid the potential for conflicting judicial
27 determinations, a district court should dismiss an action that is
28 duplicative of an earlier-filed action pending in another federal
court. Pacesetter Systems Inc. v. Medtronic Inc., 678 F.2d 93, 97

29 Defs' Mem. In Support Of
30 Mot. To Dismiss And In Opp.
31 To Pls' Mot. For A P.I./6

1 (9th Cir. 1982); see also Colorado River Water Conservation District
2 v. United States, 424 U.S. 800, 817 (1976). Dismissal of the later
3 action is especially appropriate where, as here, both suits seek
4 nationwide injunctive and declaratory relief against the same party
5 on the same legal grounds. Boucher v. Horner, Civil No. 85-9295
6 (N.D. Cal. June 13, 1986) (attached as Exhibit I); see also National
7 Health Foundation v. Weinberger, 518 F.2d 711, 712 (7th Cir. 1985).
8 No purpose would be served by permitting this action to proceed when
9 an identical suit is pending before the D.C. Circuit.³

10 II. THIS ACTION MUST BE RESOLVED ACCORDING TO THE
11 CIVIL SERVICE REFORM ACT ("CSRA"), WHICH PRECLUDES
12 DISTRICT COURT JURISDICTION OVER FEDERAL LABOR
RELATIONS DISPUTES

13 A. Under Title VII of the CSRA, This Action Must
14 Be Resolved by Negotiation Between the Parties
With Ultimate Resort to the Federal Labor
Relations Authority and the Court of Appeals

15 Considerations of comity aside, this case must be dismissed
16 because plaintiffs' challenge to the Army's drug screening program
17 cannot be brought in this forum. In its headlong rush to federal
18 court, AFGE has ignored the comprehensive, exclusive scheme set out
19 in Title VII of the Civil Service Reform Act ("CSRA") for resolving
20 federal labor relations disputes. Costanti dec. ¶¶ 2-3 (Exhibit J).
21 Under that scheme, which promotes the amicable settlement of federal
22

23 ³ The precise relief sought by plaintiffs in this action --
24 declaratory and injunctive relief with respect to DOD Directive
25 1010.9 -- was denied in NFFE. Plaintiffs in this case obviously
26 are anxious to see this issue relitigated in as many forums as
possible, hoping to find one Court that will enter an injunction
against the program and thus render the entire D.C. Circuit
proceeding moot.

27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./7

1 labor management disputes through a careful blend of mandatory good
2 faith bargaining, arbitration, and judicial review, no party to a
3 federal collective bargaining agreement (such as the parties here)
4 may file a labor management action in federal district court. See
5 NFFE, slip op. at 27; Columbia Power Trades Council v. United States
6 Department of Energy, 671 F.2d 325, 327 (9th Cir. 1982).

7 Based upon the recognition by Congress that labor organizations
8 and collective bargaining are "in the public interest," 5 U.S.C. §
9 7101(a) (Supp. IV 1980), Title VII of the CSRA establishes a
10 comprehensive scheme governing labor relations in federal employment,
11 including provisions for resolving disputes between the government
12 and collective bargaining units such as the plaintiff here.

13 Department of Defense v. Federal Labor Relations Authority, 685 F.2d
14 641, 644 (D.C. Cir. 1982). The central feature of the CSRA dispute
15 resolution process is the mandatory duty of agencies and labor
16 organizations to bargain in good faith over "conditions of
17 employment," which include any agency personnel policies affecting
18 working conditions. 5 U.S.C. §§ 7103(a)(14), 7114(b)(2).⁴

19 In order to guarantee the rights afforded by Title VII, Congress
20 established the Federal Labor Relations Authority ("FLRA"), and
21 delegated it broad powers to administer and enforce the Act. 5
22 U.S.C. §§ 7104, 7105. For example, the FLRA has the authority to
23

24 ⁴ The agency's duty to bargain over such conditions, though
25 broad, is not absolute; for example, an agency's right to
26 determine its internal security practices cannot be the subject
27 of bargaining. 5 U.S.C. § 7106. However, the procedures used by
28 an agency in exercising its internal security practices may be
the subject of bargaining. 5 U.S.C. § 7106(b)(2).

27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./8

1 investigate and resolve allegations of unfair labor practices.
2 Moreover, the FLRA is empowered to resolve issues relating to the
3 duty of management and labor to bargain in good faith. 5 U.S.C. §
4 7105(a)(2)(E).⁵ Final orders of the FLRA are subject to judicial
5 review only in an appropriate court of appeals. 5 U.S.C. § 7123(a).
6 Similarly, the FLRA may petition the court of appeals for temporary
7 relief and enforcement of its orders. 5 U.S.C. § 7123(b).

8 The CSRA does not permit an agency or a labor organization to
9 file a labor management action in federal district court; any general
10 basis for invoking this Court's jurisdiction in a federal labor
11 relations dispute, such as 28 U.S.C. §§ 1331 or 2201, has been
12 preempted by the Act. Columbia Power Trades, 671 F.2d at 327;
13 Council of Prison Locals v. Howlett, 562 F. Supp. 849, 851 (D.D.C.
14 1983).⁶ There is simply no excuse for plaintiffs' attempt to by-

15
16 ⁵ When an agency maintains that its duty to bargain does not
17 extend to a particular agency directive or union proposal, the
18 union may turn to the FLRA and seek a determination that
19 bargaining is mandatory. The FLRA then requests submissions from
20 the parties, and may hold a hearing before issuing a decision. 5
21 U.S.C. § 7117(c); see also 5 C.F.R. Part 2424 (1982).

22 ⁶ If plaintiff AFGE is dissatisfied with the Army's drug
23 screening program, the CSRA provides it with two distinct
24 administrative remedies. First, AFGE may turn to the FLRA under
25 section 7106 and attempt to force the Army to bargain with it
26 over the drug testing program. Although the Army believes that
27 its decision to implement a urinalysis screening program is an
28 internal agency security practice that cannot be the subject of
bargaining under 5 U.S.C. § 7106, plaintiffs may challenge the
Army's negotiability position before the FLRA. In addition,
plaintiffs may also seek to force the Army to negotiate over the
exact procedures used during the testing by filing a
negotiability appeal with the FLRA under 5 U.S.C. § 7106(b)(2).

26 Second, AFGE may file an unfair labor practice charge
27 against the Army under 5 U.S.C. § 7118. In investigating an
28 (continued...)

28 Defs' Mem. In Support Of
Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./9

1 pass the FLRA process, which provides for ultimate judicial review in
2 the Court of Appeals, by filing this labor management dispute in this
3 forum. See 5 U.S.C. § 7123(a); see also NFFE, slip op. at 23.

4 B. Plaintiffs Prematurely Raise Personnel Claims That
5 May Be Raised Only Before the Merit Systems Protection
6 Board by an Employee Aggrieved by an Adverse Action

7 Plaintiffs contend that the challenged drug screening program
8 could unreasonably subject a employee to an improper personnel
9 action, since the employee may be subject to removal from his
10 position based upon a confirmed positive urinalysis test result.
11 Complaint ¶¶ 15, 16. This claim, which is premature since no
12 employee has lost his job or even been tested at this point, is also
13 directed to the wrong forum. The CSRA, in addition to establishing
14 the framework for resolving labor management disputes, also sets out
15 the exclusive scheme for resolving all personnel claims by federal
16 employees. 5 U.S.C. §§ 1201, et seq., and §§ 2301, et seq. That
17 scheme does not permit a federal employee to challenge a personnel
18 action in federal district court. Veit v. Heckler, 746 F.2d 508 (9th
19 Cir. 1983).

20 In order to protect federal employees against arbitrary or
21 otherwise improper personnel actions, the CSRA permits a federal

22 ⁶(...continued)
23 unfair labor complaint, the FLRA (not the union) may petition a
24 federal district court to enjoin the alleged unfair practice. 5
25 U.S.C. § 7123(d). In fact, other unions across the country
26 (including another union at Fort Lewis) already have instituted
27 actions before the FLRA raising the same concerns raised by the
28 plaintiffs here. See Exhibit K; see also NFFE, slip op. at 23,
n.6. In short, plaintiffs may obtain the relief sought here by
following the administrative avenues provided by the CSRA.

27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./10

1 employee who loses his job (or suffers any other adverse action as
2 defined in 5 U.S.C. § 7512) to appeal that action to the Merit
3 Systems Protection Board ("MSPB").⁷ The MSPB has the statutory
4 authority to conduct a fact-specific inquiry (with hearings,
5 witnesses and document production) into the events precipitating the
6 adverse action to determine whether the adverse action was justified.
7 See 5 U.S.C. § 1205. An aggrieved employee may appeal the MSPB
8 decision to the Court of Appeals for the Federal Circuit, which is
9 the sole forum for judicial review of a federal personnel claim.
10 Veit, 746 F.2d at 511; see also NFFE, slip op. at 27. Plaintiffs may
11 not challenge adverse actions (which have not yet occurred and may
12 never occur) in this forum.

