BEFORE THE ARBITRATOR

In the Matter of the Petition of:	Case 381 No. 46687 MIA-1669
CITY OF MILWAUKEE	Decision No. 27151-c
For Final and Binding Arbitration Involving Law Enforcement Personnel in the Employ of the	
CITY OF MILWAUKEE	Sherwood Malamud Arbitrator

APPEARANCES:

Thomas C. Goeldner, Assistant City Attorney, City of Milwaukee, 200 East Wells St., Milwaukee, Wisconsin 53202, appearing on behalf of the Municipal Employer.

Adelman, Adelman & Murray, S.C., by Kenneth J. Murray, 1840 N. Farwell Ave., Suite 400, Milwaukee, Wisconsin 53202, and Bradley DeBraska, President, Milwaukee Police Association, 1840 N. Farwell Ave., Milwaukee, Wisconsin 53202, appearing and assisting on behalf of the Milwaukee Police Association.

ARBITRATION AWARD

Jurisdiction of Arbitrator

On April 10, 1992, the Wisconsin Employment Relations Commission, hereinafter the WERC, issued Findings of Fact, Conclusion of Law, Certification of Results of Investigation and Order Requiring Arbitration in which it found, inter alia, that:

> 4. On December 11, 1991, the City [City of Milwaukee] filed with the Commission[WERC] a petition for final and binding arbitration pursuant to Sec. 111.70(4)(jm), Stats. In that petition, the City asserted, among other things: that the City and the MPA [Milwaukee Police Association] had reached a deadlock after a reasonable period of negotiation pursuant to a formal reopener clause contained in the parties' calendar 1991-92 collective bargaining agreement, which reopener clause provides as follows:
>
> [The WERC then quotes the language of Article 64 of the Agreement.]

> 5. On February 6, 1992, the Commission [WERC] issued an order denying MPA's motions to dismiss or hold the instant petition in abeyance and directing that an informal investigation be conducted for the purpose of determining whether the statutory conditions precedent to the issuance of an order initiating Sec. 111.70(4)(jm), Stats., arbitration had been met.
>
> 6. On March 16, 1992, an informal investigation was conducted by Marshall L. Gratz, a member of the Commission's staff. The Investigator has advised the Commission[WERC] that the parties are at impasse on the subject matter referred to in the petition. The Investigator further advised the Commission that during the March 16 investigation meeting the parties entered into a written agreement in which the parties specified, among other things, the following: a set of criteria for the Commission's selection of arbitrators from a list of five to be submitted to the parties "to hear and decide the parties' pending dispute arising under Art. 64 of the parties' 1991-92 Agreement"; a date on which they would select the arbitrator; a deadline for convening a first meeting with the arbitrator; and limitations on the timing of arbitration hearing dates. The parties further agreed that they would exchange written final offers through the Arbitrator, rather than through the Investigator.

The parties selected Sherwood Malamud from a panel submitted to them by the Wisconsin Employment Relations Commission. On June 1, 1992, the WERC appointed Sherwood Malamud to serve as the arbitrator to issue a final and binding award in the dispute arising under Article 64 of the parties' Agreement. On July 29, 1992, the parties met with the Arbitrator and agreed to a date for the exchange of final offers. In addition, they agreed to schedule the hearing for six days in January, 1993. At the July 29, 1992, meeting, the City of Milwaukee, hereinafter the City or the Employer, submitted to the Arbitrator two copies of its final offer and proposal on the drug testing matter. The Milwaukee Police Association, Local #21, I.U.P.A., AFL-CIO, hereinafter the MPA or the Union, stated it would submit its final offer to the Arbitrator by August 17, 1992. The period for submission of the MPA's final offer was extended to August 31, at which time the MPA submitted its final offer. On that date, the Arbitrator completed the exchange of final offers.

By conference call on December 23, 1992, which call was confirmed by the Arbitrator by letter dated December 30, 1992, the parties agreed that

the scope of the Arbitrator's authority in the arbitration process on the matter of the drug program for law enforcement officers of the City of Milwaukee Police Department, "shall be wide open pursuant to the provisions of Section 111.70(4)(jm)", Wis. Stats.

Proceedings

In the December 30, 1992, letter the dates identified for hearing, namely, January 12, 13, 14, 15, 19, and 20 were confirmed. Approximately one week prior to the first day of hearing, the MPA requested a postponement which was granted. The Arbitrator and the parties met on January 12, 1993, in order to resolve or narrow the issues in dispute. The mediation effort was unsuccessful.

Hearing in the matter was held on February 23, 24, 25, March 1, 8, and 31, 1993, at the Grand Milwaukee Hotel, Milwaukee, Wisconsin. A transcriptual record of the six days of hearing was made. The Arbitrator received the transcript of the first five days of hearing by April 5, 1993, and the last day of hearing on April 26, 1993. Briefs were to be postmarked June 21, 1993. The City's brief was postmarked June 22, 1993. The period for filing of the MPA brief was extended to July 13, 1993. The extension was granted by the Arbitrator so that he would have the benefit of written argument on the important issues presented in this case. The Union's brief was received by facsimile on July 13, 1993, and the exchange of briefs was effectuated on that date. In the letter exchanging briefs, the Arbitrator alerted the parties to the recent publication of the book Resolving Drug Issues by Elkouri & Elkouri, BNA, Washington, D.C., July 1993 which he read as part of his preparation for writing this Award. The parties were afforded an opportunity to provide any additional comment should they desire to do so prior to the issuance of this Award. The parties did not file any additional comment other than the original briefs exchanged by the Arbitrator on July 13, 1993.

The Record

The record in this matter comprises the transcripts which total 911 pages. The City of Milwaukee, hereinafter the City or the Employer, presented 20 exhibits, and the Association presented 52 exhibits including a book on The Rights of Law Enforcement Officers written by one of its expert witnesses, Will Aitchison.

The City put in its case through the testimony of Milwaukee Police Department Personnel Administrator Ellis and the Department's Health and Safety Coordinator Karfonta. Chief of Police Philip Arreola testified at length explaining the reasons for the City's proposal. The City has contracted with Bayshore Clinical Laboratories to perform the drug testing in accordance with the protocols it proposes in its final offer. The City presented the testimony of the Vice President of Operations of Bayshore, Jaglinski, to

explain the collection and testing procedures it would follow under the contract with the City. He described in great detail the procedures followed by the staff of Bayshore Clinical Laboratories to obtain the urine sample and test it through an immunoassay "EMIT" screening test and a GC/MS confirmatory test. The proposal of the City to expand its drug testing policy is marked as Appendix A and is attached to this Award, and is hereinafter referred to as City Drug Testing Proposal or Appendix A.

The City presented evidence concerning the number of officers who have been subject to investigation for drug use, abuse, and/or dealing from 1986 to the present through the testimony of Franklin, the Deputy Inspector in charge of the Internal Affairs Division.

Through the testimony of Fire Chief Erdmann of the City's Fire Department, the City presented evidence of the efforts of the Fire Department in instituting a drug testing program. Chief Erdmann described the level of discipline to be imposed by the Fire Chief should a fire fighter test positive. He explained the purpose of the 30 day window offered to fire fighters to step forward to acknowledge a drug problem. The fire fighter was offered the opportunity for rehabilitation rather than discipline. In July 1992, Local 215, IAFF and the City signed off and acknowledged that the 30 day window had expired. After the close of the window, any fire fighter who tests positive under the reasonable suspicion drug testing program presently in effect would be discharged.

In addition, the City presented the testimony of Labor Relations Specialist Murphy concerning the national surveys which she conducted to ascertain the drug testing policies of police departments in municipalities similar in size to the City of Milwaukee and in municipalities smaller and larger than the City.

The Milwaukee Police Association explained the purpose and rationale underlying each of its proposals through the testimony of Association President DeBraska. The Union described the Police Officer's Support Team, POST, and the position of Post Coordinator through the testimony of the Association's Secretary-Treasurer Kernan. The MPA presented its concerns on the matter of confidentiality through the testimony of its former president, Bill Krueger.

The Union presented expert testimony on drug testing programs, particularly random drug testing programs, through the testimony of former police chief of the Bellevue, Washington Police Department Van Blaricom and the testimony of attorney Will Aitchison who represents many law enforcement collective bargaining units in the northwest region of the United States. Aitchison conducted a national survey of municipalities referenced in the Law Enforcement Management and Administrative Statistics 1990 report, hereinafter the LEMAS report, concerning drug testing programs in municipal law enforcement departments in

communities with populations in excess of 400,000. Union Executive Board Member Doyle testified to the surveys he conducted of the drug testing programs, if any, of other collective bargaining units in the City, and the surveys he conducted of law enforcement units in the Milwaukee labor market, the suburban Milwaukee police departments and the largest municipal police departments in the State of Wisconsin, inclusive of the State Patrol.

Arthur John McBay, a certified toxicological chemist, a forensic toxicology consultant, Professor Emeritus School of Pharmacy and Adjunct Professor in the Department of Pathology of the University of North Carolina testified concerning the reliability and the limitations of drug testing and drug testers.

Based upon a review of the evidence, testimony and arguments presented by the parties, and upon the application of the provisions of Sec. 111.70(4)(jm), Wis. Stats., to the issues in dispute herein, the Arbitrator renders the following Award.

ORGANIZATION OF AWARD

Introduction

At the outset of this section, the Arbitrator sets out the unique contractual and statutory context in which this decision is made. The Arbitrator then describes the statutory standards for the determination of this non-monetary issue of drug testing. The arbitral standards and concepts employed in the determination of this Award are fully examined.

The analysis of the parties' offers then follows. The Arbitrator first considers the adoption of the City's proposal in its entirety. The Association's proposal on reasonable suspicion testing as an alternative to the City's proposal for random drug testing is then considered. As will be discussed more fully below, the consideration of the Association's proposal, in this regard, assumes for purposes of analysis that the adoption of the Association's proposal on reasonable suspicion testing would not diminish the existing reasonable suspicion testing program referenced in Article 64 of the parties' extended Agreement.

The Arbitrator then considers, seriatim, each of several proposals for testing on which both the Association and the City either agree or where their offers differ only in detail. The differences in their proposals on each of these items are discussed and resolved.

The Arbitrator then turns to analyze those areas of the drug testing program on which the parties maintain different views of its purpose and approaches to its implementation.

The Arbitrator notes what choices and alternatives were considered by the Arbitrator but were not included in the expanded drug testing program which is the product of this Award. The Award concludes with an outline of the drug testing program to be included in Article 64 of the 1991-92 Agreement, as extended.

Contractual and Statutory Context of Award

The parties first included Article 64 in their 1987-88 contract. That provision has appeared in the successor 1989-90 and in the 1991-92 Agreement, as extended, the current Agreement, as well. Article 64 provides as follows:

> ARTICLE 64
> DRUG TESTING
>
> If the City chooses to modify its current drug testing practices, beyond that which is currently in effect, the parties will engage in collective bargaining as to those aspects of the modification which are primarily related to wages, hours and conditions of employment. In the event that the parties are unable to arrive at an agreement, those matters still in dispute will be submitted to final and binding arbitration before an arbitrator selected by the parties from a list provided by the Wisconsin Employment Relations Commission.

In January, 1990, the Fire and Police Commission of the City of Milwaukee, hereinafter the Commission, which is the body charged by statute to oversee the operation of the police and fire departments of the City of Milwaukee and the body to whom sworn police officers in this collective bargaining unit may appeal disciplinary charges lodged by the Chief, issued the following directive:

> REVISED DRAFT
>
> FPC POLICY TO EXPAND DRUG TESTING
>
> It is the long standing position of the Milwaukee Fire and Police Commission that the citizens of this community are entitled to the services of drug-free Fire and Police departments. In order to insure drug-free Fire and Police departments, and to maintain public confidence in the integrity of our protective services, an expanded program of drug testing that is in compliance with the constitutional safeguards afforded members of

the respective public safety services, should be implemented. The commission acknowledges the existing drug testing policies and procedures of the departments which, among other components, currently incorporate drug testing based upon reasonable suspicion. To further the above stated position, this commission hereby directs Fire Chief August Erdmann and Police Chief Philip Arreola to expiditiously (sic) develop and implement expanded drug testing policies and procedures which include, among other enhancements, random drug testing. The chiefs are further directed to engage in this process in a manner that is in full accord with all legal obligations and the rights of the members of the respective services.

Pursuant to that directive, the City's Labor Negotiator instituted negotiations with the MPA for the purpose of modifying the existing drug testing program. Chief of Police Arreola issued Memorandum 90-109 on February 12, 1990. It describes the existing drug testing program of the Milwaukee Police Department, hereinafter the Department:

MEMO 90-109

February 12, 1990

. . .

CURRENT DEPARTMENTAL DRUG/ALCOHOL TESTING POLICY

All Department members are to take notice and be cognizant of the fact that current Department policy requires a member to submit to a drug and/or alcohol test whenever two or more supervisors observing the member have a reasonable suspicion to believe that the member is:

(1) Using illegal drugs/controlled substances;
(2) Illegally using drugs/controlled substances; or
(3) In violation of Departmental Rule 4 Sections 18 or 19 (Sections proscribing on-duty consumption of intoxicating liquor and/or fermented malt beverages and proscribing the member from being intoxicated as a result of consumption of

> intoxicating liquor and/or fermented beverages while on-duty or off-duty).
>
> Positive test results shall constitute grounds for discipline, which may result in discharge. A member's refusal to submit to a drug and/or alcohol test when ordered to do so by a supervisor shall constitute grounds for discipline, which may include discharge.
>
> The term "drug test" as used herein means the testing procedure established by the Fire and Police Commission. . .[1]

The MPA strenuously argues that the City's proposal to expand the existing drug testing program in this proceeding, subjects that program referenced in Article 64 of the Agreement, to modification through arbitral determination. The MPA argues that the City proposes: that laboratory personnel act as agents of the Department; that the Chief be vested with the authority to unilaterally change the laboratories or contractors who collect and test the samples under the drug testing program; the establishment of protocols for the collection and testing of urine samples to detect the presence of illegal and/or controlled substances; the establishment of a Medical Review Officer to verify the results of the tests so administered. In this context, the entire matter of reasonable suspicion testing is before this Arbitrator. The MPA points to the letter written by this Arbitrator confirming the agreement of the parties that:

> The arbitration process on the drug issue shall be wide open pursuant to the provisions of Section 111.70(4)(jm), Wis. Stats.

The City argues, equally as strenuously as the MPA, that the only matters at issue in these proceedings are the proposals to expand the drug testing program. The existing drug testing program continues in effect without regard to the Award of this Arbitrator. The City maintains that the Arbitrator has no jurisdiction to supplant the existing drug testing program as described by Memorandum 90-109, quoted above.

The Arbitrator agrees with the City argument. In Article 64, the Employer obtained the right to continue its existing drug testing program without further identification or amplification of the nature of that program. The contours of that program were known to the parties. In February 1990,

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[1] See Milwaukee Police Association v. City of Milwaukee, Board of Fire and Police Commissioners and Philip Arreola, Dec. No. 26354-A (Examiner McLaughlin, 4/3/92), specifically, Finding of Fact No. 12, pp. 13–14, and Conclusion of Law No. 3 at page 14.

Chief Arreola set out the existing drug testing program, the reasonable suspicion drug testing program in Memorandum 90-109. In City of Milwaukee, Dec. No. 26354-A, Examiner McLaughlin states in Finding of Fact #12 that by issuing Memorandum 90-109:

> The City has not chosen to modify its current drug testing practices beyond those in effect prior to the negotiation of Article 64. The February 12, 1990, memo . . . states a standard no broader than that in effect prior to the negotiation of Article 64. The standard . . . for compelling a drug test of an individual officer whom two or more supervisors observe and believe to be acting under the influence of alcohol or a controlled is reasonable suspicion.