13 C. As in NFFE, the Presence of a Constitutional Claim
14 and an APA Claim Here Does Not Entitle Plaintiffs to
15 Direct Judicial Review of Their Claims in Federal
Court

16 The mere fact that plaintiffs' allegations include constitutional
17 claims does not entitle them to bring this labor management dispute
18 in federal district court. Federal personnel disputes that raise
19 constitutional issues are fully cognizable under the CSRA, and must
20 be brought according to that exclusive scheme just like any other
21 personnel claim. Bush v. Lucas, 462 U.S. 367, 386 (1983); Wells v.

22 ⁷ Employees may also seek review of non-adverse actions
23 (such as transfers and reassignments) by petitioning the Special
24 Counsel of the MSPB to investigate allegations of prohibited
25 personnel practices. The Special Counsel may investigate these
26 allegations and ask the MSPB to consider and order corrective
27 action in the matter. 5 U.S.C. § 1206(a)-(c). In addition, the
28 Special Counsel may seek a stay of the challenged personnel
action before the MSPB pending the investigation. 5 U.S.C. §
1208.

27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./11

1 FAA, 755 F.2d 804, 810 (11th Cir. 1985); Carter v. Kurzejeski, 706
2 F.2d 835, 841 (8th Cir. 1983); see also NFFE, slip op. at 23-30.
3 Plaintiffs may raise their constitutional claims before the FLRA
4 (with ultimate judicial review in the appropriate court of appeals)
5 or the MSPB (with ultimate judicial review in the Federal Circuit);
6 they may not bring an action directly in this Court. See NFFE, slip
7 op. at 26-29.

8 Moreover, plaintiffs' attempt to characterize the Army program as
9 a "rulemaking" action subject to judicial review under 5 U.S.C. § 704
10 must also fail. Under section 704, only agency action made
11 reviewable by statute and for which there is no other adequate remedy
12 in a court are subject to judicial review. As the NFFE court noted,
13 there is no statute that gives district courts jurisdiction over
14 cases arising out of the federal labor relations field. NFFE, slip
15 op. at 33. Moreover, because FLRA and MSPB decision are appealable
16 to the Circuit Court and the Federal Circuit, respectively, there is
17 already an adequate remedy available to the plaintiffs here. NFFE,
18 slip op. at 34. Therefore, section 704 is inapplicable and this
19 action must be dismissed.

20 III. PLAINTIFFS HAVE NOT SATISFIED THE CONDITIONS
21 FOR ISSUANCE OF A PRELIMINARY INJUNCTION

22 In a case such as this, where plaintiffs attempt to interfere in
23 the internal affairs of the armed forces, the Ninth Circuit has made
24 clear that the burden of demonstrating entitlement to a preliminary
25 injunction is much greater than in the usual case. Hartikka v.
26 United States, 754 F.2d 1516, 1518 (9th Cir. 1985). Plaintiffs have
27 failed to meet their heavy burden.

28 Defs' Mem. In Support Of
Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./12

1
2
3 A. Plaintiffs Are Not Likely To Succeed
4 On The Merits

5 1. The Army's Civilian Drug Testing Program
6 Does Not Involve An Unreasonable Search
7 And Seizure

8 Plaintiff's main claim is that the Army's drug testing program
9 will violate the Fourth Amendment. For the following reasons, this
10 claim must be rejected.

11 a. The Program is Entirely Consensual

12 Plaintiff's entire Fourth Amendment argument rests on the faulty
13 premise that the Army's program will involve the involuntary seizure
14 of urine samples from civilian employees. In fact, no employee will
15 be required to provide a sample unless he or she consents in
16 writing.⁸ There can be no violation of the Fourth Amendment where an
17 individual consents to a search. Schneckloth v. Bustamonte, 412 U.S.
18 218, 222 (1973).

19 The fact that an employee will be reassigned to a noncritical
20 position if he or she does not consent to testing, or may be
21 discharged if no noncritical positions are available, does not mean
22 the consent is coerced. Courts have found similar choices not to be
23 coercive. In McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978), for
24 example, the court held that an attorney entering a courthouse

25 ⁸ Indeed, each of the individual plaintiffs in this action
26 already has signed a form consenting to urinalysis testing.
27 (Exhibit J at ¶ 4). Plaintiffs now contend they did not sign the
28 consent form voluntarily, but were "ordered" to do so by an
unnamed superior. In response, the Court is referred to the
accompanying declarations from plaintiffs' supervisors which show
that no one "ordered" plaintiffs to sign the forms. (Exhibits L-Q).

29 Defs' Mem. In Support Of
30 Mot. To Dismiss And In Opp.
31 To Pls' Mot. For A P.I./13

1 impliedly consented to a search of his person and possessions, even
2 though it acknowledged the attorney's only other option would be "to
3 forego the practice of law." Id. at 900.⁹ Here the choice is less
4 Draconian because the Army will attempt to accommodate employees who
5 decline to consent by reassigning them to noncritical positions for
6 which drug testing is not required. Plaintiffs' consent vitiates any
7 Fourth Amendment claim.

8 b. Particularized Suspicion Of Drug Use
9 Is Not Required

10 Assuming, arguendo, that the Fourth Amendment does apply,
11 plaintiffs have not met their burden of showing that the program
12 constitutes an unreasonable search and seizure.

13 Contrary to plaintiff's position, Pls' Brief at 11, there is no
14 requirement that a urinalysis program be based on a particularized
15 suspicion that an individual employee is a drug user. Committee for
16 G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); Shoemaker v.
17 Handel, 619 F.Supp. 1089, 1100-01 (D.N.J. 1985); see Jones v.
18 McKenzie, 628 F.Supp. 1500, 1508 (D.D.C. 1986) (dictum).

19 Particularized suspicion generally is required as a safeguard against
20 abuse when the exercise of official discretion is involved in
21 selecting the subjects for search. Delaware v. Prouse, 440 U.S. 648,

22 ⁹ Similarly, in United States v. Sihler, 562 F.2d 349 (5th
23 Cir. 1977), the court found the warrantless search of a prison
24 guard's property for drugs to be consensual based on a sign at
25 the entrance to the prison warning that all persons entering were
26 subject to search, holding such consent to be a valid condition
of employment. It is also well recognized that anyone entering a
military installation impliedly consents to be searched. E.g.,
United States v. Ellis, 547 F.2d 863 (5th Cir. 1977); United
States v. Matthews, 431 F.Supp. 70 (D. Col. 1976).

27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./14

1 663 (1979) (use of roving patrols to stop vehicles randomly at
2 officers' discretion without probable cause held unconstitutional).
3 In contrast, where subjects are chosen on the basis of some neutral,
4 nondiscretionary criterion, searches conducted in the absence of
5 particularized suspicion are permissible. E.g., United States v.
6 Martinez-Fuerte, 428 U.S. 543, 566-67 (1976) (upholding use of fixed
7 checkpoint to stop vehicles on a systematic basis). In the latter
8 instance, the legality of the search depends on balancing the
9 government's interest in conducting the search against the degree of
10 intrusion on the individual's privacy interests. Prouse, 440 U.S. at
11 653-55.

12 Here, it is undisputed that the selection of individuals to
13 provide urine samples will not depend on the exercise of any official
14 discretion. The persons to be tested during any given time period
15 will be chosen in a neutral, nondiscretionary manner, such as all
16 employees whose birthday falls in a particular month. There is no
17 danger that any particular individual will be singled out for special
18 treatment, or that the testing program will be used to harass or
19 embarrass any employee. Furthermore, the results of the urinalysis
20 will not be used against the employee for criminal or disciplinary
21 purposes. Accordingly, a particularized suspicion of drug use is not
22 required. See Camara v. Municipal Court, 387 U.S. 525, 535-39
23 (particularized suspicion not necessary to conduct administrative
24 search for purposes of safeguarding public safety).

25 c. Urinalysis Testing Is Essential To
26 Protecting Vital Governmental Interests

27
28 Defs' Mem. In Support Of
Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./15

1 The next question is whether the Army's drug testing program
2 serves important governmental interests. The governmental interests
3 at stake are nothing less than the protection of the national
4 security and public safety. Exhibit A, ¶ D.3.

5 These goals are furthered by applying the testing program to
6 members of the Fort Lewis DOD Police Section. The mission of the
7 Police Section is to provide law enforcement services within the
8 Boundaries of Fort Lewis -- a sprawling military installation
9 encompassing 86,000 acres with a population of 60,000. Picucci Dec.
10 ¶ 3 (Exhibit R). The police are responsible for enforcing all laws
11 on the base -- including the drug laws -- preventing unauthorized
12 entry to the base, and preventing theft of dangerous government
13 property and property related to national security. Id. ¶ 4 and
14 Enclosure 2. Members of the Police Section carry sidearms while on
15 duty, and have ready access to shotguns. Id. ¶ 4. They are
16 authorized to use deadly force when they perceive a threat to
17 themselves, to others, or to the security of the base. Id. In light
18 of the police officers' responsibilities and the fact that they carry
19 firearms, it is imperative that the Army take steps to insure that
20 the police are drug free.

21 The government's interest in this case is far stronger than in
22 other cases where periodic urinalysis testing has been upheld. In
23 Shoemaker v. Handel, 619 F.Supp. 1089 (D.N.J. 1985), the court upheld
24 the requirement that racehorse jockeys participate in urinalysis
25 testing based on the state's interest in "maintaining the integrity
26 of the racing industry and the safety of the sport . . ." Id. at

27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./16

1 1100.¹⁰ In Jones v. McKenzie, Civil 85-1624, slip op. (D.D.C. Feb.
2 26, 1986) (Pls' P.I. Exhibit 15), the court suggested, albeit in
3 dictum, that "school bus drivers or mechanics directly responsible
4 for the operation and maintenance of school buses might reasonably
5 expect to be subject to urine and blood tests not required of other
6 bus drivers without particularized suspicion." Id. at 19. See also
7 Division 241 Amalgamated Transit Union v. Suscy, 405 F.Supp. 750
8 (N.D. Ill. 1975), aff'd, 538 F.2d 1264 (7th Cir.), cert. denied, 429
9 U.S. 1029 (1976) (post-accident blood and urine testing of bus
10 drivers and train operators).

11 Plaintiffs suggest the government's interest in testing for
12 drugs is slight because urinalysis cannot reveal whether the drugs
13 were ingested on the job or off-duty. Defendants do not dispute that
14 neither urinalysis nor any other known method of drug detection can
15 differentiate between on-duty and off-duty drug use. But the
16 possibility that a positive test result is due to off-duty drug
17 ingestion does not rule out the possibility that it was due to on-
18 duty ingestion.

19 Moreover, even if one were to assume that all positive test
20 results are due to off-duty drug use, numerous courts have found a
21 nexus between off-duty drug use and employee performance,
22 particularly when the job at issue involves the protection of public
23 safety. For example, in Borsari v. FAA, 699 F.2d 106 (2d Cir. 1983),
24

25 ¹⁰ In Shoemaker, jockeys could be required to provide a
26 urine sample up to three times within a seven-day period. 619
27 F.Supp. at 1096. The plaintiffs in this case will not be called
28 upon to provide a urine sample anywhere near that often.

Defs' Mem. In Support Of
Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./17

1 the court upheld the dismissal of an air traffic controller for off-
2 duty possession and sale (not use) of cocaine, even though there was
3 no evidence the plaintiff had ever used drugs while on the job. The
4 court was emphatic in holding that an agency need not "wait for an
5 on-the-job violation before dismissing an offending employee." Id.
6 at 110. In so holding the court stated:

7 While the [on-duty] use of drugs would certainly
8 constitute more egregious conduct, it need not be
9 established to demonstrate that the decision to
10 dismiss Borsari, based on his sale and possession
11 of illicit substances, was within the Agency's
12 discretion

11 Id. at 111 (emphasis added).

12 The requisite nexus between off-duty use of illegal drugs and
13 job performance has also been found in numerous decisions of the
14 Merit Systems Protection Board upholding the dismissal or discipline
15 of civil service employees. See cases reproduced as Exhibit S.
16 Based on this clear case law, plaintiffs' contention that there is no
17 nexus between off-duty drug use and job performance must be rejected.

18 d. Any Intrusion On Plaintiffs' Privacy
19 Interests Is Minimal

20 In contrast to the government's strong interest in insuring that
21 its police officers are drug-free, the intrusion on the plaintiffs'
22 privacy interests is minimal, and is no greater than necessary to
23 serve the government's interest. In Mack v. United States, 83 Civ.
24 5764, slip op. (S.D.N.Y. April 18, 1986) (copy attached as Exhibit
25 T), the court recently held that the taking of a urine sample from an
26 F.B.I. agent suspected of involvement with drugs did not violate the

27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./18

1 Fourth Amendment. The court characterized the taking of a urine
2 sample as "minimally intrusive," stating:

3 It is even less intrusive than a fingerprint
4 which requires that one's fingers be smeared
5 with black grease and pressed against a
6 paper. A urine sample calls for nothing more
7 than a natural function performed by everyone
8 several times a day -- the only difference
being the collection of the sample in a jar.
Measured against the vital national interest
of assuring that FBI agents are not involved
in drugs, the claim that such a search is
unreasonable is a mockery.

9 Id. at 7 (emphasis added). The court further stated that "the scope
10 of the intrusion must also 'be viewed in the context of the
11 individual's legitimate expectation of privacy.'" Id. (quoting
12 Security and Law Enforcement Employees v. Carey, 737 F.2d 187, 201
13 (2d Cir. 1984)). Just as FBI agents have a diminished expectation of
14 privacy due to their status as law enforcement officers, Mack, slip
15 op. at 8, so too do Army police officers have a diminished
16 expectation of privacy for the same reason. Their expectation of
17 privacy is further diminished by the very nature of their employment
18 on the premises of a military installation. See Ellis, 547 F.2d 863;
19 Matthews, 431 F.Supp. 70

20 Here, plaintiffs' expectation of privacy is further attenuated
21 by the fact that they are already required to provide a urine sample
22 annually as part of a mandatory physical examination. Picucci Dec. ¶
23 5 (Exhibit R). Plaintiffs do not object to that requirement, which
24 is also a condition of employment.

25 Plaintiffs' main concern seems to be that they will be required
26 to provide a urine sample in the presence of an attendant of the same

27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./19

1 sex. The presence of an attendant is necessary to insure the
2 reliability of the testing procedure. Jewell Dec. ¶ 9.b. (Exhibit
3 D). The attendant will insure that the sample is properly labeled
4 and that no accidental or deliberate adulteration of the sample
5 occurs. Id. As one court has recognized, the presence of an
6 attendant during the taking of a urine sample is not
7 unconstitutionally intrusive. Storms v. Coughlin, 600 F.Supp. 1214,
8 1222 (S.D.N.Y. 1984).¹¹

9 2. The Army's Testing Program Does Not
10 Deprive Plaintiffs Of Due Process

11 Plaintiffs' due process claim is based on the fact that a
12 positive field test of a urine sample can be used as a basis for
13 temporarily reassigning the employee to a noncritical position
14 pending confirmation of that test result.¹² Contrary to plaintiffs'
15 assertion, an employee would not lose any pay or benefits during this
16 temporary reassignment. Sumser Dec. ¶ 1 (Exhibit E). If the field
17 test is not confirmed, any action taken on the basis of the field
18 test will be rescinded, and there will be no permanent record
19 whatsoever of the positive field test. Id. ¶ 2.

20 Given these facts, plaintiffs cannot demonstrate that a
21 temporary reassignment following a positive field test deprives them
22 of property without due process of law. There is no property right

23 ¹¹ Of course, observation by third parties not necessary to
24 the testing procedure would not be permissible. Storms, 600
F.Supp. at 1222.

25 ¹² The field test, known as the EMIT, is at least 95%
26 accurate, an accuracy rate "recognized to mean almost complete
certainty." Storms v. Coughlin, 600 F.Supp. 1214, 1221 (quoting
27 Jensen v. Lick, 589 F.Supp. 35, 38 (D.N.D. 1984)).

28 Defs' Mem. In Support Of
Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./20

1 in assignment to a particular federal job. E.g., Molerio v. F.B.I.,
2 749 F.2d 815, 823 (D.C. Cir. 1984); cf. Cafeteria and Restaurant
3 Workers Union v. McElroy, 367 U.S. 886, 896 (1961) (denial of
4 opportunity to work at "an isolated and specific military
5 installation" does not give rise to the need for a due process
6 hearing). In addition, a temporary reassignment during the short
7 time it takes to confirm a positive field test result is simply
8 insufficient to trigger the requirements of due process. See, e.g.,
9 Cleveland Board of Educ. v. Loudermill, 105 S.Ct. 1494 (1985)
10 (requiring procedural safeguards only before one is finally deprived
11 of an interest in property). With respect to any final action taken
12 on the basis of a confirmed positive test result, an employee will
13 have a full array of administrative and judicial procedures
14 available for contesting that action. Sumser Dec. ¶¶ 4-6 (Exhibit
15 E).