The continuation of the reasonable suspicion standard memorialized by Memorandum 90-109 provides the Employer with no more than the benefit of its bargain. For that reason, the City's existing drug testing program is not diminished by any findings or proposals adopted or implemented by this Award.

With that said, the parties may note that in the introduction to this section of the Award, Organization of the Award, the Arbitrator notes that the Union proposal on reasonable suspicion testing is addressed. The proposal is identified as paragraph III. on page 4 and 5 of the Union's Association Exhibit #1, which is marked as Appendix B and attached hereto. The Arbitrator considers the Union proposal as a response to the City's proposal to expand the existing drug testing program to include random testing. The Union's proposal is considered only to the extent that it expands the existing drug testing program. It is not considered for the purpose of diminishing or supplanting the existing drug testing program.

It is within this contractual context that the City and Union proposals to expand the existing drug testing program are considered. Arbitral review of these proposals is rendered under the statutory scheme of Section 111.70(4)(jm)6, Wis. Stats. The statute provides that:

> Sec. 111.70(4)
>
> . . .
>
> (jm) *Binding arbitration, first class cities.* This paragraph shall apply only to members of a police department employed by cities of the 1st class. If the representative of members of the police department, as determined under par. (d), and representatives of the city reach an impasse on the terms of the agreement, the dispute shall be resolved in the following manner:

1. Either the representative of the members of the police department or the representative of the city may petition the commission[WERC] for appointment of an arbitrator to determine the terms of the agreement relating to the wages, hours and working conditions of the members of the police department.

2. The commission[WERC] shall conduct a hearing on the petition, and upon a determination that the parties have reached an impasse on matters relating to wages, hours and conditions of employment on which there is no mutual agreement, the commission shall appoint an arbitrator to determine those terms of the agreement on which there is no mutual agreement. The commission may appoint any person it deems qualified, except that the arbitrator may not be a resident of the city which is party to the dispute.

3. Within 14 days of his appointment, the arbitrator shall conduct a hearing to determine the terms of the agreement relating to wages, hours and working conditions. The arbitrator may subpoena witnesses at the request of either party or on his own motion. All testimony shall be given under oath. The arbitrator shall take judicial notice of all economic and social data presented by the parties which is relevant to the wages, hours and working conditions of the police department members. The other party shall have an opportunity to examine and respond to such data. The rules of evidence applicable to a contested case, as defined in s. 227.01(3), shall apply to the hearing before the arbitrator.

4. In determining those terms of the agreement on which there is no mutual agreement and on which the parties have negotiated to impasse, as determined by the commission, the arbitrator, without restriction because of enumeration, shall have the power to:

...

f. Determine all work rules affecting the members of the police department, except those work rules created by law.

...

6. In determining all noncompensatory working conditions and relationships under subd. 4, including methods for resolving disputes under the

> labor agreement, the arbitrator shall consider the patterns of employe-employer relationships generally prevailing between technical and professional employes and their employers in both the private and public sectors of the economy where those relationships have been established by a labor agreement between the representative of those employes and their employer.
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> . . .
>
> 8. Within 30 days[2] after the close of the hearing, the arbitrator shall issue a written decision determining the terms of the agreement between the parties which were not the subject of mutual agreement and on which the parties negotiated in good faith to impasse, as determined by the commission[WERC], and which were the subject of the hearing under this paragraph. The arbitrator shall state reasons for each determination. Each proposition or fact accepted by the arbitrator must be established by a preponderance of the evidence.

Under the above statutory scheme, the Arbitrator may select portions of the proposals of each party for inclusion in the Award. The Arbitrator is not limited to select the entire proposal of either party. In addition under this statute, the Arbitrator may incorporate in the Award matters not proposed by either party.

Legal Context and Arbitral Standards

In its proposal, Appendix A, the City seeks the right to require sworn police officers to submit urine samples when they have been randomly selected for drug testing. The police officers must submit to testing when there is no individualized suspicion of their use or consumption of illegal drugs or controlled substances without prescription. Examiner McLaughlin, in his award cited above, provides an excellent analysis of the legal issues associated with drug testing under the reasonable suspicion standard then in effect in the Department. Examiner McLaughlin's excellent and concise analysis of the constitutional underpinnings for the drug testing issue which appears at pp. 29 and 30 of his opinion, follows:

> The relevant federal law is the Amendment to the United States Constitution, [17] which is applicable

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[2] The parties granted the Arbitrator an extension to issue this Award.

[17] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

to municipal police through the operation of the Due Process Clause of the Fourteenth Amendment.[18] It is, at present, settled law that a compelled urinalysis to test for the presence of illegal drugs is a search within the meaning of the Fourth Amendment.[19] It is also settled law that a public employer's "searches conducted pursuant to an investigation of work-related employee misconduct"[20] are governed by the Fourth Amendment.[footnote #21 omitted]

The Court has not required a warrant for every Fourth Amendment search, but has recognized that searches "ordinarily must be based on probable cause."[22] The Court has also noted, however, that the probable cause standard "is peculiarly related to criminal investigations".[23] For a considerable period, the Court has developed a doctrine distinguishing criminal searches from administrative searches, with the latter category not requiring probable cause if, in the particular search involved, the Government's interests in the search outweigh the individual's legitimate privacy expectations.[24] In Ortega, the Court expressly declined to apply a probable cause standard to employer "investigations of work related misconduct", and applied "the standard of reasonableness under all the

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upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[18] See Mapp v. Ohio, 367 U.S. 643 (1961).

[19] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 4 IER Cases 246 (1989); Skinner v. Railway Labor Executives Association, 489 U.S. 602, 4 IER Cases 224 (1989).

[20] O'Connor v. Ortega, 480 U.S. 709, 724, 1 IER Cases 1617, 1622 (1987).

[22] Von Raab, 4 IER Cases at 252.

[23] Ibid.

[24] This line of cases extends back at least as far as Camara v. Municipal Court, 387 U.S. 523 (1967). The balancing test has been variously stated, but continues in Von Raab and Skinner. Significantly, the Court has also applied a "reasonableness" standard to quasi-criminal searches, see Terry v. Ohio, 392 U.S. 1 (1968).

circumstances" to "both the inception and the scope of the intrusion."[25]

In Von Raab, the Court upheld, as a reasonable search under the Fourth Amendment, a United States Customs Service requirement that employes transferring or being promoted to certain positions pass a drug test. The Court upheld this requirement, in the absence of any individualized suspicion of any of the affected employes, reasoning thus:

> We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test ... Much the same is true of employees who are required to carry firearms ... While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in the safety and in the integrity of our borders.[26] [Footnotes 17-26 are in the original of Examiner McLaughlin's Decision.]

Examiner McLaughlin's analysis not only supports the warrantless search which results from reasonable suspicion testing under the existing departmental drug testing program as described in Memorandum 90-109, but it also provides the legal basis for the warrantless seizure which results from a random drug testing program, where the selection and the timing of the testing are both made at random without individualized suspicion.[3]

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[25] O'Connor v. Ortega, cited at footnote 20 above, 480 US at 725-726, 1 IER Cases at 1623.

[26] Ibid., 4 IER Cases at 253.

[3] Policeman's Benevolent Association v. Township of Washington, 840 F. 2d. 133 (3rd Cir. 1988).

And see, The Rights of Law Enforcement Officers, 2nd edition, by the MPA's expert witness, Will Aitchison, footnote 16 at pp. 171-172, which is the footnote to the text appearing at p. 147 in which the author concludes

Although Penny v. Kennedy, supra, was decided by the Sixth Circuit Court of Appeals in 1990 after the Supreme Court's 1989 decisions in Skinner and Von Raab, the U.S. Supreme Court has not issued any decision, through the recently concluded term of the Court, which sheds any additional light on the constitutionality of random drug testing.

The MPA points to the dissent of Justice Scalia in Von Raab that "... even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." The MPA opines in its brief that: "...the bulk of the cases since Skinner and Von Raab in both state and federal courts take the position that random testing without individualized suspicion is unconstitutional." The Arbitrator and the MPA's expert witness Aitchison disagree with the MPA's assertion regarding the federal courts.[4] The stance of the Wisconsin Supreme Court on the constitutionality of random drug testing under the fourth amendment protection afforded by the federal and/or state constitutions has not been cited to this Arbitrator.

The Arbitrator concludes, that as of this writing, random drug testing of non-probationary "tenured" sworn law enforcement officers who carry a weapon and who are vested with the power of arrest, without individualized suspicion, would be found by the Courts to represent a reasonable seizure under the fourth amendment. The question in this case is not the legality of a random drug testing program, but **whether random drug testing should be included in Article 64 of the 1991-92 Agreement, as extended.**

Arbitral Premises

In this sub-section of the Award, the Arbitrator articulates those assumptions, which the parties would have the Arbitrator accept and apply in his determination of this case. This Award is rendered in the context of the contractual relationship of the parties, namely, the Fire and Police Commission, the Milwaukee Police Department, and the Milwaukee Police Association, and the unique circumstances which mark the collective bargaining relationship between an employer in the law enforcement setting and a union representing sworn officers with the powers of arrest.

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that "... every lower court decision under the federal constitution since the two cases [*Skinner* and *Von Raab*] have held that purely random testing of law enforcement employees is not unconstitutional" (bracketed insertion made by Arbitrator). In footnote 16 the author cites *Penny V. Kennedy*, 915 F. 2d 1065 (6th Cir. 1990) (random testing of police officers and fire fighters); *Guiney V. Roache*, 873 F. 2d 1557 (1st Cir. 1989) (approves of random testing of officers who carry guns and those who participate in drug interdiction); ...

[4] Ibid.

For its part, the Fire and Police Commission, in its policy to expand drug testing which it issued on January 4, 1990, states that the citizens of the City "are entitled to the services of drug-free Fire and Police departments." In a decision which it issued in June 1991 in which the Commission dismissed charges of drug use against an officer due to the failure of a laboratory to locate and supply documentation substantiating the testing results, the Commission made the following statement with regard to drug use by police officers:

> *In our view there is absolutely no place for illegal* drug use on the Milwaukee Police Department.[5]

In its statement of policy in its drug testing proposal for Article 64, the MPA states that:

> The Milwaukee Police Association and the City of Milwaukee recognize the abuse or misuse of alcohol, prescription drugs and illegal substances is detrimental to the efficiency of the Milwaukee Police Department.

Although the Union proposal refers to rehabilitation of an officer, its proposal for rehabilitation is limited to a 30 day window in which officers who are in need of drug rehabilitation are encouraged to step forward. Those who are "caught dirty", who test positive subsequent to the 30 day window period, are not offered an opportunity for rehabilitation under the Union proposal, Appendix B. The Arbitrator approaches the issues in this case mindful that drug use by sworn police officers with the power of arrest and who carry a gun is a concern to both management of the Milwaukee Police Department and the rank and file officers of the Department.

The City proposes to expand its existing drug testing program with random testing to serve as a deterrent to dug use/abuse by police officers. Deterrence assumes that drug use/abuse is a rational act. Justice Scalia, in his dissent in Von Raab, and Justice Stevens in his concurring opinion in Skinner, both recognize the limitation of deterrence as a tool in fighting drug use/abuse. Skinner concerns the testing of a train crew involved in a train wreck which results in property damage in excess of $500,000 or loss of life. Both justices observe that a member of a train crew reporting for work under the influence of drugs is not a rational act. If it were, the fear of the loss of a job, or worse, injury or death to one's self or others which may result from an accident caused by the consumption of drugs or other mind altering substances, should deter such conduct. It does not.

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[5] In re the appeal of James L. Williams, Jr., at page 2. Association Exhibit No. 51 in this arbitration proceeding.

Similarly, in law enforcement, it is not rational for a police officer to consume drugs and then operate a motor vehicle or place himself in a situation in which the officer may find it necessary to use a weapon. In law enforcement, the occasions when an officer must exercise split second judgment are legion. It would not be rational for an officer to report for duty after consuming illicit drugs. Furthermore, it is not rational for an officer to engage in blatant illegal conduct, such as the consumption of illegal drugs which may compromise his integrity and his ability to perform his duties. Accordingly, it must be recognized that the conduct which the Department attempts to control and deter stems, at least in part, from an irrational decision to consume illegal or controlled substances.

Arthur McBay, the MPA's noted expert witness on the forensic toxicological aspects of the drug testing proposals of the City and the MPA, objected to the statement in the City's proposal that, "There is sufficient evidence to conclude that the use of controlled substances and other forms of drug abuse can seriously impair an employee's physical and mental health, and thus, job performance." Dr. McBay objects to the assumption present in this statement that a urinalysis, the drug test in both the City's and the MPA programs, detects the quantity of drugs present and the time of consumption to provide the basis for an inference concerning impairment. A urinalysis indicates the presence of the drugs which are the subject of the test, nothing else.

In non-law enforcement settings impairment is the ultimate question before a finder of fact. Traditionally, the argument is pressed by a union, on behalf of its members, that the off duty activity of an employee is beyond the employer's legitimate inquiry. In this case, the MPA emphasizes a police officer's need for privacy.

In law enforcement, as contrasted to other places of employment, such as, manufacturing or other employment, the illicit nature and illegality of consuming drugs while off duty is a legitimate concern of the Employer. In law enforcement impairment is but one issue which relates to the job performance of a police officer. An officer is subject to a call to duty when off duty. Under memorandum 9490, if an officer elects to wear his weapon in public, he must refrain from consuming alcohol and/or other substances which impair his ability and judgment. In addition, the use of illegal drugs may lead to other conduct, such as soliciting sexual favors in exchange for drugs. One officer discharged from the Department traded drugs for sex. Corruption may result through an officer's use of drugs; the officer's judgment may be blinded by the officer's ties to the chain of supply and/or a concern for disclosure of the officer's involvement in the drug culture.

Drug use/abuse place the officer, other police officers, the Department, and the public generally, in harm's way. The individual placed in the most danger by the use and/or abuse of such substances is the individual officer. Fellow officers are placed in danger when an officer's

judgment is impaired The Department suffers a loss of respect and trust when its officers are found to be users or abusers of illegal or controlled substances. Finally, the public may be placed in danger through the improper conduct or misjudgment of an officer who has consumed illegal or controlled substances.

Law enforcement officers work in a profession in which they may find themselves depriving other members of the public of their freedom. There exists a mentality among law enforcement officers of us versus them. The presence of that mentality manifests itself in certain proposals and concerns for confidentiality and for minimizing the opportunity of members of the public to identify police officers as police officers when they are directed to take a drug test. The unique place of the sworn police officer is recognized by the Arbitrator in the analysis which follows.

Consumption of drugs will not always manifest itself in the job performance or conduct of a police officer on any particular day. If an officer is a substance abuser, there may be a deterioration in that officer's job performance; there may be an increased frequency of incidents involving excessive force; there may be physical manifestations such as a runny nose or there may be increased absenteeism and tardiness which may be the result of long abuse which appears over a period of time. However, on a day-to-day basis it may be difficult, if not impossible, for a supervisor to ascertain through close supervision that on a particular day an employee ingested an illegal or controlled substance.

Many of the witnesses who testified in these proceeding made no distinction between drug use, which may not be manifest in officer conduct, as contrasted with drug abuse, which over time may be more likely to surface. Certainly, the comments of the MPA's expert witness, McBay, require that the Arbitrator recognize the different manifestations and tools necessary to detect use and abuse. The Arbitrator is ever mindful in the analysis which follows that drug testing through urinalysis may detect the presence of a subject drug, but will not answer the question as to whether the presence of the drug has impaired the performance of an officer. In this regard, the Arbitrator considers the appropriateness of the tool, urinalysis, to accomplish the task set out for it by the proposal of the City or the MPA.