16 Plaintiffs also contend that temporary action taken on the basis
17 of a positive field test will stigmatize them and impair their
18 liberty interests. However, a lateral transfer does not constitute a
19 deprivation of liberty. Mosrie v. Barry, 718 F.2d 1151, 1161 (D.C.
20 Cir. 1983).

21 Finally, plaintiffs make the unfounded claim that their security
22 clearances can be permanently withdrawn without any opportunity to
23 challenge the test results. Withdrawal of a security clearance that
24 results in an adverse action can be accomplished only in conformity
25 with the agency's ordinary, internal procedures for such actions.
26 Egan v. Department of Navy, 28 M.S. P.R. 509, 519 (1985). While the

27
28 Defs' Mem. In Support Of
Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./21

1 MSPB will not review the merits of a decision to withdraw a security
2 clearance, it will review to insure that proper procedures were
3 followed. Id.

4
5 3. The Constitutional Right of Privacy Is
6 Not Implicated In This Case

7 Plaintiffs' final constitutional claim is that the Army's drug
8 testing program will violate their constitutional right to privacy
9 because it involves urination in the presence of an attendant and
10 because employees are permitted (not required as plaintiffs' contend)
11 to disclose any legitimate medications they may be taking that could
12 affect the test results. Neither of these concerns implicates the
13 constitutional right of privacy. That right is limited to matters
14 involving marriage, procreation, child rearing, contraception, and
15 family relationships. Bowers v. Hardwick, No. 85-140, slip op. at 3-
16 4 (U.S. June 30, 1986). Moreover, any intrusion on plaintiffs'
17 privacy is outweighed by the need to insure against the
18 misidentification or adulteration of urine samples -- precautions
19 that are as much in the employees' interest as they are in the
20 government's interest.

21 4. The Army's Program Does Not Violate the
22 Drug Abuse Office and Treatment Act or the
23 Civil Service Reform Act

24 The Drug Abuse Office and Treatment Act provides that "[n]o
25 person may be deprived of Federal civilian employment . . . solely on
26 the ground of prior drug abuse." 42 U.S.C. § 290ee-1(c)(1) (emphasis
27 added). Plaintiffs' claim that the Army's drug testing program
28 violates the Act is without merit for four reasons. First, the
Army's program tests for current drug use, not prior drug use.

Defs' Mem. In Support Of
Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./22

1 Second, no employee with a confirmed positive test result will lose
2 his or her federal employment solely as a result of the test.
3 Rather, such employees will be reassigned to noncritical positions,
4 and will be discharged only if no noncritical positions are
5 available. Third, the Act specifically states that it shall not be
6 construed to prohibit the dismissal of a federal civilian employee
7 "who cannot properly function in his employment." 42 U.S.C. § 290ee-
8 1(d). Because the Army's legitimate security needs dictate that its
9 armed police force be drug free, by definition, a police officer with
10 a confirmed positive test result "cannot properly function in his
11 employment." Finally, notwithstanding plaintiffs' assertions to the
12 contrary, the Army's program is not disciplinary in nature. Sumser
13 Dec. ¶¶ 3, 7 (Exhibit E). Employees with positive test results will
14 be offered counseling and treatment for their drug problem. Id. ¶ 3.

15 Plaintiffs also contend the Army's program violates the CSRA,
16 claiming there is an insufficient nexus between off-duty drug use and
17 employee conduct to support an adverse personnel action. As
18 discussed above, the MSPB, in a long line of cases, has held to the
19 contrary, sustaining the removal of many federal employees due to
20 possession or use of illegal drugs for the simple reason that such
21 activity is misconduct that impairs the efficiency of the federal
22 service. (See cases reproduced as Exhibit S); see also Borsari, 699
23 F.2d at 111. There can be no serious dispute that abstinence from
24 illegal and dangerous drugs is a legitimate condition of employment
25 for employees such as plaintiffs, whose jobs require them to carry
26

27 Defs' Mem. In Support Of
28 Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./23

1 firearms, and who are directly responsible for the lives and safety
2 of thousands of military and civilian personnel.¹³

3 B. Plaintiffs Are Not Threatened With
4 Any Immediate, Irreparable Injury

5 The Ninth Circuit recently has made clear that a plaintiff bears
6 an exceptionally heavy burden when seeking to obtain an injunction
7 that "interfere[s] in the internal affairs of the armed forces."
8 Hartikka v. United States, 754 F.2d 1516, 1518 (9th Cir. 1985). The
9 moving party must "make a much stronger showing of irreparable harm
10 than the ordinary standard for injunctive relief." Id.

11 Here, plaintiffs have not alleged any immediate, irreparable
12 injury to themselves that would justify the issuance of a preliminary
13 injunction. Plaintiffs have the option of either participating in
14 urinalysis testing or seeking reassignment to a noncritical position.
15 Any such reassignment will be rescinded if the program ultimately is
16 held to be invalid, and there will be no loss of pay or benefits.
17 Even assuming that a temporary reassignment could be considered to be
18 an "injury," it certainly is not an irreparable one.

19 C. The Public Interest Weighs Heavily Against
20 Issuance Of A Preliminary Injunction

21 The public clearly has an interest in a drug-free police force
22 that has the responsibility for maintaining the security and the

23 ¹³ Plaintiffs' reliance on the precatory merit systems
24 principle that "all employees and applicants for employment
25 should receive fair and equitable treatment . . . with proper
26 regard for their privacy and constitutional rights," 5 U.S.C. §
27 2301 (b)(2), is misplaced for an additional reason. The MSPB has
28 long held that the merit systems principles are not self-
executing, and that a violation of them does not by itself
provide a cause of action against the United States. Wells v.
Harris, 1 MSPB 199, 203 (1978).

Defs' Mem. In Support Of
Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./24

1 integrity of a major military installation. The threat to military
2 installations from terrorism and espionage cannot be discounted.
3 While it is true that the Army's program has been under consideration
4 and design for some time, the defendants should not be punished for
5 taking the time to insure that the program is reliable and fair.
6 Given the need to insure that employees in critical positions are
7 drug-free and the absence of any irreparable injury to the
8 plaintiffs, there is no basis for delaying the program any longer.

9 CONCLUSION

10 Plaintiffs' motion for a preliminary injunction should be denied
11 and this case should be dismissed.

12 Respectfully submitted,

13 RICHARD K. WILLARD
14 Assistant Attorney General

15 GENE S. ANDERSON
16 United States Attorney

17 
18 JUDITH F. LEDBETTER

19 
20 JEFFREY S. PAULSEN

21 
22 ROBERT C. CHESNUT

23 Department of Justice -- Room 3336
24 10th & Pennsylvania Ave., N.W.
25 Washington, D.C. 20530
26 Telephone: (202) 633-2791

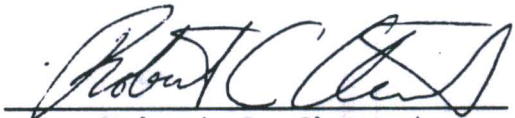
27 Attorneys for Defendants'

28 Defs' Mem. In Support Of
Mot. To Dismiss And In Opp.
To Pls' Mot. For A P.I./25

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Motion to Dismiss, Memorandum in Support of Motion to Dismiss Or, In the Alternative, For Summary Judgment, And in Opposition to Plaintiffs' Motion for a Preliminary Injunction, and exhibits thereto were hand-delivered on July 3, 1986 to:

Joe Goldberg
American Federation of Government Employees
80 F. St. NW
Washington, DC 20001


Robert C. Chesnut

Hon. Jack Tanner

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

COPY RECEIVED

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, et al.,

Plaintiffs,

v.

CASPAR WEINBERGER, et al.,

Defendants.

JUN 17 1986
LMI 10:15 RB
UNITED STATES ATTORNEY
Seattle, Washington

Case No. CA86-242T

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

BACKGROUND

This action challenges the constitutionality and statutory
legality of the recently enacted drug surveillance program of
the Department of Defense (DoD) and the Department of Army
(hereinafter "Army" or "DOA"). These regulations create a
pervasive program of random drug testing (not based on any proof
or reasonable suspicion) of all employees in 14 particular job

Pl. Memo in Support of Motion
for Temporary Restraining Order/1

DAVIES, ROBERTS,
REID & WACKER
ATTORNEYS AT LAW
201 ELLIOTT AVENUE WEST, SUITE 500
SEATTLE, WASHINGTON 98119
285-3810

categories for off-duty drug use.

The American Federation of Government Employees, AFL-CIO (hereinafter "AFGE") brings this action on behalf of its members (and members of its bargaining units) who work for the Army in the 14 designated job categories. AFGE, through its Local 1504 (hereinafter "L-1504" or "the local") represents approximately 1200 employees at Ft. Lewis, Washington. The individual named plaintiffs, Nancy Lee Dancer, Michael L. Stepetin, Jr., Karl Steven Goering, and Roosevelt Martin are GS-083 civilian Police Officers who have been informed that they will be subject to the DoA drug tests, on a random basis, beginning in mid-July 1986. (See Affidavits, TRO Ex. 1-4, ¶11)¹

The Army's urinalysis surveillance program was formally promulgated on February 10, 1986.² AR 600-85, interim change number 111 (C. Ex. 2). This program subjects civilian employees in 14 job categories to a comprehensive regiment of surveillance through mandatory urinalysis. Employees may be required to participate in urinalysis testing "periodically after

¹ Exhibits which has been attached to the complaint in this action or this motion for temporary restraining order will be referred to as (C. Ex. __) and (TRO Ex. __), respectively.

² The regulations also call for testing "when there is probable cause to believe that an employee is under the influence of a controlled substance while on duty" and during an investigation of "a mishap or safety investigation." AR 600-85, 5-14e(1)(c),(d).

1 appointment or selection on a random basis." AR 600-85 5-
2 14e(1)(b). Id. In the event that this testing results in a
3 "positive urinalysis test result" or where employees refuse to
4 submit a specimen, they may be removed under adverse action
5 procedures. AR 600-85, 5-14c(3)(b). Id. The regulations
6 permit local activities to use "field testing" procedures and
7 provide for temporary transfer, forced leave or denial of access
8 to classified information after positive field test results.
9 (C. Ex. 1)

10 The Army's drug testing regulations are currently being
11 implemented by defendant Ltg. Palastra at Ft. Lewis,
12 Washington. On April 2-3, 1986 the employees represented by
13 Local 1504 were given a letter notifying them of the new drug
14 screening program and a copy of the Department of the Army Form
15 5019-R, "Condition of Employment for Certain Civilian Positions
16 Identified as Critical Under the Drug Abuse Testing Program."
17 (C. Ex. 3). This form explains that the employee will be
18 required to produce a urine sample periodically, on an
19 unannounced basis, in the presence of a staff member. Id.

20 Employees will be provided "an opportunity to submit medical
21 documentation to support the legitimate use of a specific drug."
22 (C. Ex. 3). ³ This will force employees to divulge their use
23
24

25 ³ Medical evidence suggests that an unknown number of products

(CONTINUED)
DAVIES, ROBERTS,
REID & WACKER

ATTORNEYS AT LAW
201 ELLIOTT AVENUE WEST, SUITE 500
SEATTLE, WASHINGTON 98119
285-3610



of any and all drugs.

The regulation provides that "Detection of drug usage through confirmed positive urinalysis test results may be cause for a determination that you have failed to meet the conditions necessary for your continued employment in the position." Id.

ARGUMENT

Standard' for Injunction

The traditional equitable criteria for granting preliminary injunctive relief are (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Los Angeles Memorial Coliseum Com'n v. Nat. Football, 634 F.2d 1197, 1200-01 (9th Cir. 1980).

In this circuit, the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that

³ (FOOTNOTE CONTINUED)

may trigger a positive urinalysis test. Common over-the-counter products may trigger a positive finding. In a study testing 161 over-the-counter and prescription drugs, using seven different EMIT assays (i.e. each assay tests for a different drug), 65 drugs caused false positives. See Morgan, "Problems of Mass Urine Screening for Misused Drugs, 16 Journal of Psychoactive Drugs October - December 1984 at 310; (TRO Ex. 5).

Pl. Memo in Support of Motion
for Temporary Restraining Order/4

DAVIES, ROBERTS,
REID & WACKER
ATTORNEYS AT LAW
201 ELLIOTT AVENUE WEST, SUITE 500
SEATTLE, WASHINGTON 98119
285-3610



1 serious questions are raised and the balance of hardships tips
2 sharply in its favor. These are not separate tests, but the
3 outer reaches "of a single continuum." Benda v. Grand Lodge of
4 International Association of Machinists, 584 F.2d 308, 315
5 (9th Cir. 1978) cert. dismissed 441 U.S. 937 (1979). The
6 Plaintiffs satisfy each of these factors.

7 I. Plaintiffs Are Likely To Succeed On The Merits In Their
8 Allegations That AR 600-85 Violates Their Constitutional
9 And Statutory Rights

10 The Army's extensive program of urine testing for evidence
11 of past drug use violates several of the plaintiffs' constitu-
12 tional and statutory rights.

13 A. Random Drug Testing Is An Unreasonable Search And
14 Seizure

15 Courts have found that the taking of blood tests,⁴ pubic
16 hair sampling,⁵ x-raying,⁶ and the collecting of fingernail
17 scrapings⁷ constitute searches under the Fourth Amendment. In
18 these cases, the searches "went beyond mere 'physical
19
20
21

22 ⁴ Schmerber v. California, 384 U.S. 757 (1966)

23 ⁵ Bouse v. Bussey, 573 F.2d 548 (9th Cir. 1977)

24 ⁶ United States v. Allen, 337 F.Supp 1041 (E.D. PA. 1972)

25 ⁷ Cupp v. Murphy, 412 U.S. 291 (1973)
26

1 characteristics ... constantly exposed to the public.'"⁸ It
2 is plain that the DoA regulation at issue provides for a
3 "search" in the constitutional context.

4 The analysis does not end with the conclusion that a urin-
5 alysis is a Fourth Amendment "search." Warrantless tests will
6 violate Fourth Amendment rights only if they infringe on "an
7 interest, which the Fourth Amendment was designed to protect."⁹

8 In Katz v. United States ¹⁰ the Court, using the rational
9 that the Fourth Amendment, "protects people, and not
10 places",¹¹ developed a test which examines the legitimate
11 expectations of privacy manifested by the person searched.

12 Citing Katz the Supreme Court has repeatedly held that the
13 test to determine whether the government has invaded the area
14 protected by the Fourth Amendment requires consideration of the
15 scope of the particular intrusion, the manner in which it is
16 conducted, the justification for initiating it, and the place in
17 which it is conducted.¹²

18 "The overriding function of the Fourth
19 Amendment is to protect personal privacy and

20
21 ⁸ Id. at 295 (quoting U.S. v. Dionisio, 410 U.S. 1, 14 (1973))

22 ⁹ Rakes v. Illinois, 439 U.S. 128, 140 (1978)

23 ¹⁰ 389 U.S. 347 (1967)

24 ¹¹ Id. at 351

25 ¹² Bell v. Wolfish, 441 U.S. 520, 559 (1979); see also,
26 Camera v. Municipal Court, 387 U.S. 523, 536-537

dignity against unwarranted intrusion by the State."

Schmerber, supra, 384 U.S. at 767¹³

The "search" at issue here is the Army's demand that employees produce urine samples on a random basis in the presence of an observer for government analysis. A requirement that individuals give body fluids to a government official involves a search and seizure within the meaning of the Fourth Amendment. Schmerber, supra. This principle applies equally to mandatory urinalysis. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976) cert. denied, 429 U.S. 1029 (1976); Jones v. McKenzie, CA No. 85-1624 (D.D.C. Feb. 26, 1986) (Memorandum Opinion) (TRO Ex. 15); Schoemaker v. Handel, 619 F.Supp. 1089, 1097-8 (D.N.J. 1985); Allen v. City of Marietta, 601 F.Supp. 482, 488 (D. Ga. 1985).

Taking blood from the body is a search and seizure within the meaning of the Fourth

¹³ In Schmerber, the defendant had been arrested for driving while intoxicated and the police directed a physician to extract a blood sample over the defendant's protest. At trial, the defendant objected to the admission of the chemical analysis made from the sample, contending that the withdrawal of blood denied him his Fourth Amendment right not to be searched without a warrant. The Court found that the blood test "plainly invades the broadly conceived reach of a search and seizure under the Fourth Amendment ... [and that] [s]uch testing procedures plainly constitute searches of 'persons' within the meaning of that Amendment. Thus, one's person is protected against official intrusion up to the point where the community's need for evidence surmounts a specific standard, ordinarily "probable cause." Winston v. Lee, ___ U.S. ___, 105 S.Ct. 1611, 1616 (1985).