The City did not introduce into evidence the precise cost of implementing its drug testing proposal. Accordingly, cost is not an issue before the Arbitrator. The Arbitrator assumes, for the purposes of this Award, that the City has the resources and is willing to expend the resources necessary to accomplish its testing proposal.

It is important to note what is not at issue in this case and which lies outside the jurisdiction of the Arbitrator. Alcohol abuse is subject to a different departmental policy other than the Article 64 drug testing program. Neither the Employer nor the MPA presented any proposals on

alcohol abuse. That subject is specifically excluded from the jurisdiction of the Arbitrator. The Award which follows does not apply to alcohol abuse.

THE SUBSTANTIVE PROPOSALS OF THE PARTIES

Introduction

Article 64 appears in three of the parties' collective bargaining agreements. Accordingly, the City need not establish a quid pro quo for expanding the existing drug testing program. Since it is the City which proposes to expand its drug testing program, it must demonstrate the need for a change.

RANDOM TESTING

The central element and focus of the City proposal, Appendix A, is random drug testing. The City proposes that the frequency of such random tests, the size of the population to be tested at any particular time and the timing of the testing should all lie within the sole discretion of the Chief of Police. Furthermore, the City emphasizes that on each occasion that it tests, the pool from which those individuals who are to be selected for testing shall include: all law enforcement officers who are covered by the collective bargaining agreement; supervisors and all upper management personnel inclusive of the Chief. An officer shall not be removed from the pool as a result of the officer's selection for testing on any one or any number of occasions. Accordingly, it is entirely possible, under the City's proposal for random testing, that a particular officer may be subject to testing on each occasion that testing occurs, while others are not tested, at all. Certainly, the odds of that happening are remote, but under the City's proposal it is certainly a possibility.

The stated purpose of the City's expanded drug testing proposal is to discourage officers from using/abusing illegal drugs and other controlled substances.[6] It attempts to root out and terminate the employment of officers who are users/abusers of drugs. It does not propose rehabilitation as the first response to those officers detected as users and/or abusers of drugs.

Under the City proposal, the Chief of Police has the discretion to impose discipline up to discharge for those detected as users/abusers under the random testing program, or to permit an employee to participate in rehabilitation rather than subject that officer to charges which may result in the termination of the officer's employment. Chief Arreola testified that termination of employment is the penalty which he, as Chief, will generally impose on those detected as users/abusers of drugs through the random testing program.

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[6] Unless specifically stated otherwise, reference to drugs is to illegal drugs and to controlled substances taken without a legitimate prescription.

Need

The need to expand the drug testing program to incorporate random testing is the pivotal arbitral criterion, in this case. After Skinner and Von Raab, the courts do not require the employer to demonstrate the existence of a drug problem in a municipality's police department to validate a random drug testing program.[7] Again here, the issue is not the legal validity, the constitutionality, of random drug testing. The issue before the Arbitrator is whether the City has demonstrated a need to change by expanding its existing drug testing program.[8]

Deputy Inspector Franklin, the officer in charge of the Internal Affairs Division, testified that since 1985 five police officers have been discharged for criminal convictions relating to drugs. An additional five were discharged as a result of drug use. He also testified that, since 1985, an additional 16 officers had criminal and/or internal investigations regarding use of drugs or involvement with drugs pending at the time they resigned.

The MPA strenuously objected to Franklin's reference to 16 officers whose resignations were the result of their alleged involvement with drugs. The MPA introduced data it culled from the "Loudermill" notices it receives from the Chief when the Chief believes that he may discipline an employee. Association Exhibit 31 shows that in 1992 and 1993 through March 1993, the Department did not discipline or contemplate discipline against any officer for drug use. In 1991, one officer resigned as a result of an investigation pointing to the officer's possible use of drugs. In 1990, one officer was charged with delivery of drugs. Another was charged with the use of drugs and that officer refused to stand a drug test. In 1989, one

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[7] Brown v. City of Detroit, 715 F. Supp. 832 (E.D. Mich. 1989).

[8] The U.S. Supreme identifies the need for a warrantless seizure of urine as an important premise in its fourth amendment analysis in the two lead cases on point Skinner and Von Raab, supra. Justice Kennedy, writing for the majority details at great length the need for the railroad administration to study the causes of train wrecks and accidents as a justification of the governmental need to test both urine and blood for drugs and alcohol. The Court refers back to prior studies by the railroads concerning drug use of its employees. The Court notes that the order for a member of the crew to provide a urine sample and the testing of that sample constitutes a warrantless search or seizure. The question before the Court is whether that warrantless search and seizure is reasonable. The reasonableness of the search is established by the Court in Skinner on the basis of the governmental need for the information obtained from these tests, the data concerning the cause of train wrecks. The governmental interest was found to outweigh any expectation of privacy held by the individual members of the train crew.

officer was charged with drug use, and one officer was charged with using drugs to cultivate and obtain sexual favors from a woman. In 1988, two officers were charged but reinstated because of the inability of the laboratory to produce the necessary chain of custody documents relative to the drug tests which it conducted. A third officer was charged with possession, but not the use of drugs, but he was discharged. Accordingly, the Union notes that in the 4 1/2 year period from 1988 through the first quarter of 1993, eight officers were discharged because of their involvement with drug use, possession or delivery; that out of a total potential pool of sworn officers and supervisors comprising 2,074 officers in 1991 and 2,262 in 1992.

Whether the 26 incidents of drug involvement by officers testified to by Deputy Inspector Franklin or the 8 acknowledged by the MPA is used as the number of drug incidents in the Department over the last 4 to 8 years, it is a minuscule percentage, somewhere in the neighborhood of a tenth of one percent of the entire police force that has been investigated and/or suspected of use, possession, or delivery of drugs.

In his testimony, Chief of Police Philip Arreola states two reasons why the City needs to expand the existing drug program with random drug testing. First, he was directed to do so by the Fire and Police Commission. Second, the random testing drug program would provide assurance to the public of the integrity and drug-free nature of the Milwaukee Police Department and its officers. Public assurance would enhance the authority of the individual police officer. Chief Arreola emphasized the need for public acceptance and recognition of the drug-free nature of the Department, inasmuch as, a police officer is vested with the authority, under certain circumstances, to take a life or deprive a citizen of her/his liberty. A police officer charged with these important responsibilities must be fit to meet the challenge of that responsibility and must be accountable for the manner in which the officer discharges that responsibility.

The concerns of Chief Arreola certainly are valid. These are concerns that all chiefs of police have concerning the integrity of their respective departments.

The Arbitrator is mindful of the difficulty which management has in identifying police officers who use and/or abuse drugs. An officer who uses illegal drugs and/or controlled substances may well fail to manifest signs of impairment or engage in conduct which a well trained supervisor may be able to detect. Although many of the witnesses who testified in this arbitration proceeding made no distinction between use and abuse, the Arbitrator has noted and repeats here the legitimate management concern with off-duty consumption of drugs. Simply put, close supervision of police officers <u>may</u> not be adequate to detect drug use. It may be sufficient to detect police officers who are drug abusers. Nonetheless, there is no evidence in this record of the existence of a drug problem in the Department.

The City has not conducted any studies of drug usage in the Milwaukee Police Department to ascertain if a problem exists within the Department. Simply put, the City has failed to show that reasonable suspicion testing is inadequate to weed out the few officers who may have succumbed to drug use/abuse. On the basis of the above evidentiary record, the Arbitrator concludes that the City has failed to establish the need for the inclusion in Article 64 of the 1991-92 Agreement, as extended, the random drug testing program set out in Appendix A.

Comparability

The City points to an internal comparable which supports the adoption of the random drug testing program as set out in Appendix A. The Milwaukee Police Supervisors' Organization (MPSO) has in place the precise drug testing program which the City proposes to include in Article 64 of the 1991-92 Agreement, as extended. The City notes that it is engaged in collective bargaining with the fire fighter unit of 991 employees, to include the same drug testing program in the agreement between Local 215, IAFF, AFL-CIO and the City.

The MPA notes that the City has proposed to AFSCME District Council 48 a reasonable suspicion drug testing program for all employees which it represents. Among those employees are those who operate large pieces of equipment and vehicles over the streets and roads within the city limits.

None of the employees represented by District Council 48 and its appropriate affiliated locals are vested with the authority to make arrests or carry a weapon. The MPA reference to non-sworn officers is given no weight by the Arbitrator. As noted in the Arbitral Premises section of this Award, sworn law enforcement officers with the powers of arrest bring to the employer-employee relationship unique considerations. Foremost among those considerations is the authority of the police officer to make arrest and deprive a citizen of her/his liberty or life. The police officer is charged with the responsibility of enforcing the drug laws. A police officer bears the responsibility to himself, fellow police officers, the Department and the public to be free of the potential corruptive influence which drugs and drug use/abuse may have on the ability of a police officer to fulfill those duties.

Both the City and the MPA presented extensive evidence on external comparables. The Milwaukee suburban law enforcement communities are much smaller in size than the Milwaukee Police Department. Of those only Shorewood has a random drug testing program. The Shorewood Police Department may test no more than five times per year; i.e., that is a total of five drug tests in the entire Department. In the state of Wisconsin, only the city of Green Bay has a random testing program. As noted above, that

program was put in effect in 1991, after Green Bay tested all of its current force.

Both the City and the MPA referred to the Law Enforcement Management and Administrative Statistics, a 1990 survey conducted by the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. Even if the survey data is reviewed in a light most favorable to the City; i.e., without close attention to whether the law enforcement units are represented by a collective bargaining representative and whether or not the drug testing program was unilaterally imposed or negotiated, the survey results reflect that between 1990 and 1992 13 of 32 municipal law enforcement jurisdictions and municipalities with populations in excess of 400,000 have random testing. Eighteen of the 32 law enforcement departments have reasonable suspicion testing. Boston had its drug testing program struck down by the Massachusetts Supreme Court. Without regard to the scope and nature of the details of the drug testing programs surveyed, the above data reflects that less than a majority of law enforcement departments have a random testing program.

In 1989, the International Association of Chiefs of Police and the Office of Justice Programs of the U.S. Department of Justice prepared a model drug testing policy with supporting rationale explaining the various choices made by the two organizations in their compilation and publication of the Model Policy. The following discussion of random drug testing appears on p. 18-19 of the Model Policy, Association Exhibit #44:

> B. Random-testing
>
> The model policy prohibits random drug-testing of sworn officers. For the purposes of this paper, a distinction is made between mandatory and random testing, although courts often use the terms interchangeably to denote drug tests conducted without any basis for belief that the person to be tested has used or is using drugs.
>
> Random drug-testing, as first discussed in Shoemaker v. Handel [795 F. 2d 1136 (3rd Cir. 1986, cert. den. 107 S. Ct. 577] can take several different forms. Obviously, the person to be tested is chosen at random. However, in a classic random test, no attempt is made to test all officers equally over a specified period. While each officer has an equal chance to be tested at each draw, unless the names of those already tested are withdrawn, officers can be subjected to double-testing or no testing. Random drug-testing of law enforcement officers has been almost unanimously prohibited by the courts as an unconstitutional search and seizure,

> and a violation of due process. [Guiney v. Roache, 3 IER Cases 598] As with mandatory tests, random tests are considered a prohibited "general" search because the officer is tested without any actual suspicion of drug use. ... Several courts ruling against random drug-testing of police have noted that they would approve a random testing plan if the department could prove that officer drug use had reached such proportions that testing upon reasonable suspicion, and normal police intelligence and investigative techniques to detect officer drug use were no longer a viable option. [City of East Point v. Smith, 258 GA 111., 365 S.E. 2d 432 1988] (Emphasis in the original) (Bracketed citations inserted by the Arbitrator from footnotes in the original which follow at the end of the text.)

The above analysis from the model policy is given no weight by the Arbitrator. That analysis occurred prior to the Supreme Court decisions in Skinner and Von Raab. Subsequent to the Court's determination of those two cases, the federal courts have sustained the constitutionality of random drug testing programs. The Model Policy's prohibition against such programs is couched in constitutional terms. It is noteworthy, that mandatory testing as part of a physical fitness annual physical exam is approved by the Model Policy. The only caveat provided by the Model Policy for mandatory testing is that the drug test be part and parcel of an annual physical exam which is administered generally throughout a department.

Although the MPSO represents supervision, on balance, the Arbitrator concludes that the internal comparable outweighs the external comparability data and provides slight support for the inclusion of the City's random drug testing program in Article 64 of the 1991-92 Agreement, as extended.

Individual Components of the City's Drug Testing Program-The Fixed Pool

The City proposes that the same pool, inclusive of all approximately 1800 bargaining unit members represented by the MPA, the approximately 300 police supervisors represented by the Milwaukee Police Supervisors' Organization (MPSO), and all other sworn management personnel with the authority to make arrests inclusive of the Chief, serve as the pool of employees from which the number of officers are to be selected for testing. This is the pool which the City proposes be used on each occasion a group of officers are to be selected for testing. This method contains no limitation on the number of occasions that an officer may be tested in a particular year. The City argues that it proposes random testing as a deterrent to drug use/abuse by police officers. If there is a fixed number of drug tests in a specified period of time, an officer will be free from testing once that fixed number of tests have been administered.

However, the luck of the draw, literally, may result in the selection of an officer for testing on 12 occasions in a year, when other officers are not tested, at all. The only basis for the testing is the randomness of the selection process. However, should that officer object to the intrusive nature of the search and seizure of his bodily fluids on the basis of the fourth amendment, the only basis for that seizure is randomness. What is the distinction between randomness and arbitrariness under those circumstances? The Arbitrator believes that under those circumstances the officer is not the object of a deliberate attempt to subject him to intrusive searches. However, the randomness of the testing process would be found to be arbitrary under those circumstances. There is a need for a check on the number of tests to which an officer may be exposed. In the City of Green Bay, where all officers were subjected to mandatory testing in 1991; i.e., all officers were tested in that year, only 10% of the officers are selected from a pool and tested, and an officer may be tested annually no more than three occasions.

The City proposal is unsupported by the evidence. No need for this kind of deterrent has been shown. In addition, even those departments with random drug testing programs in place, limit the number of occasions which an officer may be tested in one year's time.

Frequency of Testing

Under the City proposal, the Chief establishes the frequency rate for testing and the timing of the testing. Certainly, there is no problem with the Chief's selection of particular dates when testing is to occur. The frequency of testing proposed by the City is not fixed. The City argues that the Chief should be able to reduce the frequency of testing, if after some experience under the program, few officers test positive. The Arbitrator finds this City proposal undermines the intent and purpose of its proposal.

The City proposes random drug testing as a deterrent. The City did not introduce any expert testimony as to the testing frequency necessary to deter officers from using/abusing drugs. Officers must be convinced of the likelihood of being tested, for the testing program to serve as an effective deterrent.

Health and Safety Coordinator Karfonta testified that the testing program contemplates testing all members of the police department, collective bargaining unit members, supervisors represented by the MPSO, and management inclusive of the Chief at least once every three years. Chief Arreola indicated in his testimony that he believed a majority of the force would be subject to testing over a three year period. The City gives little account to the possibility that officers may be tested one, two, or three times when other officers may not be tested at all. There is no sampling process or division of the police force into sub-units to insure that all officers are tested over a certain period of time.

If the program is to serve as a deterrent, then testing should be at a rate sufficient to test all officers in relatively short time span, one or two years. Otherwise, officers may decide that the risk of detection through testing is so remote, that they may continue to use drugs. The City has failed to make its case in this regard. If anything, vesting the Chief of Police with the authority to increase or decrease the frequency of testing serves to undermine the deterrent purpose of the random testing program.

At this juncture, it must be emphasized that the City does not propose this testing program as a basis for establishing police officer fitness for duty. The drug test is not a part of an annual or semi-annual physical examination. The random drug testing program does not supplement a mandatory drug testing program which is associated with and part and parcel of an annual physical examination of police officers. The random drug testing program proposed by the City is one which is geared as a tool to deter and to detect users and abusers of drugs.