Pl. Memo in Support of Motion
for Temporary Restraining Order/7

DAVIES, ROBERTS,
REID & WACKER
ATTORNEYS AT LAW
201 ELLIOTT AVENUE WEST, SUITE 500
SEATTLE, WASHINGTON 98119
285-3610



Amendment. Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966). Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine. However, urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available for others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids. Therefore, governmental taking of a urine specimen is a seizure within the meaning of the Fourth Amendment. Allen v. City of Marietta, 601 F.Supp. 482, 488-89 (N.D. Ga. 1985); Storms v. Coughlin, 600 F.Supp. 1214, 1217-18 (S.D.N.Y. 1984); Murray v. Haldeman, 16 M.J. 74, 81 (C.M.A. 1983).

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

It is this court's conclusion that the Fourth Amendment allows defendants to demand of an employee a urine, blood, or breath specimen for chemical analysis only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic beverages or controlled substances. See Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976). But See Allen v. City of Marietta, supra, 601 F.Supp. at 491.

1 Id. at 1130.

2 The objective standard required by the Fourth Amendment is
3 generally met by requiring a search warrant issued by a neutral
4 magistrate upon a showing of probable cause. Camara, supra at
5 528, 532 87 S.Ct. at 1731-2.¹⁴ AR 600-85 does not provide for
6 independent evaluation or require a search warrant and the Army
7 must therefore demonstrate the existence of "an exceptional
8 situation" which justifies an exception to the warrant
9 requirment. Vale v. Louisiana, 399 U.S. 30, 34, 90 S.Ct.
10 1969, 1972 (1970).

11 Constitutional restrictions on government action also apply
12 to the government's dealing with its own employees. Division 241
13 Amalgamated Transit Union, supra. The public employee is
14 entitled therefore, to the same right as other individuals to be
15 protected from searches by public officials unless the "need for
16 evidence surmounts a specified standard, ordinarily 'probable
17 cause.'" Winston v. Lee, supra at 1616. See Delaware v.
18 Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396 (1979).

19 AR 600-85 provides for mandatory urinalysis "periodically
20 after appointment or selection on a random basis." AR 600-85 5-
21 14e(1)(b) [C. Ex. 2]. Thus the regulation provides no

22
23
24 ¹⁴ The broad purposes of the Fourth Amendment lead to the
25 conclusion that its prohibition on unreasonable searches applies
26 to all governmental intrusions. New Jersey v. T.L.O., ____
U.S. ____, 105 S.Ct. 733, 740 (1985).

1 objective standard for deciding whether to search an
2 individual. This lack of objective standards renders these
3 regulations unconstitutional on their face. Camera, supra at
4 532.

5 Random searching of employees based on generalized concerns
6 about drug use is not constitutionally permissible. See Jones
7 v. McKenzie, C.A. No. 85-1624 (D.D.C. Feb. 6, 1986) (Memoran-
8 dum Decision) (TRO Ex. 6). As McDonell noted in a case
9 involving a scheme to randomly test prison guards:¹⁵

10 Defendants urge in support of taking blood
11 and urine samples of employees the same rea-
12 sons urged for searching employees' cars
13 parked outside the gates -- identifying pos-
14 sible drug smugglers. So might searches of
15 employees' homes and taps on their tele-
16 phones. The possibility of discovering who
17 might be using drugs and therefore might be
18 more likely than others to smuggle drugs to
19 prisoners is far too attenuated to make
20 seizures of body fluids constitutionally
21 reasonable. Defendants also argue that
22 taking body fluids is reasonable because it
23 is undesirable to have drug users employed at
24 a correctional institution, even if they do
25 not smuggle drugs to inmates. No doubt most
26 employees consider it undesirable for employ-
ees to use drugs, and would like to be able
to identify any who use drugs. Taking and
testing body fluid specimens, as well as
conducting searches and seizures of other
kinds, would help the employer discover drug
use and other useful information about employ-
ees. There is no doubt about it - searches

15

For similar reasons, random searches of prison employees are
impermissible. SEC and Law Enforcement Employees v. Carey,
737 F.2d 187 (2nd Cir. 1984).

1 and seizures can yield a wealth of informa-
2 tion useful to the searcher. (That is why
3 King George III's men so frequently searched
4 the colonists.) That potential, however,
5 does not make a government employer's search
6 of an employee a constitutionally reasonable
7 one.

8 Id. at 1130.

9 Where blood or urine tests have been permitted in the
10 employment context, it has been in situations where the employer
11 had an objective basis for the individual search. Division 241
12 Amalgamated Transit Union, supra at 1267; Turner v. Fraternal
13 Order of Police, 500 A.2d 1005 (D.C. App. 1985). As Turner
14 noted, the objective support for a particular test "must be
15 related to the police officer's fitness for duty. There must be
16 a reasonable, objective basis to suspect the urinalysis will
17 produce evidence of illegal drug use." Id. at 1009. It is
18 precisely this lack of objective criteria in individual
19 situations which renders the random search scheme of AR 600-85
20 unconstitutional.

21 B. Plaintiffs Will Suffer A Denial Of Due Process
22 Because Of The New Regulations

23 There is no question that the employees represented by both
24 AFGE and AFGE Local 1504 have a constitutionally protected
25 property interest in their positions. Arnett v. Kennedy, 416
26 U.S. 134 (1974). This property right is threatened by the

1 procedures created by the challenged regulations. The
2 regulations authorize certain actions against covered employees
3 on the basis of a single, unsubstantiated urinalysis test.
4 These include administrative leave, referral to a civilian
5 employee assist program, and loss of security clearance.
6 Further, the individual plaintiffs were informed in a management
7 meeting that they would be placed in a Leave Without Pay (LWOP)
8 status upon a positive unverified urinalysis if no
9 administrative position was available. See TRO Ex. 1-4, ¶14.

10 The Civilian Police Corps is a small unit of Ft. Lewis. The
11 fact of a fellow officer being relieved from regular duty, and
12 the reason, would become widely known at least within the
13 Department. See TRO Ex. 1-4, ¶16. For the police officers
14 represented by AFGE Local 1504 involuntary placement on
15 administrative leave, referral to a civilian employee assistance
16 program or loss of security clearance would permanently
17 stigmatize the employee and thereby affect the liberty interests
18 of the plaintiffs. E.g., Bishop . Wood, 426 U.S. 341
19 (1976). Opportunities for advancement will be permanently
20 impaired, and the employee will lose the trust which is
21 essential to carry out his duties. This will occur without any
22 right to review the evidence or to answer the accusation.

23 Where due process rights are implicated, inquiry must be
24 made into the nature of the process which is due. Morrissey v.
25 Brewer, 408 U.S. 471, 481 (1972). According to Cleveland

1 Board of Education v. Loudermill, ___ U.S. ___, 105 S.Ct. 1487
2 (1985), a fundamental principal of due process is that a depri-
3 vation of property must "be preceeded by notice and opportunity
4 for hearing appropriate to the nature of the case." Here the
5 preclusion of review of the findings of the field urinalysis
6 testing, before the interference in one's job tenure has
7 occurred, constitutes a violation of due process. The fact that
8 field tests may later be confirmed in the laboratory does not
9 constitute adequate protection of constitutional rights as the
10 harm has already occurred.

11 The regulations further deny employees their due process
12 rights by allowing permanent revocation of a security clearance,
13 with the attendant possible loss of one's job, following a
14 finding that an employee's urine contained a controlled
15 substance. The individual plaintiffs are currently being
16 required to obtain a security clearance as a condition of
17 retaining their job as a police officer. Loss of the clearance
18 would inevitably lead to loss of his job. Id. The Army
19 Regulation explicitly does not "preclude the use of a confirmed
20 positive urinalysis result in an authorized adverse action
21 proceeding or for other appropriate action." AR 600-85, 4-
22 15(e)(4) (C. Ex. 2).

23 An employee does not have an opportunity for a hearing on a
24 decision to remove his or her security clearance. Further,
25 under current MSPB precedent, an employee is not entitled to
26

1 challenge the reasons for the loss of his security clearance if
2 he is removed from employment for failure to maintain a security
3 clearance. Egan v. Navy, Docket No. SE07528310257 (MSPB Aug.
4 8, 1985), appeal docketed, No. 86-579 (Fed. Cir.). The employee
5 will never have an opportunity to have a meaningful hearing as
6 to the facts and circumstances of the drug test. Thus, even the
7 most minimal due process protections most recently reaffirmed in
8 Loudermill will be denied plaintiffs under these new
9 regulations.