Based upon the above discussion, the Arbitrator concludes that the random drug testing program as proposed by the City would not serve as a deterrent to drug use.

Summary

The Arbitrator finds that the City has failed to establish that drug use among sworn officers represented by the MPA has reached a level that it is necessary to employ random drug testing, as proposed in Appendix A, to serve as a deterrent to drug use/abuse by officers.

In addition, the City has failed to establish that a majority of other police departments in the immediate area of Milwaukee, in the state of Wisconsin, or nationally among municipalities with populations in excess of 400,000 use random drug testing. The internal comparable, the acceptance of random testing by the MPSO, offsets the external comparability data. However, the comparability criterion is given less weight than need. Each municipality must consider the appropriateness of a random drug testing program in light of the unique circumstances of that municipality. If drug use among police officers is such that there is a need for random drug testing, then the fact that other municipalities without that need do not employ such random testing should be given little weight. Here, the reverse is evident. There is little drug use; consequently there is little need for random testing. In addition, the fixed pool from which officers are selected for testing, injects an arbitrary quality into the program. The City's proposal to allow the Chief to vary the frequency of testing, undermines the deterrent effect of the City's proposal. Accordingly, the Arbitrator rejects and does not include the random drug testing program as reflected in Appendix A, pages 2-3, I.B.6. a–f in Article 64 of the 1991-92 Agreement, as extended.

Union Proposal on Reasonable Suspicion

The Arbitrator considers Appendix B, at III. on pp. 3 and 4, to be the Union's proposal to expand the existing reasonable suspicion testing in effect in the City of Milwaukee. The essence of the Union proposal which differs from the existing reasonable suspicion policy is found in the following sentence in III.A., as follows:

> All facts and/or circumstances shall be documented and sealed prior to a reasonable suspicion drug test.

The Union mandates that the facts and circumstances which give rise to the reasonable suspicion identified by two supervisors must be reduced to writing, whether or not the supervisors have an opportunity to reduce those facts to writing. The Union points to no other department which requires the written codification of reasonable suspicion, facts and circumstances in a writing before an officer is sent for a drug test.

Chief Arreola testified that he expected supervisors to note and be prepared to recount to the Internal Affairs Division the basis for their suspicion that an officer is using or abusing drugs and should be subjected to a drug test. To the extent that supervision had an opportunity to reduce those observations to writing and failed to do so may well impact upon the weight to be given the supervisors' account by the Chief and by the Fire and Police Commission, should the Chief act to discipline the officer.

Supervision would be well advised to reduce to writing the facts and circumstances upon which it concludes that an officer should be tested. However, to require that it be sealed suggests that supervision cannot be trusted to perform this important task. There is not a scintilla of evidence in this record to suggest that supervision is incapable of performing the task required of it in recounting objective facts as a basis for their reasonable suspicion that a police officer is using or abusing drugs and should be subjected to a drug test.

Association Exhibit #44, the Model Policy referred to above, does not contain the requirement that the facts and circumstances be documented and sealed prior to the ordering of a reasonable suspicion drug test. The Union placed in evidence a proposal by the League of Martin, an organization of black police officers employed in the Milwaukee Police Department. The League of Martin proposes that the Department establish a mandatory drug testing program for all officers as part of an annual physical exam. This proposal includes reasonable suspicion testing, but it does not require the supervisor to write out the basis for the suspicion and seal it.

In the extensive evidentiary record established here, there is no evidence that any Milwaukee suburban law enforcement department, large departments in the State or those in municipalities with populations in

excess of 400,000 require the written documentation and sealing procedures proposed by the MPA.

The Union has failed to establish the need for its proposed documentation procedure for a reasonable suspicion drug testing. Accordingly, it is rejected.

The Union proposes as part of its reasonable suspicion drug testing program, that the Department be permitted to drug test upon reasonable suspicion when:

> 1. Department officers may be required to submit to a drug test which complies with Section V of this Agreement, [Section V of the Union's drug testing program which is analyzed, infra] when the department has a reasonable suspicion that said officer is currently impaired by a controlled substance illegally ingested. (Emphasis added)

The Union proposal connects reasonable suspicion to impairment when its own expert, McBay, testified that urinalysis will not provide the factual basis for inferring impairment from the presence of drug metabolites in the urine. The drug testing program proposed both by the Union and the City, urinalysis of a urine specimen, will only document the presence of certain substances in the urine.

The Union proposal, whether or not it intended to do so, would permit an officer who uses drugs to avoid discipline if that officer can show that his job performance was not impaired even though the officer's urine tested positive for the presence of drugs. As noted above, the Arbitrator finds that there is a legitimate employer interest in detecting off-duty drug use, even absent evidence of abuse, which may serve as a basis for the imposition of discipline. The use of drugs may well serve to undermine the integrity of the job performance of a police officer. Drug use, even in the absence of abuse, can expose a police officer to corruptive pressures which may well impact upon the police officer's job performance. Finally, the Department, fellow police officers, and the public have a right to expect that police officers will comply with the law and refrain from using and/or abusing drugs.

Finally, the Union proposes in III.A.3. in Appendix B, that an officer who is in uniform at the time she/he is ordered to submit to a reasonable suspicion drug test be afforded ample time to change into civilian attire. The purpose of this proposal is to insure that the technician collecting the sample is unaware that the donor is a police officer. However, the Department may feel it is necessary to send another officer or supervisor to escort the officer suspected of drug use or abuse to the specimen collection

site. The mandatory nature of the proposal is changed by the Arbitrator to permit the Department to provide an officer with sufficient time to change to civilian attire, if it is reasonable to do so under the circumstances. However, failure to permit an officer to change out of uniform shall not invalidate any test conducted while the officer is in uniform.

With the exception of the inclusion of the Arbitrator's modification of III. A. 3., concerning civilian attire, the balance of III. as proposed by the Union is rejected and it shall not be included in the expanded drug testing program of the City.

Summary

In the above discussion, the Arbitrator has rejected the City's proposal for inclusion of a random drug testing program as part of an expanded drug testing program. Similarly, the Arbitrator has rejected the Union's proposal to expand the existing reasonable suspicion drug testing program as reflected in Memorandum 90-109 by inclusion of III. at pp. 3 and 4 of Association Exhibit No. 1, with the exception of providing the opportunity to an officer to change into civilian attire prior to proceeding to the collection site where circumstances and time permit. Accordingly, the City's reasonable suspicion drug testing program as reflected in Memorandum 90-109 is not expanded by either the City's proposal for random drug testing or the Union's proposal in III. A.3.

AGREED UPON OCCASIONS FOR DRUG TESTING

The Arbitrator now turns to consider the specific events or those work assignments for which both the City and the MPA propose the expansion of the existing drug testing program. In this section of the Award, the Arbitrator identifies those areas of agreement. The proposals fall into two categories. Those in which an event is precipitates the need to test. Promotions and leaves of absence fall into this category. The second provides for testing officers of a certain status or assignment. the testing of probationary officers and those in sensitive assignments fall in this second category. The differences between the two proposals are discussed and a determination is made as to which proposal is to be included in Article 64 of the 1991-92 Agreement, as extended.

Promotions

Both the City and the MPA provide for testing of officers during the life of a promotional list. The proposals of the parties differ to a minor degree. The MPA lists those positions which it believes are promotional. The City does not spell out the positions which it deems to be promotional. The language of the Association Exhibit #1, at the bottom of page 6, at a. and the list which appears on page 7 shall be incorporated in Article 64.

Language shall be added to the expanded drug testing program which provides that the inclusion of the list of promotional positions shall not prevent the Department from eliminating a listed classification or reducing the number of positions in a particular classification. Furthermore, the listing of the above classifications shall not prevent the Department from creating new classifications which may serve as promotional positions for some incumbent officers. This additional language reflects the intent of the parties.

Officers who are promoted to newly created classifications are tested just as officers are tested who promote to existing classifications. The intent of both parties is to test all officers who are subject to promotion.

The City's proposal that the promotion shall be contingent upon passing the drug test shall be incorporated in this portion of the drug testing provision in Article 64 of the 1991-92 Agreement, as extended.

The Union proposes, and the Arbitrator accepts this proposal, that drug testing for promotions occur no later than two weeks prior to "the actual expected promotion date". The term "the actual expected promotion date" is defined in the record by President Debraska. The Chief of Police recommends promotions to the Fire and Police Commission. The receipt of the Chief's recommendations by the Fire and Police Commission at one meeting and the action by the Fire and Police Commission at its next regular meeting is the basis for the Union's proposal that testing be completed no later than two weeks prior to the second Fire and Police Commission meeting on the Chief's recommendations for promotion. This two week provision permits the completion of testing prior to the effective date of a promotion. However, if for some reason the testing is not completed, the language in the Agreement must be clear that the promotion is contingent upon the passing of the drug test. This procedure provides for the completion of the testing process prior to a promotion. It also establishes that a promotion is not finalized until the testing process is completed.

Returning From a Leave of Absence

The City and MPA agree that police officers returning from a leave of absence may be tested. However, that is the limit of their agreement. There are two major areas of disagreement relative to drug testing an officer on the occasion of the officer's return from a leave.

The first issue concerns the length of a leave which will precipitate drug testing. The City proposes to test officers upon their return from a leave of absence without pay or disciplinary suspension in excess of 90 days. The MPA would permit such testing of officers returning from a leave of absence in excess of 365 days.

Is the officer returning from a leave on active duty when directed to test? This the second issue separates the parties. It is not an academic question. The availability of Section 62.50 protection for those who may test positive on a drug test hinges on the answer to this question.

With regard to the first issue, the rationale for testing any officer who is returning from any length of a leave, no matter what the purpose of the leave, is in recognition of the officer's absence during the leave from rigorous supervisory scrutiny, such as, daily roll call. The Arbitrator agrees with the Union concern, that even through the use of sick leave, it is possible for a young officer without much of a sick leave bank to be on a family leave which may extend to 90 days. On the other hand, the MPA proposal to test only after an individual is on a one year leave affords little assurance that an individual on leave for an extended period of time has not been exposed to drugs and is ready to return to work. The leave of absence provision at issue, here, touches more upon the fitness for duty approach rather than the deterrent effect of drug testing. Both the City and the MPA proposals contemplate one drug test at the point that the employee returns to work.

The Union proposal to test after a one year leave may effect only one or two officers in any one year. Under the Union proposal, individuals on lengthy leaves of ten or more months would not be subject to testing. The Arbitrator rejects this porion of the Union proposal.

The Arbitrator has modified the City proposal to afford the drug testing for a member who returns from a leave of absence that exceeds 120 consecutive calendar days. It is less likely that leaves of that duration will require those on a family leave to test. However, should an individual be on a leave of absence for in excess of 120 days on a family leave, the individual will be required to test. There is nothing in the Wisconsin Family Leave Act, a copy of which was placed in evidence, which precludes the testing of an employee upon their return from a leave.

As for the second issue, the Union proposes that the officer be placed on active duty before the drug test is administered. If the test is positive and the Chief recommends discharge, the officer would be suspended with full salary under the procedures of Section 62.50 of Wisconsin Statutes.

The City proposes that testing occur before the officer is on active duty. The City maintains that an officer who returns from a leave with drugs in her/his system should not be permitted to collect his/her salary under Section 62.50 of the statutes pending appeal of any discipline which may be imposed by the Chief. In the City's view, an officer on a leave of absence testing positive will have that leave extended to cover the appellate process, should there be an appeal of the discipline imposed by the Chief.

With regard to internal comparables, Chief Erdmann of the fire department testified that he reviews the reason for a leave before he makes the decision to test. It is unclear from his testimony whether the employee on leave is placed back on the payroll or not. The length of the leave does not necessarily lead to a decision by Chief Erdmann to order a fire fighter to take a drug test.

In the Milwaukee Police Department an officer on an unpaid leave of absence is off the payroll. The parties must bargain over the conditions of employment which will be in effect for an officer when that officer returns from a leave. Such negotiations between the MPA and the City occur for each officer returning from a leave. The comparability data concerning other jurisdictions is given little weight by the Arbitrator. Milwaukee has a unique relationship with employees on extended leaves of absence. They are off the payroll. The conditions of employment under which they return must be negotiated.

The Arbitrator finds that the language of state statute 62.50 governs the determination of the question whether the officer returning from a leave is on or off duty. Section 62.50 provides as follows:

> Sec. 62.50, Wis. Stats.
>
> . . .
>
> **(18) Salary during suspension.** No chief officer of either department or member of the fire department may be deprived of any salary or wages for the period of time suspended preceding an investigation or trial, unless the charge is sustained. No member of the police force may be suspended or discharged under sub. (11) or (13) without pay or benefits until the matter that is the subject of the suspension or discharge is disposed of by the board or the time for appeal under sub. (13) passes without an appeal being made.

The statutory purpose is to afford police officers the benefit of receiving salary while they appeal a disciplinary action taken against them by the Chief of Police. The Arbitrator is unable to rationalize why a police officer charged with a heinous crime would be entitled to the protection of Sec. 62.50(18), whereas an employee who tests positive upon returning from a 121 day leave for the presence of THC metabolite (marijuana) would not be afforded that protection should the Chief of Police decide to terminate that officer's employment. The Arbitrator finds that a decision in favor of the City on this point would be contrary to the explicit intent of Sec. 62.50(18) of the Wisconsin Statutes.

Probationary Officers

Both the City and the MPA propose drug testing of new recruits, probationary officers, during the 16 month period of probation. They agree that this provision for testing does not apply to officers serving a probation as a result of a promotion. The testing of applicants for positions in the Milwaukee Police Department, pre-applicant testing, is outside the scope of this Arbitrator's jurisdiction, in this case.

President DeBraska testified at Volume 6 (March 31, 1993 hearing), page 39, of the transcript that the frequency of testing, was at the discretion of the Chief of Police. The Arbitrator understands the Union proposal is to limit any probationary employee to no more than one drug test, but the Chief of Police has the discretion to fix the time when the test is to be administered.

In its proposal, the City increases the frequency of random testing for probationary officers. In the discussion above, the Arbitrator has rejected the inclusion of random testing in Article 64 of the Agreement. In the case of probationary officers, the pool of officers to be tested is limited. Under the City's random testing proposal as it would apply to probationary officers, the number of occasions each recruit will be tested, the number selected for testing and the timing of such testing would be left to the discretion of the Chief.

Which proposal, the City's or the MPA's, is to be included in Article 64?

In recent years, the Milwaukee Police Department has accepted applications for its police officer positions from individuals who acknowledge on their application that they have in the past used drugs. Obviously, if they admit to current use, their applications are not accepted. However, previously, applicants who admitted to drug use in the past were not accepted for police officer positions. The application is used by the Department to conduct investigations to assure itself that it is not hiring individuals who are users and/or abusers of illegal drugs or controlled substances.

In 1992, the Department conducted four recruit classes with an enrollment totaling 224 recruits. Each recruit class was conducted over a different period of time during the year. From the data submitted in the record, the recruit classes of 1992 generated a total number of recruits for that year which is much larger than the recruit classes of other years.

Association Exhibits 8-10 contain data on drug testing in other City departments, suburban police departments, and other large police departments in the state of Wisconsin. In each of the categories, the evidence demonstrates that few departments test probationary employees

during probation. However, the departments' acceptance of applications from individuals who admittedly have used drugs in the past require that testing be carried out during the probationary period to insure that drug-free officers enter the ranks of tenured officers. The comparability data presented by the Association has less import, in this case, where both the proposals of the City and the MPA provide for testing. The real issue before the Arbitrator is the number of occasions that probationary officers may be tested.

The record evidence demonstrates that new recruits, probationary officers, are under close scrutiny and supervision. They are evaluated on a monthly basis. They must stand roll call on a daily basis. Their conduct is closely monitored on a day-to-day basis. Nonetheless, the testimony of the MPA's noted expert McBay indicates that measuring impairment by way of a drug test may not be possible. The conduct of a casual drug user may not manifest itself even under the closest supervision. For the oft stated reasons recounted above by the Arbitrator, it is important that only those officers who are "clean" pass probation.

One test in a period of 16 months is not adequate to insure that a probationary officer is drug free. Furthermore, it certainly does not serve as a deterrent. An officer tested in the first month of the 16 month probationary period may feel free to engage in casual consumption of drugs without any fear of detection. The Union proposal of one drug test during the probationary period is ineffective. The Arbitrator rejects it.

The seizure and testing of an individual's urine is intrusive, whether probationary officers or other officers are tested. The intrusiveness of the drug testing is not diminished by the employment status of the officer. In balancing the governmental interest against the privacy interests of the individuals who are to be tested, the courts look to the expectation of privacy of the category of individuals to be tested. The Model Policy created by the International Association of Chiefs of Police with the substantial legal and technical input of the Department of Justice recognizes the diminished expectation of privacy of probationary employees. They are already subject to very close scrutiny. Testing is one further aspect of that close scrutiny.

How many times may a probationary officer be tested? Shall the selection of probationary officers for testing be made through random testing?

The timing of such tests and the number of probationary officers tested on any particular day is at the discretion of the Chief. This discretion is agreed to by both the MPA and the City.

There is a limited number of recruits in any particular class and during any particular point in time there is a limited number of probationary officers. The Chief may decide to test all probationary officers, at one time.

However, in 1992, the number of probationary employees was at least 224. The City proposes random testing as the method of selecting those to be tested. All probationary officers comprise the part of the pool of officers to be tested. It may result in the testing of one probationary officer on any number of occasions, while other probationary officers are not tested at all. As noted above, this result is arbitrary.

The Arbitrator accepts the City's argument for the implementation of an effective deterrent to drug use/abuse of drugs by probationary employees. The City must be able to represent to "tenured officers" that the probationary officers with whom they are working are "clean". It is difficult to root out an officer with a drug problem after that officer passes probation. For that reason, the Arbitrator concludes that the Chief may test probationary officers as many times as he deems appropriate.

The Arbitrator modifies the random selection proposal of the City to provide for a "range of testing". To avoid the arbitrary selection of one probationary officer for testing on several occasions while others are not tested at all, no probationary officer may be tested more than one occasion than all other probationary officers. For example, if a probationary officer was tested once, that officer could not be tested again until all other probationary officers are tested. If all officers had been tested once, then any probationary officers may be selected for testing a second time. The Department need not announce the range of tests as it stands at any particular time. The Department shall take appropriate steps to insure that officers who are randomly selected for testing with greater frequency than their fellow probationary officers shall not be tested except within the range of testing specified herein.

The Arbitrator does not invalidate a test administered outside the "range of testing" described above. During a probationary period the Department may terminate the employment for any reason. An arbitral provision that an "out of range" test be invalidated, will not undo the self-destructive act drug/abuse of an officer just beginning a career in law enforcement. Consequently, the Arbitrator does not invalidate the results of an "out of range" test which is administered to a probationary officer.

The integrity of the testing process is dependent upon the willingness of the Department to comply with its own rules.[9] The Arbitrator directs that the Department prepare a semiannual report in which it will indicate

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[9] Even simple error in administering drug testing to probationary officers, in violation of the "range of testing" set out in this Award, may serve to undermine the integrity of the Department, in the eyes of its newest officers. In the Arbitrator's view, the cynicism which may be engendered by even the most innocent error of testing probationary officers at times when they should not have been tested is sufficient to insure that the Department will test within the "range of testing".

the number of probationary officers in each recruit class who have not been tested, and the number who have been tested, on one, two, three occasions, etc. Names of probationary officers shall not be used in the report. As this report is prepared, it shall be provided to the Union. This will permit the Union to monitor Departmental compliance with the "range of testing" for probationary officers.

The Arbitrator accepts the Union limitation that drug testing of any probationary officer occur two weeks prior to the completion of the 16 month probationary period. As in the case of promotions, this will insure that the final drug testing process is finished and results obtained prior to the completion of an officer's probationary period.

Sensitive Assignments

There is little difference between the parties as to the units which constitute sensitive assignments. The City's listing is more inclusive. It includes members of the tactical squad other than riflemen who should be tested under the drug testing program. The City proposes testing those members in the property control section who are directly involved in the custody and handling of illegal drugs. The MPA limits such testing to the custodian and assistant custodian of property and stores. The Arbitrator concludes that the City listing of sensitive assignments is the one which is to be included in Article 64 of the 1991-92 Agreement, as extended. Where the MPA and City lists differ, the City's includes those in assignments in which an officer bears greater exposure to drugs.

Both the MPA and the City propose testing officers in sensitive assignments. The MPA proposal limits the testing of individuals in sensitive assignments to no more than twice per year. The MPA would not permit the Department to test until a member is in a sensitive assignment for at least 60 days to demonstrate that it is a permanent assignment. The City proposal increases the frequency of testing under its random selection program.

For those officers in sensitive assignments, both the City and the MPA agree that they should be tested. Consequently, evidence concerning comparability or need for testing need not be discussed.

Temporary assignment to one of the units designated as a sensitive assignment should not occasion drug testing. Again, it must be remembered that officers directed to test are not subject to any suspicion of wrongdoing. The testing process is intrusive. It is a seizure. For it to be reasonable, there must be a purpose to the test. The Arbitrator agrees with the MPA that the assignment to a sensitive assignment should not be carried out for the sole purpose of forcing a member to take a drug test. The drug testing of an officer temporarily assigned to one of the listed units shall be a basis for invalidating the results of such test.

In the discussion above, the Arbitrator rejects the random drug testing program as proposed by the City. The question remains as to how officers in sensitive assignments are to be selected for drug testing.

The Arbitrator directs that the same "range of testing" process described above to select probationary officers for testing be employed for officers in sensitive assignments. The Chief of Police may determine the sampling pool from among officers in the each of the sensitive units listed, or he may direct that all officers of a particular unit be tested. However, in order to avoid the situation in which random testing becomes arbitrary testing, the Chief may direct that any officer of any particular unit be tested one occasion more than all other members in any particular unit. For example, the Chief may decide to test one sensitive unit more frequently than another. The members in the Vice unit may be tested more frequently than those in the Canine unit. However, within the Vice unit, the Chief may not test one officer two times when there are officers in that very unit who have not been tested at all. Again, the variance is one.

The Chief need not announce or make known the rate of testing in these sensitive units. The Department shall prepare a frequency of testing report similar to the one described for probationary officers. The report is to be provided to the MPA semiannually to permit the Union to monitor the testing of those in sensitive assignments.

Unlike the testing of a probationary officer which is "out of range", should a non-probationary officer in a sensitive be tested outside the range provided herein, then that shall invalidate the results of that test. There is a far stronger employer-employee tie and relationship than in the case of the probationary officer. A "tenured officer" may test positive while in a sensitive assignment due to the increased exposure to drugs and the drug culture. The Department placed the officer in the situation of increased exposure to drugs through the sensitive assignment. This positive test may result after many years in the Department. For these two reasons, the Arbitrator invalidates an "out of range" positive test to an officer in a sensitive assignment.

The Arbitrator has not selected the MPA proposal to test members in such assignments twice annually. It may serve as an adequate deterrent in some units, but not in others. This is an occasion where for the protection of officers assigned to sensitive assignments is important. Frequent testing and a testing schedule which is not known in advance may maintain the deterrent effect sought by the City. It may serve as another tool to dissuade those in assignments close to drugs, to refrain using/abusing drugs.

AN OCCASION FOR TESTING AND REHABILITATION ON WHICH THE PARTIES DISAGREE

Rehabilitation

The MPA proposes a 30 day window in which officers are to be afforded the opportunity to voluntarily submit to rehabilitation. The written text of the proposal provides for the assignment of such individuals under Article 62 of the 1991-92 Agreement to Assignments Consistent with Employee's Medical Capabilities, hereinafter ACEMC assignments. Under the Union proposal, members who voluntarily submit to an inpatient rehabilitation treatment program, not to exceed 30 calendar days, shall receive compensation and fringe benefits as if working and shall be required to provide medical verification of fitness for duty. These officers shall be subject to testing at a frequency rate to be determined by the Chief in the year following the return of that officer to duty.

An officer who chooses to be rehabilitated, or whose insurance program directs that rehabilitation occur on an outpatient basis, is to be assigned an ACEMC assignment for one calendar year during which period the officer may be tested as frequently as directed by the Chief. The Union proposes that the ACEMC assignment made to an officer who comes forward for rehabilitation during the 30 day window period shall not be to a position which requires that officer to carry a gun or operate a Department vehicle.

Since the Arbitrator has rejected the City's random testing program and the Union's reasonable suspicion drug testing program, the primary drug testing program for the majority of members of the Department is the existing reasonable suspicion drug testing program embodied in Memorandum 90-109, quoted above. As a result, the MPA proposal for a specific 30 day window is not only unnecessary but would subject those officers who come forward under the 30 day window to a more restrictive environment than the current program presently in effect. It is rejected.

At present, a member may seek advice and preliminary counseling from a POST member. The POST member may refer the officer to the City's Employee Assistance Program, hereinafter EAP, for evaluation and for placement in an appropriate drug rehabilitation program. Under these procedures, Departmental management would not know that the employee is participating in an employee assistance program. In this manner, officers are encouraged to participate in the EAP.

The increased incidence of testing, for example the testing of those in sensitive assignments, presents the problem of how officers in the City's EAP program will be treated if they test positive. For example, an officer in a sensitive assignment acknowledges his drug dependency in response to the deterrent effect of the expanded testing program set out in this Award. What is the effect of her/his participation in the City's EAP when she/he tests positive. This scenario was the subject of the following dialog between

the Chief and the Arbitrator in the arbitration hearing:

> Q: (the Arbitrator) If ... somebody subjects themselves to the Employee Assistance Program and is participating in that program and is tested positive, do you have any sense of whether that person will be terminated if that program were in place? In other words, the person recognizes the problem, goes to EAP and then while he is in or she is in the EAP program they get tested and it shows up positive.
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> A: (by Chief Arreola) Well, that's an interesting set of facts. I think obviously if someone seeks rehabilitation before being subject of this program, that becomes a private matter between he and whatever program they're involved in, and also has to do with the public disclosure. If as a result of being subjected to this process it is publicly disclosed that the individual is addicted or abusing certain controlled substances or illegal drugs, then the public issue has to be reviewed.
>
> I know that this is a stretch, but given the set of circumstances that you propose that the individual is presently involved in a rehabilitation program, I think what would have to be taken into consideration as discussed with Mr. Murray is the merits of that individual case. If, for instance, you were notified to appear for random drug testing today and on the way down you called the EAP and said I've got a problem, I need help, obviously that is not going to be looked on very persuasively by me. On the other hand, if you are involved in a program for some duration, hopefully by that time any evidence of drug abuse should be gone, so it's difficult to say at this point.

The Chief must retain the broad discretion to discipline. There are myriad reasons why the Chief may decide to terminate the employment of an officer rather than permit him to complete an EAP should that officer's use or abuse of drugs be discovered as a result of the testing program. For example, the officer may have participated in an EAP in the recent past. After a period of being "clean", the officer may have succumbed and returned to using or abusing drugs.

The Arbitrator deliberately chooses to discuss this issue of rehabilitation just after the analysis of sensitive assignment testing. Those in sensitive assignments may well be officers with long and distinguished careers with the Department. The officer may have acquired the drug problem while in the sensitive unit. The need for a rehabilitation option has greater moral force. There must be a viable outlet for the deterrent effect of the City's drug testing program. If an officer with a drug problem cannot preserve her/his job in the City's Employee Assistance Program, then the only avenue afforded the officer is resignation from employment, or if caught, termination of employment. With that limited choice, the officer may decide to take his chances. The deterrent effect of testing is lost. An officer who is a drug user/abuser must be provided with an opportunity to kick the habit.

At the "Loudermill" meeting with the Chief, she/he may advise the Chief of the officer's participation in the City's EAP. Similarly, if an officer is directed to test under the drug testing program put in place through this arbitration proceeding, the officer may apprise the Chief of the officer's participation in the EAP. The Arbitrator directs that an officer who is in EAP prior to the Department's discovery of the officer's drug problem through drug testing and is not tested as a result of reasonable suspicion testing, may be afforded the opportunity to continue the rehabilitation process in EAP. However, the Chief may decide to recommend discipline including discharge of the officer in EAP prior to testing positive on a without suspicion test. In that case, the Chief shall explain in the charges filed why discipline is imposed rather than permitting the employee to complete the EAP.

Officers who are tested under the existing reasonable suspicion testing program are not afforded the opportunity for rehabilitation. The Arbitrator does not alter that arrangement. The provision for rehabilitation is afforded only to those who are tested under the expanded drug testing program and who recognize their drug problem by voluntarily entering the City's EAP. In addition, officers who are ordered to test under the reasonable suspicion testing program manifest signs in their conduct and work performance that drug use/abuse is affecting their work performance.

Under this procedure, the Chief retains his discretion to discipline. Yet, the purpose of the City's EAP is preserved in this environment of increased drug testing. The deterrent effect of drug testing is given a viable outlet in rehabilitation. The increased incidence of testing may well encourage officers to participate in EAP or run the real risk of termination of employment if drug use or abuse is discovered through drug testing.

Incidence of Death or Great Bodily Harm

The parties intend the statutory definition of the phrase "great bodily harm" to apply here, as well. Chief of Police Arreola testified that the

discharge of a weapon by a police officer or a shooting which resulted in the slight wounding of a citizen or an officer would not result in the drug testing of the officer discharging her/his weapon. However, if a marksman is ordered by a supervisor to shoot a citizen which results in a death, everyone involved in the shoot, including the supervisor who ordered it, would be required to test.

The City and the MPA disagree on the issue of whether an individual should be tested upon the occurrence of such an incident. The City takes the position that an officer should be tested. The MPA strenuously argues that the officer should not be tested.

The testing procedure at issue is a urinalysis, in accordance with the protocols and for the drugs which are themselves the subject of City and MPA proposals which are discussed, infra.

The MPA presented a substantial amount of evidence concerning the emotional condition of a police officer who is involved in a shooting which results in death or great bodily harm. It not only is a period of trauma, but it is an occasion, in the MPA's view, which requires Departmental sensitivity to the need of the officer for as much Departmental support as possible to get through the trauma. In fact, the Department recognizes this need by providing a debriefing with a mental health professional to an officer who is involved in such an incident. In addition, the Police Officer Support Team Coordinator and/or member is afforded an opportunity to talk with and support the officer under the standard operating procedures for such incidents which were recently adopted by the Fire and Police Commission. In the view of the MPA, testing at that particular moment would be contrary to the other steps taken by the Department to support and help the officer through this traumatic time.

Departmental procedures for officers involved in incidents involving death or great bodily harm also require the officer to participate in and submit to an investigation conducted by a supervisor. The District Attorney's office initiates a review and ruling concerning the incident.[10]

An officer is not only afforded support for the emotional trauma which the officer must endure, but the Department at the same time engages in an investigation to meet the concerns of the public which is to ascertain the cause of the incident. In this regard, the purpose of the testing is the same as the testing mandated under the railroad legislation reviewed by the Supreme Court in Skinner. Health and Safety Coordinator Karfonta testified that the purpose of the test is to remove from consideration any concern that the incident was caused by the officer. It also provides additional data for the Department in its investigation of such incidents. The purpose of

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[10] (Association Exhibit Nos. 25 & 26)

the test is not to treat the officer as a suspect or someone who has violated the law or rules of the Department.