10 C. The Drug Testing Regulations Violate Plaintiff's
11 Right To Privacy

12 The Supreme Court has recognized that within the penumbra of
13 the specific guarantees of the First, Fourth, Fifth and Ninth
14 Amendments there exist areas or zones of privacy which are pro-
15 tected from unwarranted governmental intrusion. Roe v. Wade,
16 410 U.S. 113 (1973)

17 Here the plaintiffs' privacy rights have been invaded
18 because the Army regulation unreasonably intrudes into the
19 legitimate privacy interests of federal employees. The Army has
20 decided to "verify that [employees] are not currently using
21 drugs," implementing this through urinalysis testing. DA Form
22 5019-R; (C. Ex. 2). The particular procedures chosen by the
23 Army also invade individual privacy.

24 First, the Army requires that the sample be given in the
25
26

1 presence of an observer. Plaintiffs all reasonably expect
2 privacy in their excretory functions. TRO Ex. 1-4, ¶10. As
3 stated by Judge Viotor in McDonell, supra, 612 F.Supp. at 1127:

4 [U]rine is discharged and disposed of
5 under circumstances where the person
6 certainly has a reasonable and legitimate
7 expectation of privacy.

8 Second, the regulation requires employees to identify in
9 advance all the medication which they are taking. If they are
10 later tested positive during urinalysis and offer as an
11 explanation that they are taking medication, this explanation
12 may not exculpate them. (C. Ex. 3) The tested employees have a
13 reasonable expectation of privacy in their legal drug use which
14 does not affect their work performance. See TRO Ex. 1-4, ¶13.
15 Thus, the regulation forces an unwarranted disclosure of
16 extremely personal information including the use of legal
17 prescription and over the counter drugs. This too is
18 constitutionally impermissible.

19 D. The Defendant's Implementation Of This Drug Abuse
20 Testing Program Is Contrary To Law

21 Drug Rehabilitation Act

22 In 1972, Congress carefully considered the issue of drug
23 abuse in the federal workforce and enacted the Drug Abuse Office
24 and Treatment Act, Pub. L. No. 92-255, §413, 42 U.S.C. §290ee-1
25 (hereinafter Treatment Act). This statute requires that "no
26 person may be denied or deprived of federal civilian employment

1 or a federal professional or other license or right solely on
2 the grounds of prior drug abuse." 42 U.S.C. §290ee-1(c)(1). In
3 explaining the purpose of this legislation, the House Committee
4 stated that drug abuse "shall be handled by the federal
5 departments as a medical problem" H.R.Rep. No. 92-775,
6 reprinted in 1972 U.S. Code Cong. & Ad. News 2045, 2067. The
7 Committee further explained that "federal employees may have
8 their appointment terminated only for failure to perform their
9 jobs." Id. Congress clearly expressed its position that the
10 appropriate concern of a federal agency is drug abuse which
11 affects an employee's performance and that such abuse should be
12 treated as a medical problem, not a disciplinary problem.

13 In enacting its program of random urinalysis DoD and the
14 Army are testing employees for off-duty conduct, not impairment
15 of job performance. Further, the focus of the Army program is
16 disciplinary, not rehabilitative. The regulations provide that,
17 in the event of a positive urinalysis test result, an employee
18 "may be subject to adverse action proceedings." AR 600-85, 4-
19 15c(3)(b) (C. Ex. 2).

20 In enacting the Treatment Act, Congress carefully carved out
21 an exception to the prohibition on discipline based on prior
22 drug use. Thus, 42 U.S.C. §290ee-1(c)(2)

23 This subsection shall not apply to employ-
24 ment: (a) in the Central Intelligence
25 Agency, the Federal Bureau of Investigation,
26 the National Security Agency, or any other
department or agency of the federal govern-
ment designated for the purposes of national

1 security by the President, or (B) in any
2 position in any department or agency of the
3 federal government, not referred to in clause
4 (A), which position is determined pursuant to
5 regulations prescribed by the head of such
6 department or agency to be a sensitive
7 position.

8 The Office of Personnel Management (OPM) was given the respon-
9 sibility for developing regulations to implement this statute.
10 See Pub. Law. No. 92-255, Section 413(a), 42 U.S.C. §290ee-
11 1(a). The OPM regulations limit an agency's ability to desig-
12 nate positions as "sensitive" to "only those which are desig-
13 nated as critical-sensitive in Federal Personnel Manual Chapter
14 732." Federal Personnel Manual Supplement (FPM Supp.) 792-2, S1-
15 4a(6), (TRO Ex. 7).

16 DoD and Army have apparently implemented their urinalysis
17 testing program without any regard for the careful limitation
18 imposed by both Congress and OPM. The designation of positions
19 as "critical" by the Army does not appear to have any relation-
20 ship to the appropriate statutory requirement, the "sensitivity"
21 of the position. FPM Chapter 732, Subchapter 2-2, at 732-5 (TRO
22 Ex. 16.) These agencies' apparent total disregard for the
23 statutory and regulatory requirements renders this program
24 contrary to law.

25 Further, OPM's regulations provide that "[i]n practice, the
26 alcoholic or drug abuser should be dealt with little differently
from other problem employees. The supervisor identifies the
aspects of job performance that are not satisfactory, consults

1 with the medical and counseling staff, or both ... [and] discus-
2 ses aspects of below standard performance with the employee
3" FPM Supp. 792-2 S5-1(b) (TRO Ex. 7). AR 600-85, on the
4 other hand, is a deliberate effort to treat the question of drug
5 abuse differently from other employment problems,¹⁶ seeking
6 out and screening employees for potential problems without
7 evidence of an impact on job performance.

8 Civil Service Reform Act

9 The Army's program of random urinalysis is also contrary to
10 the Civil Service Reform Act (CSRA), Pub. L. No. 95-454, 5
11 U.S.C. §2301 et seq. A prerequisite to disciplinary action
12 against a federal employee is that the action be based on "such
13 cause as will promote the efficiency of the service." 5 U.S.C.
14 §7513(a). This requirement mandates that adverse action be
15 taken only for reasons that are directly related to legitimate
16 government interests and "serves to minimize unjustified
17 government intrusions into the private activities of federal
18 employees." Doe v. Hampton, 566 F.2d 265, 272 fn.20 (D.C.
19 Cir. 1977); See Merritt v. Department of Justice, 6 MSPB 493
20 (1981) (TRO Ex. No. 8).

21 This requirement of a "nexus" between an employee's off-duty
22
23

24 ¹⁶ The Statutory scheme concerning drug abuse is closely
25 patterned after that concerning alcoholism. See, 42 U.S.C.
26 §290dd-1.

1 activity and actions taken against him or her is expanded by the
2 CSRA's Prohibited Personnel Practices, which forbid
3 discrimination "for or against any employee or applicant for
4 employment on the basis of conduct which does not adversely
5 affect the performance of the employee ..." 5 U.S.C.
6 §2303(b)(10). This requirement expands the coverage of the
7 nexus requirement beyond mere discipline to "any action under
8 Chapter 75 of this Title of other disciplinary or corrective
9 actions..." 5 U.S.C. §2302(a)(2)(A)(iii), Merritt, supra at
10 508. Thus, the nexus requirement also applies to requirements
11 that the employee seek counseling or treatment for drug abuse.

12 Finally, a basic merit system principle of the CSRA is that
13 "all employees and applicants for employment should receive fair
14 and equitable treatment ... with proper regard for their privacy
15 and constitutional rights." 5 U.S.C. §2301(b)(2).

16 These three statutory requirements, when taken together,
17 lead inescapably to the conclusion that an agency has an
18 obligation to refrain from intruding on the private lives of its
19 employees to the greatest extent possible. The DoD and Army
20 programs take the exact opposite approach. First, urinalysis is
21 a technique which imprecisely measures metabolite concentration,
22 not on the job impairment. See TRO Ex. 9, ¶8, 13. Second, the
23 agencies purposely inquire randomly into employees lives, rather
24 than restricting this intrusion to situations where probable
25 cause exists. Third, they have implemented the program in such

1 a way that employees are forced to divulge private details of
2 their medical histories, whether job related or not, fearing
3 that failure to disclose will hurt them if there is a positive
4 EMIT finding.

5 Administrative Procedures Act

6 Courts are also empowered to strike down agency regulations
7 which are "arbitrary, capricious or an abuse of discretion." 5
8 U.S.C. §706(2)(A). DoD and the DOA have enacted this urinalysis
9 surveillance program, not because of any true government
10 interest, but in a misguided reaction to drug problems which are
11 "coming to a head" in society. See TRO Ex. 10.