There is great public concern with the causes of incidents which result in death or great bodily harm. The immediate family of the person killed or who has suffered great bodily harm is most interested in learning how the incident came about and why a relative has been killed or injured. Where a testing procedure is in place and employed on the occasion of a promotion, the failure to test in the case of an incident of death or great bodily harm, may lead members of the public to believe that the Department is covering up officer misconduct. If the MPA proposal were adopted the Department's decision to refrain from testing would be in response to the needs of its officers. The governmental interest in obtaining information regarding the causes of such incidents and the need to address public concern whether an officer's judgment was impaired as a result of use or abuse or drugs outweigh the interests of the officer to avoid being tested at a particularly emotional time in the officer's life.

However, it is important to keep in mind the purpose of the test. Its purpose is to detect impairment. Its purpose is to ascertain if the judgment of the officer was affected by drug use. It is not a test to ascertain whether an officer ingested or used marijuana some months prior to the incident. Information concerning past use which has no relationship to the condition of the officer at the time of the incident is information which may be harmful to the legitimate governmental interest of the Department.

A urinalysis will not generate data useful to determine the cause of such an incident. It can provide information which maybe easily misconstrued. It may be used to assess blame, when in fact the officer's judgment was not impaired. A urinalysis not only fails to quantify the drugs in the system of the officer, it does not indicate the exact time drugs were ingested.

A more accurate test from which impairment might be inferred is a blood test. Neither the City nor the MPA propose the administration of a blood test to an officer who is involved in an incident of death or great bodily harm. A blood test and urinalysis were approved by the Court in Skinner. However, the Court recognized the primacy of the blood test in providing valid and useful information as to the quantity of drugs in a person's system at the time the blood test is administered; information which is useful to in the study of train wrecks. The Court approved the urinalysis only as a backup test for situations where facilities were not available to administer a blood test. Such concerns are not present in the City of Milwaukee. There are facilities available to conduct a blood test.

The Arbitrator has not directed that a blood test be conducted for an incident of death or great bodily harm. The record is inadequate as to what the cutoff levels for the subject drugs (such as the five NIDA certified drugs),

must be which would demonstrate or permit one to infer impairment. The establishment of impairment levels as reflected by the quantities of such substances in the blood is a matter of some controversy, according to McBay, the Association's expert witness.

The Arbitrator concludes that drug testing is appropriate and necessary on the occasion of an incident of death or great bodily harm. The appropriate test is a blood test; one administered as close to the incident as possible. However, neither the Association nor the City have proposed such a test. There remain too many questions concerning the implementation of such a test on the occasion of such an incident which preclude the Arbitrator from directing that a blood test be administered on the occasion of incidents of death or great bodily harm. Accordingly, the City proposal for urinalysis is rejected. Article 64 of the 1991-92 Agreement, as extended shall contain no provision for testing upon the occasion of an incident of death or great bodily harm.

Summary

In the above discussion, testing upon the return from a leave of absence in excess of 120 days, serves more as a test of fitness than a deterrent to drug use. If discipline should result from the administration of a drug test to an officer returning from such a leave, the officer shall enjoy the protection afforded by Sec. 62.50, Wis. Stats. The Arbitrator provides for the selection of probationary officers for testing and officers in sensitive assignments on the basis of the "range of testing" principle described above. Testing a member who is involved in an incident which results in death or great bodily harm is not included in the drug testing program awarded herein for the reasons explained above. Rehabilitation is afforded to those who meet two requirements: 1) voluntarily enter EAP prior to testing positive for drugs; 2) the officer is selected for testing under the expanded (without suspicion) testing program.

DRUGS TO BE TESTED AND THE PROTOCOLS FOR DRUG TESTING

The parties do not agree upon which drugs are to be the subject of testing. The MPA proposes that the five drugs listed in the Department of Health and Human Services regulations titled the Final Mandatory Guidelines for Federal Workplace Drug Testing Programs, City Exhibit No. 9, hereinafter the NIDA guidelines, are the drugs for which testing is to be conducted. The five NIDA drugs are Marijuana Metabolites, Cocaine Metabolites, Opiate Metabolites, Phencyclidine, and Amphetamines. The guidelines establish initial and confirmatory test levels for each of the above drugs which are to serve as the basis for a negative or positive test result.

The City proposes that the five NIDA certified drugs listed above be tested in accordance with the initial and confirmatory test levels specified

in the guidelines, but also that five additional classes of drugs be included in the panel of drugs for which initial and confirmatory tests are to be conducted. Those additional drugs are Methaqualone, Barbiturate Group, Benzodiazepine, Methadone, and Propoxyphene. The City introduced the testimony of the Vice President of Operations Kenneth Jaglinski of Bayshore Clinical Laboratories, the lab contracted by the City to conduct its drug testing. He testified that many employers order the panel of ten drugs; the five NIDA certified drugs and the five additional drug groups listed above.

The need for accuracy in the drug testing process cannot be overstated. A false positive for an officer who is "clean" is devastating. Under the existing drug testing program, and the expanded drug testing programs approved by this Award, a positive drug test may in all likelihood result in a recommendation by the Chief that the officer's employment by the Milwaukee Police Department be terminated. If the officer is "clean", there is no reason for that officer's participation in an EAP. The officer's employment will be terminated under circumstances in which fellow police officers and the Department will consider him/her "dirty".

The quality review procedures for NIDA certified laboratories, which are incorporated in the guidelines, provide quality assurance and control inspections and tests for the five drugs listed. Certification of a laboratory is determined on the basis of its ability to test the five classes of drugs listed above. Certified laboratories are sent blind specimens for testing in order to spot check their accuracy. Proficiency scores are provided by the government's certification process to reflect the laboratory's capability to test the five classes of drugs: Marijuana, Cocaine, Opiates, Amphetamines, and Phencyclidine.

Any failure in the procedures or quality control of a laboratory in its testing of drugs other than the five are not subject to the rigorous inspection and certification process described in the mandatory guidelines. The City uses the panel of ten drugs, the five NIDA certified and the five non-NIDA certified drugs listed above, for its pre-employment test of applicants. Although rejection of an application is important to the applicant, the termination of a career after many years of employment must be based on tests which are as accurate as humanly possible. The panel of the five NIDA certified drugs are the subject of testing by agencies such as the FBI and the CIA. The Arbitrator directs that the five NIDA certified panel of drugs serve as the panel of drugs subject to testing under the expanded drug testing program, awarded herein.

Protocols for Drug Testing

The major difference between the MPA and City proposals concerning the protocols for testing relate to the level of detail which the MPA incorporates in its proposal. The Union takes the present text of the Guidelines, and with several exceptions which are discussed, infra, it

incorporates those protocols in its proposal. The City incorporates by reference the protocols for testing set out in the NIDA guidelines.

The inclusion of these procedures as they exist today in the Guidelines introduces the possibility that as the NIDA guidelines are changed, the City of Milwaukee Police Department will have one set of standards and protocols and the NIDA Guidelines may provide another standard. The NIDA standards may be changed to reflect technological advances in testing. By codifying a set of protocols written for the technology of the present, the MPA proposal would require the testing laboratory to follow one set of protocols for the Department and another for all other testing it performs. This will only serve to introduce confusion into the testing process. As a result, false positives may be the result of the MPA's proposal. For that reason, the Arbitrator provides that the collection procedures, the tests employed by the testing laboratory, and the inspection and certification procedures which the testing laboratory must meet, must strictly conform to the federal NIDA guidelines. These Guidelines, in essence set the standard for the drug testing industry.

In its request for proposal in the course of the City's contracting process, it shall require the laboratory with which it contracts to notify the City of any changes made by the Secretary of the Department of Health and Human Services to the collection, testing and laboratory certification protocols. Upon receipt of such notification the City shall so notify the MPA. In the future, the federal guidelines may provide for changes in technology for the testing of urine. With one exception, changes in technology shall be incorporated in the federal guidelines. The level of specificity and sensitivity of the immunoassay test and GC/MS confirmatory test cutoff levels specified in City Exhibit No. 9 shall be continued and carried forward into any changes in technology which may be incorporated into the federal guidelines. The present cutoff levels for the NIDA five drug tests permit a certain level of false negatives; i.e., a false negative reflects the nonexistence of drug metabolites in the urine, when the metabolites for the drugs subject to testing are present in the urine. Any change in sensitivity level must occur through the collective bargaining process rather than by changes incorporated in the guidelines by a third party, the Secretary of the Department of Health and Human Services.

Similarly, if the federal guidelines include certify additional drugs for testing, the inclusion of those drugs as part of the expanded testing process must be the product of bargaining between the parties. Any addition to the five presently NIDA certified drugs, may include drugs which are widely available through prescription. The testing of such drugs may require police officers to divulge a broad range of medical conditions. The parties may wish to consider alternative methods for alerting the Department to the use of certain prescription drugs by members of the bargaining unit. The collective bargaining process is the best vehicle to expand the panel of drugs and the cutoff levels for the initial screening and confirmatory tests.

The Arbitrator directs that the expanded drug testing program contain the following additional requirements. The City is charged with the responsibility of selecting the laboratory to conduct the drug testing. The laboratory it selects must be a NIDA certified laboratory. Prior to signing any contract with the laboratory, the City shall inform the MPA of the name of the laboratory and its location. The City shall provide/arrange for the Union to tour the laboratory facilities. The laboratory shall be required to share with the City and the MPA the results of the proficiency reports provided to the laboratory by the certifying agency(ies). In this case, these requirements were met by Bayshore Labs during the hearing process. Should the City change laboratories, it shall provide in writing to the MPA the reason(s) for the change.

Medical Review Officer

The City must contract with a physician "who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test results together with his or her medical history and any other relevant biomedical information" to serve as its Medical Review Officer (MRO). The NIDA guidelines provide for the employment of a Medical Review Officer.

The MPA proposes that the MRO not be employed by the City to evaluate worker's compensation cases. This proposal will provide further assurance of the independence of the licensed physician selected to serve as the MRO. Accordingly, that proposal of the MPA shall be incorporated in the expanded drug testing program. Prior to signing a contract with the licensed physician to serve as the Medical Review Officer under Article 64 of the Agreement, the City shall permit a committee of the MPA, no larger than its bargaining committee, to conduct an interview of the MRO. Again, this opportunity to interview and question the MRO was afforded to the MPA by the City prior to its selection of an MRO, who unfortunately passed away in a tragic aircraft accident.

The Arbitrator directs that the City may not rely upon any drug test result which it obtains under the expanded drug testing program awarded herein, without the review of such results by a MRO in accordance with the NIDA guidelines.

The MRO verifies the test results and communicates those results to the Chief or the commanding officer of Internal Affairs. This role is reflected in the proposals of both the City and the Union. The Arbitrator summarizes this process. The results of the initial screening EMIT immunoassay and confirmatory GC/MS tests are to be reported to the MRO. It is the MRO, under both the City and the Union proposals, who confirms a positive result. Before the MRO communicates with the Chief and/or the commanding officer of Internal Affairs, the MRO shall interview the officer tested to obtain the officer's medical history. The MRO shall determine

whether the positive test is the result of the officer's medical history (prescription and over the counter drugs which the officer may take) or a cross reaction to legal substances ingested by the officer. After review of all this medical evidence, the MRO shall determine whether to verify and report a confirmed positive result or treat the test as a negative test result.

The Arbitrator provides that the City may change its Medical Review Officer. The reason for the change shall be provided in writing to the MPA. The opportunity to interview the successor Medical Review Officer shall be afforded to the MPA in accordance with the provisions stated herein.

Split Samples

The MPA proposes the use of a split sample. The following is a description of a split sample. At the collection site, as soon as the technician obtains the specimen from the officer to be tested, the specimen is split into two containers. One sample is to be processed and tested by the testing laboratory. The other sample is to be stored by the laboratory should a verified confirmed positive result from the test of the first sample. The second sample would then be available to the officer for a "second" opinion.

The MPA proposes that the laboratory which the officer may choose to test for the second opinion, may be a NIDA certified or non-NIDA certified laboratory. To permit a non-NIDA certified laboratory to test the second sample and bring into question the test results of the NIDA certified lab would undermine the whole basis for the decision of the Arbitrator. The testing process adopted as part of the expanded program is controlled, certified and monitored under the NIDA Guidelines. The Arbitrator rejects this MPA proposal.

The laboratory contracted for by the City shall forward the second sample to the NIDA certified laboratory designated by the officer using the necessary evidentiary and forensic procedures to preserve the reliability of the test results for use in evidence in any disciplinary proceeding. The officer shall pay for the laboratory test conducted on the second sample.

The Arbitrator rejects the Union proposal which mandates the Medical Review Officer to request the laboratory contracted by the City conduct a second confirmatory test, at the City expense, on the sample which tested positive. The second testing only adds to costs without any particular benefit to either party. If an error occurred in the testing process, the availability of a split sample affords the officer the opportunity to reverse the first positive result through a second test by another NIDA certified laboratory. The City proposal at page 5, paragraph 3, provides for the reimbursement of the officer should the independent test provide a result which successfully challenges the test of the contract laboratory.

The City does not provide for a split sample in its proposal. However, the split sample provides assurance that the sample tested by the lab contracted by the City and the lab which provides the second opinion are each testing untouched samples which were collected at the same point in time. The MPA maintains that provision for a split sample will be introduced into the NIDA guidelines, in the near future. The Arbitrator directs that the split sample be incorporated in the expanded drug testing program. This is the one area where the Arbitrator directs the incorporation of a procedure which does not appear in the present NIDA Guidelines.

The Arbitrator provides that the City may change laboratories. However, the reason for the change shall be provided to the MPA. The opportunity to tour the laboratory facilities of the successor NIDA certified laboratory and review that laboratory's proficiency tests shall be afforded to the MPA in accordance with the provisions stated herein.

Summary

The panel of drugs to be tested and the protocols to be employed in conducting the drug tests are to be carried out in accordance with the federal mandatory NIDA Guidelines. As those guidelines are amended, those amendments are incorporated in the expanded drug testing program of Article 64, except where such changes impact upon the levels at which officers may be found to test positive rather than negative. The sensitivity and specificity levels reflected in the cutoff levels as they presently exist for the present technology reflected in the federal NIDA Guidelines are the levels of specificity and sensitivity which are to be carried forward and which may not be increased or decreased by fiat of the Secretary of the Department of Health and Human Services. Such changes must be negotiated between the parties. The City is the party which is underwriting the cost of the drug testing program. Accordingly, it is the party responsible for contracting with a NIDA certified laboratory to conduct the tests and with a Medical Review Officer to screen those tests. A split sample procedure is the one change from the present NIDA guidelines incorporated in the expanded drug testing program to be included in Article 64 of the 1991-92 Agreement, as extended.

CONFIDENTIALITY

At one level, there is little difference between the parties concerning the need for confidentiality. Both the City and the MPA propose that the drug test be kept confidential and shall not be disseminated to the public.

The MPA makes several proposals to enhance confidentiality. First, it attempts to centralize the order for testing in the hands of the Health and Safety Coordinator. Inasmuch as the reasonable suspicion testing process

remains intact and is a process which is instituted by supervision through consultation with the Deputy Inspector of Internal Affairs, the limitation of the order to test to the Health and Safety Coordinator is inconsistent with the reasonable suspicion basis for ordering a test. The Arbitrator shares the MPA concern that the fact that an officer has been directed to test as a result of reasonable suspicion of supervision or has been directed to test because of random sampling of officers in sensitive assignments, should not be broadcast throughout the Department.