12 DoD has pursued this intrusive program despite the
13 conclusion of Dr. J. Jarrett Clinton, the Deputy Assistant
14 Secretary for Professional Affairs and Quality Assurance, that
15 problems with drug abuse among civilian employees are "very
16 small." Yoder, Federal Times (June 3, 1985) (TRO Ex. 10). Dr.
17 Clinton explained that DoD developed the civilian testing
18 program to achieve consistency between civilian employees and
19 members of the military, who are subject to testing. Id. He
20 also stated that the general concern about drug abuse in society
21 motivates the program. Id. Dr. Clinton admitted that DoD's
22 stated fear of drug-related blackmail is not based on any
23 evidence that this has happened. Id. "This policy was not
24 based on cases, on incidents," he said. Id.

1 As Dr. Clinton noted, the profile of the average federal
2 employee hardly fits that of a typical drug abuser. The average
3 employee is over 30, is married and has a decade or more experi-
4 ence working for the government. Id. AFGE submits that this
5 reasoning is so deficient as to constitute arbitrary and
6 capricious action and therefore is another ground for
7 invalidating the regulations.

8 DoD's perception that drug abuse among employees in the
9 selected job categories is not a significant problem is corrobo-
10 rated by the plaintiffs. The individual named plaintiffs have
11 never seen a civilian police officer at work who appeared to be
12 under the influence of illegal drugs or alcohol. TRO Ex. 1-4,
13 ¶12.

14 On site or "field testing" generally employs the Enzyme
15 Multiplied Immunoassay (EMIT) test marketed by the Syva
16 Corporation. Field testing is authorized by AR 600-85, even
17 though the techniques used in these tests result in high numbers
18 of inaccurate or "false positive readings."¹⁷

21 ¹⁷ EMIT testing is subject to a variety of limitations which
22 render it inaccurate. The Syva Company indicates that a test
23 can detect marijuana with 95% confidence. Other reports
24 indicated accuracy rates as low as 85%. O'Connor, EMIT
25 Cannabinoid Assay, 5 J. Anal. Toxicology, July/August 1981, (TRO
26 Ex. 11). "False positive" results indicate the presence of a
tested drug which is not present in the urine. They are caused
by a variety of factors. First is "cross reactivity." See
infra at note 3; TRO Ex. 9 McBay Affidavit, ¶6. False positive

(CONTINUED)
DAVIES, ROBERTS,
REID & WACKER

ATTORNEYS AT LAW
201 ELLIOTT AVENUE WEST, SUITE 500
SEATTLE, WASHINGTON 98119
285-3610

1 DoD and the Army are implementing mandatory drug testing of
2 civilian employees despite clear indications that this testing
3 is inappropriate for the purpose of evaluating drug usage in an
4 employment context. Urine tests do not measure whether a person
5 is impaired or was affected by the drug. TRO Ex. 9, McBay
6 Affidavit, ¶8, 12, 13; See Mason and McBay, Cannabis:
7 Pharmacology and Interpretation of Effects, 30 J. For. Sci. 615
8 1985 (TRO Ex. 12).

9 Nor can urinalysis provide information as to the time of use
10 or the dosage. TRO Ex. 9, ¶9;

11 As is explained in a letter published by Dr. McBay in the
12 Journal of the American Medical Association,

13 It is impossible, at present, to establish by
14 urine testing methods that the person was
15 adversely affected by the drug. More useful
16 information may be obtained by analyzing a
17 blood or plasma sample for THC and Carboxy
18 THC, but a correlation between concentrations
19 and possible impairment has not yet been
20 fully established. McBay, 249 JAMA 7 (Feb.
21 18, 1983) (TRO Ex. 13).

22
23
24
25
26

17 (FOOTNOTE CONTINUED)

results may also be produced by substances created by the human
body and possibly by inhalation by individuals in the presence
of smoked marijuana. Morgan, infra n. 3, (TRO Ex. 5). Finally,
false positive readings may be the result of operator error,
especially where field personnel work under difficult conditions
or with inadequate training. Field personnel generally need not
undergo licensing to establish their qualifications. See also
Morbidity and Mortality Weekly Report, Vol. 32, No. 36, Sept.
16, 1983, TRO Ex. 14.

Pl. Memo in Support of Motion
for Temporary Restraining Order/22

DAVIES, ROBERTS,
REID & WACKER
ATTORNEYS AT LAW
201 ELLIOTT AVENUE WEST, SUITE 500
SEATTLE, WASHINGTON 98119
285-3610



1 Even the manufacturer of the most widely used urinalysis
2 test (EMIT) admits that its test cannot determine intoxication.
3 Syva, Frequently Asked Questions About Syva and Drug Abuse
4 Testing, (C. Ex. 4 at 8). Because "there is almost no proved
5 correlation between any positive urinary test for drugs and
6 observed or assessed human behavior," the Army's drug testing
7 program is an inquiry into the employee's private life, not his
8 or her efficiency or capability for the required work. See
9 Morgan, supra, (TRO Ex. 5)

10 AFGE has presented significant constitutional and statutory
11 support for its claim that the regulations are illegal and that
12 it is likely to prevail on the merits in this action.

13 II. The Imminent Infringement On The Plaintiffs'
14 Constitutional Rights Constitutes Irreparable Harm

15 The imminent denial of constitutional rights clearly
16 constitutes irreparable injury. Elrod v. Burns, 427 U.S. 247,
17 373, 96 S. Ct. 2673, 2693 (1976). Courts have found irreparable
18 harm based on the loss of procedural due process, Lewis v.
19 Delaware State College, 455 F.Supp. 239 (D. Del. 1978); the
20 Fourth amendment, Zepeda v. INS, 753 F.2d 719 (9th Cir. 1983),
21 McDonald, supra, (preliminary relief granted February 6,
22 1984); and the right to privacy, Deerfield Medical Center v.
23 Deerfield Beach, 661 F.2d 328 (5th Cir. 1981).

24 The status quo insures no constitutional violations. The
25
26

1 very act of taking the drug tests (including the lack of privacy
2 in each employee being observed while urinating) constitutes
3 irreparable harm in that the search itself and the humiliation
4 of the test procedure cannot be undone by this court at some
5 later time. Defendants have indicated their intention to begin
6 random and periodic drug surveillance in mid-July 1986. See C.
7 Ex. 3; TRO Ex. 1-4, ¶11. This danger to plaintiffs' constitu-
8 tional rights is concrete, as well as imminent.

9 III. The Defendants Will Not Be Harmed By Delay In
10 Implementing Their Drug Abuse Surveillance

11 Because these regulations were not promulgated to address a
12 significant problem, a delay in their implementation will not
13 cause any problem for defendants. Second, the implementation of
14 these regulations has taken place over an extended period of
15 time. The DoD Directive authorizing components to develop
16 mandatory urinalysis for civilians was issued on April 8, 1985.
17 The Army's implementing regulations were issued some 10 months
18 later, in February, 1986. The fact that the defendants have
19 taken a long time to develop and implement this program
20 indicates that further delay would not harm them.¹⁸

21
22
23
24 ¹⁸ Defendants have ample measures available to deal with
25 employees whose performance is jeopardized by drug abuse.
26 Employees who demonstrate unusual or suspicious conduct at work
may be referred for medical evaluation.

1 IV. Injunctive Relief Would Be In The Public Interest

2 The right to all citizens to be protected from unreasonable
3 search and seizure is a central component of our constitutional
4 system. Injunctive relief which preserves this and other rights
5 of public employees furthers the public interest, which favors
6 the protection of these rights. See Kelly v. United States
7 Postal Service, 492 F.Supp. 121, 131 (S.D. Ohio 1980).

8 CONCLUSION

9
10 AFGE has demonstrated that preliminary equitable relief is
11 appropriate in this case. Therefore, it requests that the Court
12 grant an order enjoining the DoD and DOA from continuing to
13 implement or enforce DoD Directive 1010.9 and Interim Change
14 No. 111, amending AR 600-85 (5-14). Finally, we request that
15 the Court order defendants Marsh and Palastra to cease and
16 desist from further distribution of DA Form 5019-R and to
17 destroy completed copies of the form.

18 Respectfully submitted,

19 Mark D. Roth (CGR for)
20 Mark D. Roth - General Counsel
21 American Federation of
22 Government Employees, AFL-CIO

23 Joe Goldberg
24 Joe Goldberg - Staff Counsel
25 American Federation of
26 Government Employees, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6426
(202) 639-6420

15 HERMAN L. WACKER
Herman Wacker
Davies, Roberts, Reid & Wacker
201 Elliott Avenue West, Suite 500
Seattle, WA 98119
(206) 285-3610

DAVIES, ROBERTS,
REID & WACKER
ATTORNEYS AT LAW
201 ELLIOTT AVENUE WEST, SUITE 500
SEATTLE, WASHINGTON 98119
285-3610