The City shall advise the MPA of the management and/or supervisory personnel who shall know of the individual officers ordered to test under the various categories of testing directed herein, other than in cases of reasonable suspicion testing. Those individuals shall be directed by the Chief of Police to refrain from disclosing to any other officer in the Department the name of the officers of the bargaining unit who are scheduled to test pursuant to the expanded testing program.

The MPA introduced evidence concerning an incident that occurred to a former president of the MPA in another municipality. At best, the evidence demonstrated the lack of confidentiality afforded to this officer by the other law enforcement jurisdiction. However, there is no evidence in this record to suggest that the Milwaukee Police Department disseminated the information it obtained from the police department of another jurisdiction. There is nothing in this drug testing program or any provision of the extended collective bargaining agreement which prohibits the Milwaukee Police Department from inquiring about the conduct of one of its officers while that officer is in another jurisdiction. The fact that the other jurisdiction responds to the request, perhaps in violation of the privacy interests of the officer, does not provide a basis for the Arbitrator's determination that the Milwaukee Police Department is incapable of maintaining the confidentiality of drug test records generated under this expanded drug testing program.

The Arbitrator rejects the MPA proposal that drug test results may not be used by the City in unemployment compensation appeals or worker's compensation hearings. Those proceedings are initiated by the officer. If an officer's employment is terminated as a result of a positive drug test, the Department should be able to refer to the drug test in defending itself against a worker's or unemployment compensation claim.

Both parties agree that any drug test results shall **not** be used in any criminal prosecution. The test results are the product of a warrantless search.

The language of the MPA proposal on use of drug tests in criminal proceedings rather than the City's wording of that proposal is to be included in the expanded drug testing program included in Article 64. The City employs the term "may"; the MPA uses the term"shall". The parties agree

that tests administered for this employment purpose are not to be used to deprive the tested officer of his/her liberty.

In the very beginning of this Award, the Arbitrator included in the expanded drug testing program a provision to permit police officers in uniform to change to civilian clothes to maintain the confidentiality of the drug testing process. Similarly, the Arbitrator directs that the Department employ payroll and driver's license numbers to serve as the basis for identification of the officer at the collection site, should the collection of a specimen occur at a site other than the police academy or a police district facility. The collectors of specimens need not know that the person who is providing the urine specimen is a police officer. It is for that reason that the Arbitrator rejects the MPA proposal that a thumbprint be used for identification purposes. Vice President of Operations for Bayshore Laboratories Jaglinski did not indicate that any other client of the laboratory employed a thumbprint for purposes of identification. As a result, a thumbprint will immediately identify the one employer which uses this method of identification, the Milwaukee Police Department. The acceptance of the MPA proposal will undermine the confidentiality which it seeks to obtain and preserve through its proposal. The use of a payroll number and a driver's license should preserve that confidentiality, assuming of course, that the picture on the driver's license is not of the officer in uniform.

Training

The MPA proposes that the expanded drug testing program be explained to all members of the unit. In this regard, the MPA introduced evidence of an internal comparable, the City's Fire Department. When the reasonable suspicion testing program was first implemented in the Fire Department, every fire fighter received "training" concerning that program. It was fully explained in the course of inservices conducted throughout the Fire Department.

If the drug testing program is to serve as a deterrent to drug use/abuse, then it is most important that all officers of the Police Department be fully informed of the full scope of the expanded drug testing program. The manner in which the Department disseminates that information to officers is left to the discretion of the Chief of Police. However, the requirement that such information be disseminated to all members of the unit shall be included in the expanded drug testing program.

WHAT THE ARBITRATOR HAS NOT DONE

The Arbitrator does not incorporate in this Award the suggestion made by the League of Martin for annual drug testing. The parties did not

present any evidence that the Department requires an annual or semiannual physical examination which may incorporate a drug test as part of the physical examination. With the exception of the leave of absence provision, fitness for duty is not a basis for any other provision incorporated in the expanded drug testing policy.

The MPA proposes inclusion in the expanded drug testing program reference to the Americans with Disabilities Act. Any reference to that Act, if such reference is necessary, should be included as a separate article which governs not only the drug testing program, but other programs and policies incorporated in the collective bargaining agreement. If the parties desire to incorporate within the Agreement and subject to the grievance procedure provisions of the Americans with Disabilities Act, they may do so in future collective bargaining.

Finally, there are many references in the record to training of supervision to be alert to conduct or patterns of behavior which may indicate drug abuse. The Arbitrator does not incorporate within the expanded drug testing program any reference to training of supervision. That is a matter outside of the jurisdiction of the Arbitrator, here. Certainly, the Department would be wise to properly train its supervisors to recognize drug abusers among members of the unit. The Department does not need the advice of this Arbitrator on that subject.

Miscellany

Officers directed to test under the expanded drug testing program shall be paid at straight time rates so long as they are directed to test no less than two hours prior to the end of their regular shift. If, in a particular case, there is evidence that testing required more than two hours to complete, the Department may provide for the payment of overtime for time beyond the end of shift spent in testing. If testing is directed under the expanded program less than two hours prior to the end of shift, it shall be at overtime rates. The Department controls all testing under the expanded program. It can insure that testing take place during an officer's regular shift.

The MPA proposes that: the lab technicians who collect and handle the urine specimen wear latex gloves; the same sex technician collect the urine sample and that toilet seat covers be made available at the collection site. In addition, the Union proposes that the City be precluded from collecting specimens at Departmental facilities.

The Arbitrator provides in the above discussion that specimen collection may occur in Departmental facilities. When probationary officers are tested, it may be reasonable to do so at the Academy. The Union failed to make a case for latex gloves for technicians.

The Arbitrator directs that the City may request that specimen collection be conducted by the same sex technician. Since the technician does not enter the stall in which the specimen is provided, the same sex technician is preferable, but not necessary. Similarly, toilet seat covers are a convenience which should be provided. The City shall request the same sex technicians and the toilet seat covers be provided by the contracting lab. However, the collection of a specimen by a technician not of the same sex as the donor or the unavailability of toilet seat covers will not invalidate the collection process and the testing of the specimen so collected.

In drafting the specific language to be added to Article 64, the City's proposal shall be used as the principal draft of the expanded testing program. In those instances in which the specific language of the Union's proposal is referenced and adopted by the Arbitrator, that language shall be added to Article 64. Sec. 111.70 (4) (jm) 9. sets out the procedure for dealing with any other language issues which may arise out of the incorporation of the Arbitrator's Award into contractual language.

A Final Word

The Arbitrator rejected the random drug testing program as proposed by the City, for the most part, because it failed to demonstrate the need to so expand the existing program. It will be difficult for the Department to ascertain whether there is a need for more intensive drug testing on the basis of the existing reasonable suspicion testing and the expanded testing program provided in this Award. The parties have engaged in bargaining over drug testing for approximately three years. Both the MPA and the City should come out of this process with a sense that the expanded drug testing program together with the existing reasonable suspicion testing memorialized in Memorandum 90-109 are adequate for the needs of the Department. Accordingly, the Arbitrator provides that the City may contract for a study of the extent of drug use, of the five NIDA certified drugs, by officers in the Department.

The contractor selected by the City to conduct the study shall be familiar with statistical sampling methods and shall take a sample of sufficient size of officers, who are not subject to the specified testing procedures incorporated in the expanded drug testing program, supervision and management. The sample of officers shall be tested in accordance with the protocols established by the expanded drug testing program. The results of those tests shall be reported to the MRO and the number of confirmed positives shall be verified by the MRO in accordance with the procedures identified herein. The MRO shall **only** report the **number** of verified confirmed positives generated by the tests. The MRO shall then destroy all records of the confirmed positives and negatives generated by this study. The individual officer test results from this study **shall not be** provided to the Department. The MPA shall be kept apprised of the City's selection of a contractor, the methods employed to conduct the study and

the results of the study. The purpose of this provision is to replicate the anonymous testing study referenced in the arbitration award, Day and Zimmerman, 94 LA 399 (Nicholas, Jr., 1990).

McBay, the MPA's noted expert, provided testimony and documentary evidence in this record of the percentage of positives generated by other segments of the population such as federal employees, railroad employees, and employees tested by the federal highway administration. The MPA and the City shall be in a position to compare the test results from this study to the percentage of positives found among these various segments of the U.S. work force.[11]

The Arbitrator does not establish a point at which drug testing, random drug testing or some other drug testing program should be incorporated in the expanded drug testing provision, Article 64 of the Agreement, as extended. It is the responsibility of the MPA and the City to determine whether the results of the study reflect the need for further drug testing. If it does, they may negotiate such a program.

SUMMARY OF EXPANDED DRUG TESTING PROGRAM

This summary covers the major determinations made by the Arbitrator in this Award.

The Arbitrator does not include the City's proposal for random drug testing of all its officers. The Union proposal to expand the existing reasonable suspicion testing program is rejected, as well.

Both the City and the Union propose that drug testing occur upon the occurrence of a singular event; when an officer is promoted or when an officer returns from an extended leave of absence. With regard to the testing which is to occur upon a return from a leave of absence, the Arbitrator modifies the City's proposal for testing those officers returning from a leave in excess of 90 days to provide testing to officers who return from a leave in excess of 120 days. Should the officer test positive upon her/his return, the Arbitrator concludes that the officer is subject to the protection afforded by Section 62.50(18) of the Wisconsin Statutes.

The Arbitrator does not include testing for incidents which result in death or great bodily harm. The Arbitrator finds that testing is appropriate.

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[11] McBay, indicates in his prepared comments, Association Exhibit No. 49, the positive drug test rate in several employee population groups: 1.04% of the railroad industry tested positive; the federal highway administration reflected a 2.1% positive rate out of 143,000 tests administered; less than 1% of the million or more federal employees tested positive.

However, the appropriate test is a blood test, rather than the urinalysis proposed by the City.

The expanded drug testing program provides for multiple testing of probationary officers and those in sensitive assignments. The Chief of Police shall have the discretion to establish the timing, when such tests are to be administered. The City shall employ the "range of testing" procedures for selecting those officers to be tested. The sampling pool for sensitive assignments is established on a unit-by-unit basis as explained, above.

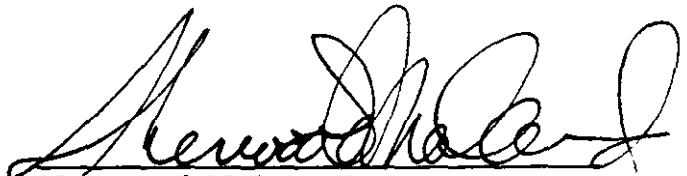
The opportunity for rehabilitation is available, for the most part, to officers in sensitive assignments. Officers who are tested when they are promoted and upon a return from leave of absence, know in advance approximately when they are to be tested. If they test positive, that is an indication of the presence of a serious drug problem. Probationary officers are not afforded the opportunity for rehabilitation. On the basis of the testimony provided at the hearing, it is most likely that a probationary officer who tests positive will be discharged from the Department. For the reasons stated above, the discussion concerning rehabilitation is inapplicable to officers who are ordered to test under the existing reasonable suspicion drug testing program.

The Arbitrator concludes that the panel of drugs which are to be the subject of the drug test and the protocols to be used in the conduct of those tests shall be governed by the Final Mandatory Guidelines, City Exhibit No. 9. The MPA proposal for use of a split sample is the one exception to the present protocols which the Arbitrator includes in the expanded drug testing program.

In addition, the Arbitrator provides the City and MPA with the opportunity to conduct an anonymous study of officers who are not subject to the expanded drug testing, provided for herein, to determine if there is any further need for testing in the Department.

Pursuant to Section 111.70(4)(jm)9 of the Wisconsin Statutes, the parties are directed to reduce to writing, the items mutually agreed to by them and the determinations made by the Arbitrator herein. Those determinations are specifically identified throughout this Award.

Dated at Madison, Wisconsin, this 23rd day of August, 1993.



Sherwood Malamud
Arbitrator

MILWAUKEE POLICE DEPARTMENT DRUG TESTING POLICY STATEMENT

The Milwaukee Police Department is charged with enforcing all laws and ordinances and with maintaining a safe and peaceful community. The pervasive risk of harm caused by drug trafficking and illegal drug use by members of the Police Department creates a clear and present danger to the safety of the public and fellow law enforcement officers. The law enforcement profession has several uniquely compelling interests that justify the use of employee drug testing. The public has the right to expect that those who are sworn to protect them are at all times both physically and mentally prepared to assume these duties. There is sufficient evidence to conclude that the use of controlled substances and other forms of drug abuse can seriously impair an employee's physical and mental health, and thus, job performance. Where law enforcement officers participate in illegal drug use and drug activity, the integrity of the law enforcement profession and public confidence in that integrity is destroyed. This confidence is further eroded by the potential for corruption created by drug use.

The illegal use of drugs cannot and will not be tolerated within the Milwaukee Police Department. It is the Department's position that any member proven to have illegally used drugs should be dismissed for such use, subject only to the discretion of the Chief of Police and review by the Fire and Police Commission.

Therefore, in order to ensure the integrity of the Milwaukee Police Department and to preserve public trust and confidence in a fit and drug free law enforcement profession, the Department shall implement an expanded drug testing program to detect illegal drug use by sworn employees. Officers of all ranks will be randomly tested in such numbers as to ensure that a credible deterrent exists to illegal drug use.

I. MPD EXPANDED DRUG TESTING PROGRAM DESCRIPTION

A. The term "Department" as used herein shall mean the Milwaukee Police Department. The term "member" shall mean a Department employee in the WERC - certified Department bargaining unit represented by the Milwaukee Police Association (MPA).

B. Members shall be subject to drug testing under the following circumstances:

1. Whenever a member is directly involved in an incident that results in death, or great bodily harm as defined by State Statute.

2. Whenever a member is on probation, the member shall be tested prior to completion of the member's probation period. Completion of the member's probation period shall be contingent upon passing the drug test.

3. Whenever a member is eligible for promotion (including reclassifications), the member shall be tested prior to promotion. Promotion shall be contingent upon passing the drug test.

4. Whenever a member is returning from a leave of absence that exceeds 90 consecutive calendar days in duration. Reinstatement to the Department from the leave of absence shall be contingent upon passing the drug test.

5. Whenever a member is returning from a paid suspension that exceeds 90 consecutive calendar days in duration.

6. Random Drug Testing

   a. Periodically a list of Department members selected for drug testing shall be generated by an independent secure random selection process. The frequency of random testing, and sampling rate, shall be as prescribed from time to time by the Chief of Police. The independent agency providing the random selection process shall be prescribed by the Chief. Such independent agency shall be provided with a list of all Department members covered by random drug testing encoded so that only the Chief of Police and the Commanding Officer of the Internal Affairs Division know the identity of the Department members.

   b. The Chief may increase the frequency of random testing, and sampling rate over and above the frequency of random testing and sampling rate he prescribes from time to time under paragraph 6.a., hereof, for members assigned to the following Department Units: Vice Control Division, Tactical Enforcement Unit, DARE Program, Bomb Squad, Canine Unit Property Control Section (only those persons directly involved in the custody and handling of illegal drugs) and

Internal Affairs Division. If subsequent Departmental reorganization results in modifications to any of these units, the function performed by a unit as it is presently constituted, shall continue to be covered hereunder no matter how such unit is constituted following a future reorganization.

c. Members selected to be tested shall be notified by their Commanding Officer, who shall give them a written order to report for testing. A copy of such written order shall not be entered into a member's personnel file, but shall be retained by the Department in a file kept at the Internal Affairs Division.

d. All members on paid leave who are selected for drug testing pursuant to paragraphs 6.a. or 6.b., hereof, shall not be required to participate in such test, except those members having the following status as of the notice of selection:

(1) Members on sick or injury leave who have received permission to leave the residence to further recuperation;

(2) Members on compensatory time off authorized after the selection notice; or

(3) Members on "suspended with pay" or "dismissed with pay pending appeal" status.

e. Members shall not be subject to random drug testing on their regular off days.

f. Any member selected for testing who claims inability to participate due to medical reason shall be examined by a physician designated by the Chief. The physician shall determine if such member may be excused from the test. If such member is excused from a scheduled test, he/she shall be rescheduled for testing as soon as possible, irrespective of any random sampling selection.

7. Members having sensitive assignments, referenced in paragraph 6.b., hereof, shall be subject to drug testing upon entering and leaving these assignments.

C. Refusal to submit to a drug test shall result in immediate suspension and discipline up to and including dismissal from the Department. Attempts to alter or substitute test sample provided by the member being tested shall be deemed a refusal to submit to a drug test; testing personnel shall document the circumstances on the drug-test report form. The member shall be permitted no more than eight (8) hours to give a sample, during which time he/she shall remain in the testing area, under observation. Reasonable amounts of water may be given to the employee to encourage urination. Failure to submit an adequate sample shall be considered a refusal to submit a drug test.

D. Testing Procedure

1. a. The testing procedure shall be consistent with the Final Mandatory Guidelines, as may be amended, which were adopted in accordance with Executive Order 12564 and section 503 of Pub. L. 100-7 as set forth in the Federal Register, hereinafter known as "the Federal Guidelines."

b. Nothing herein shall prohibit the Chief of Police from changing the provider of this procedure, so long as the new provider is NIDA-certified.

2. Substances to be tested for include those classes of drugs described in the Federal Guidelines, at the threshold levels indicated therein, and the following drugs:

Drug	Initial Test Level (ng/ml)	Confirmatory Test Level (ng/ml)
Methaqualine	300	200
Barbiturate group	300	200
Benzodiazepine group	300	200
Methadone	300	200
Propoxyphene	300	200

The threshold levels for the five classes of drugs enumerated above shall be established by the NIDA-certified testing laboratory.

Nothing herein shall prohibit the Chief of Police from amending the list of substances described above. The Department will notify the MPA of amendments to this list of substances.

3. If a member's specimen tests positive, a portion of it shall be retained by the testing agency and preserved for one year after receipt of the test results for use by the member, in the event he/she should elect to challenge the test result by means of independent testing of the specimen. Such independent testing must be performed at a NIDA-certified laboratory other than the primary laboratory. All costs associated with such independent test shall be borne by the member; provided however, if such independent testing results in a successful challenge, then the Department shall reimburse such member for the costs of such independent test. Any such independent tests shall be conducted subject to the retesting provision described in the Federal Guidelines.

II. ACCESS TO TEST RESULTS

Confirmed positive drug test results verified by the MRO shall be made available only to the following:

Chief of Police
Commanding Officer of the Internal Affairs Division

III. ADMINISTRATION/DISCIPLINARY ACTION

A. A member, who has been ordered to take and has taken, a drug test shall not be subject to disciplinary action regarding the test results until they are

received by the Department. During that period, however, the member may be required to surrender his/her weapon, badge, I.D. card, cap shield, and callbox key, and may be suspended with pay.

This action shall be accomplished most discreetly and, whenever possible, without advising other personnel of the reasons.

B. All discipline involving a member who has a confirmed positive test for illegal drug use, verified by the MRO, shall be administered by the Chief; such discipline may include dismissal from the Department. A challenge to a confirmed positive test result by a member shall not affect or delay the effective date of discipline imposed against the member pursuant to this section.

IV. EXCLUSION OF TEST RESULTS FROM CRIMINAL PROCEEDINGS

Drug test results obtained through the Milwaukee Police Department Drug Testing Program may not be used as evidence against an officer in a criminal proceeding.

V. CONFIDENTIALITY

A. Except as provided in paragraph V.B., below, there shall be no dissemination of an individual member's drug test results (including documentation or information contained therein) to the public.

B. The provisions of paragraph V.A., hereof, shall not apply to an individual member's drug test results in the following circumstances:

(1) Disciplinary hearings, or appeals therefrom, occasioned by such individual member's drug test results.

(2) Nondisciplinary administrative hearings, or appeals therefrom, when such individual member's drug test results would be relevant to such hearings/appeals.

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Appendix B

ARTICLE 64

DRUG TESTING

I. POLICY STATEMENT

The Milwaukee Police Association and the City of Milwaukee recognize the abuse or misuse of alcohol, prescription drugs and illegal substances is detrimental to the efficiency of the Milwaukee Police Department. The public trust is one of the most sacred values held. The nature of the law enforcement profession, particularly the unique authority and responsibility held by police personnel, requires a high standard of performance, professionalism and personal conduct from police officers.

Recognizing abstinence from controlled substance abuse or misuse is only a small component of an individual police officers total physical and mental health, it is the intent of this policy to ensure a greater emphasis on prevention and rehabilitation prior to any disciplinary action. This program is determined to safeguard the employee's rights while protecting both parties' interests in obtaining a drug free workplace.

Therefore, to protect the reputation for professionalism of the Milwaukee Police Department, the Milwaukee Police Association puts forth the following program.

II. OPEN WINDOW FOR REHABILITATION

A. The term "Department" as used herein shall mean the Milwaukee Police Department and the term "Member" shall mean a Department employee in the Wisconsin Employment Relation

Commission certified bargaining unit represented by the Milwaukee Police Association herein after referred to as "MPA."

B. On a one time basis a member will have a thirty (30) day window, after the execution and implementation of this Article, to seek and utilize treatment for rehabilitation. A member of the Department shall not be discharged without first having been offered the opportunity to discontinue use of a controlled substance, either through personal choice or by treatment for chemical dependency. Thereafter, impaired by, misuse or abuse of a controlled/illegal substance (except alcohol) may result in discipline and may include discharge as deemed appropriate by the Chief of Police. Nothing herein will prohibit the Chief of Police from administering discipline to a member for intoxication due to alcohol under the appropriate rule.

1. In the event a member seeks treatment on an inpatient basis for his/her chemical dependency pursuant to this Section the maximum residential stay will not exceed thirty (30) calendar days. During this inpatient rehabilitation treatment period, the member shall receive the usual compensation and fringe benefits as if the member was working his/her normal assignment.

a. After completing the inpatient rehabilitation program, the member shall be required to submit medical verification from a physician that he/she is fit for full duty or capable of performing in an assignment consistent with Article 62, Assignment Made Consistent With Employees Medical Capabilities

(A.C.E.M.C.). During the year following return to duty the member may be drug tested subject to section V. Drug Testing and Collection Procedures and Section IV. A. 4. a. & b.

2. A member, pursuant to this Section will also have the option to select treatment for rehabilitation on an outpatient basis.

a. If a member chooses to treat the chemical dependency on an outpatient basis the member shall be required to immediately submit medical verification from a physician that he/she is capable of performing active duty. Immediately upon entering the outpatient treatment program the member shall be assigned to an (A.C.E.M.C.) for one (1) calendar year forward, from the date of entry into the treatment program. During this period of A.C.E.M.C., the member may be drug tested subject to Section V. Drug Testing and Collection Procedures. Further, Section IV. A. 4. a. & b.

b. Any member utilizing the provisions of this one time open window for rehabilitation that is not medically released for active duty status will be permitted to use accrued benefit(s) time from his/her account balances. Once exhausted and not medically released, the member may be removed from the payroll. When the member is subsequently medically released

for an A.C.E.M.C. he/she shall be placed in such status subject to Section II.A.1.a.

c. A member utilizing the open window for rehabilitation and subsequently released for an A.C.E.M.C. and while occupying said position tests positive (subject to confirmation by the medical review officer - MRO) may be discharged.

d. The A.C.E.M.C shall be an assignment that does not require carrying a gun or operating a department vehicle.

III. REASONABLE SUSPICION DRUG TESTING

A. All Department members may be subject to drug testing if a member is reasonably suspected of being impaired by, misusing or abusing an illegal/controlled substance (Except Alcohol). All facts and/or circumstances shall be documented and sealed prior to a reasonable suspicion drug test. A drug test based upon reasonable suspicion shall comply with the "Drug Test Collection Procedure" as set forth in Section V. of this Article.

1. Department officers may be required to submit to a drug test which complies with Section V. of this Agreement, when the Department has a reasonable suspicion that said officer is currently impaired by a controlled substance illegally ingested.

Reasonable suspicion shall be: 1) founded on specific, objective and articulated facts either directly observed by at least two (2) supervisors or learned from a reliable

source, and 2) corroborated by facts and circumstances from which a reasonable inference may be drawn that said the officer is currently impaired by a controlled substance illegally ingested. Reasonable suspicion based solely on an officer's physical appearance, conduct and psychological demeanor must be premised on factors that are generally accepted within the scientific community as reflecting the high probability of illegal drug use and must be specifically documented. The Department must make a record of the basis for its determination that reasonable suspicion exists to order a drug test prior to testing and this record will be dated, sealed and signed by the officer ordered to take the test, his representative, if present, and the Department supervisor ordering the test.

2. All time required of the member to submit to the reasonable suspicion drug test and investigation shall be deemed overtime as defined in Article 15 of this Agreement.

3. A member ordered to submit to a reasonable suspicion drug test shall be afforded ample time to change into civilian attire prior to testing if in uniform at the time of the order.

IV. SCHEDULED DRUG TESTING

A. Under the following conditions a member may be drug tested absent reasonable suspicion. In the event the Department chooses to test a member within this section, the Department

shall adhere to the Drug Testing Collection Procedures as set forth in Section V. of this Article.

1. Probationary Period: A member - while still on probation, (as defined by Article 7 of this agreement), may be drug tested prior to the expiration of the probationary period. In the event the Department requests an extension of a probationary period from the Fire and Police Commission, (hereinafter referred to as F&PC), the Department may drug test during this extension. In any event the Department shall, if it chooses to drug test, perform such test no later than eight (8) workdays prior to the expected expiration of the probationary period or expiration of a requested extension.

2. Promotion: When a member is eligible for promotion, the member may be drug tested no later than two (2) weeks prior to the actual expected promotion date. For purposes of interpretation of this provision, a member is eligible for promotion only after the F&PC has approved and published a list of qualified candidates for promotion and the member is notified of an anticipated promotion date. If a member is denied a promotion based upon a positive drug test and thereafter a challenge reverses a denial, he/she shall have all benefits adjusted retroactively to the original expected promotional date.

a. The following position/rank classifications will be considered a promotion subject to a scheduled drug test:

-Administrative Police Sergeant

-Detective

-Computer Aided Dispatch Specialist

-Police Electronic Technician

-Identification Technician

-Narcotics Control Officer

-Police Sergeant

-Police Sergeant - Garage

-Police Alarm Operator

-Court Liaison Officer

-Document Examiner

-Chief Document Examiner

-Latent Print Examiner

3. Sensitive Positions and Sensitive Classifications: Members assigned on a permanent basis in sensitive positions or classifications may be drug tested. An assignment will be deemed permanent if such assignment exceeds sixty (60) consecutive calendar days. Only after an employee has held the position for 60 days may the member be tested.

a. Assignments within the below listed sensitive areas may be subject to a drug test:

-Internal Affairs Division

-K9 Patrol

-Dare Program

-Bomb Squad

-Metropolitan Enforcement Group (MPD Personnel)

-Vice Control Division

-Tactical Enforcement Division (Designated Riflemen)

-Custodian Of Property and Stores

-Assistant Custodian of Property and Stores

b. The members assigned to sensitive position/classification(s) may be drug tested twice a calendar year (365 days from assignment appointment date) on a noncumulative basis as long as the member remains assigned in one of the identified position/classification(s).

c. Caution shall be exercised when requiring a member occupying a sensitive position/classification so as not to inadvertently reveal the identity of personnel working in an undercover capacity.

4. Leaves of Absence: A member on an authorized departmental leave of absence may be drug tested upon return if the leave exceeds 365 consecutive calendar days. This drug test shall be ordered and performed within the first five (5) working days upon return from such authorized leave. The Department not requesting a drug test within five (5) working days shall forfeit its right to test under this subsection.

a. All time required of a member to submit to a scheduled drug test shall be deemed overtime as defined in Article 15 of this Agreement.

b. Further, a member ordered to submit to a scheduled drug test shall be afforded ample time to

change into civilian attire prior to testing if in uniform at the time of the order.

V. DRUG TESTING AND COLLECTION PROCEDURES

A. Notification of a Member: When a member of the Department is required to submit a urine specimen for scheduled drug testing pursuant to Section II or Section IV, it shall be the responsibility of Health and Safety Coordinator (hereinafter referred to as HSC) to deliver a written order to report for testing. [This form will be in triplicate, one copy given to the member required to give a specimen, a copy mailed to the Milwaukee Police Association and the original to be retained by the HSC.]

1. The form shall indicate the reason for the drug test, the name and address of the collection facility and the date and time the member is required to report. Prior to leaving the work location the member shall place his/her right index finger print on the rear of the original copy of the order-to-report form. The form will contain no further means of identification except the member's payroll number.

2. A member required to submit to a scheduled test shall not be required to test while his/her status is one of the following:

-Maternity Leave

-Workers Compensation Leave

-Sick Leave

-Injured On Duty

-Compensatory Time Off

-Holiday Off

-Vacation

-Authorized Leaves of Absence

-Funeral Leave

-Regular Off

-Off Payroll

-Educational Leave

3. When a member of the Department is required to submit a specimen pursuant to Section III. Reasonable Suspicion Drug Test, the HCS shall cause the form described in Section V.A.1. to be immediately prepared and delivered after the drug test. The MPA shall be notified prior to such test. Effort should be made not to interrupt the scheduled leave(s) as described in V.A.2., however, if circumstances dictate causing an interruption, the fact shall be reduced to writing on an official department Matter Of and an MPA Police Liaison Officer shall be notified immediately.

B. Collection Facility: The City of Milwaukee or any agents of the City shall not be permitted to change the collection site facility or the laboratory without the MPA mutually agreeing upon a new facility. In the event the collection site or laboratory can no longer process specimens the City and the MPA shall immediately enter into negotiations and select new facilitie(s) upon mutual agreement. In any event, the laboratory shall at all times be NIDA certified and must perform

all test procedures pursuant to NIDA standards (as amended from time to time). If the laboratory fails to strictly comply with NIDA standards and procedures, the services of the laboratory shall be discontinued and positive findings expunged from the records of the Department.

C. Method of Travel to Collection Site: After proper notification the member will proceed directly to the collection site. In the event a member is required to take police action while enroute, he/she shall immediately notify the Commanding Officer of such delay via KSA radio. If a member chooses to report to the collection facility in his/her private vehicle, sufficient time will be afforded for travel.

1. When a member uses a private vehicle to travel to the collection site, the City will indemnify the officer for any property damage sustained by his/her vehicle and shall afford legal representation for the officer and shall be responsible for any judgment, damages and costs entered against the officer which result in traveling to and from the site or acting within the scope of his/her employment. Further, all thefts of personal property while at the test site or damage to personal property shall be reimbursed by the City. The procedure for reimbursement set forth within Article 35 Section 2 of the parties' labor contract shall be applicable.

2. A member shall be permitted to travel to and from the collection facility in a uniform or unmarked squad car, the department shall furnish an available vehicle. Further,

supervisors shall be in plain clothes while in attendance with a member.

D. Guidelines for Personnel Collection Site: Entry to the collection site will be available at all times through the main entrance. After entry to the collection site a member shall advise an employee in the reception area, that he/she is there for a drug test. Site employees should take no action that would identify the member to the public or the purpose for which he/she is there. Prior to admitting the member into a secured test area the member will be required to produce for the technician an adjoining right index finger print on the original copy of the form described in Section V.A.1.

E. Guidelines for Specimen Collection: At all times the technician shall keep the member under observation, except during actual urination. The member will be instructed to wash his/her hands. The member shall be given a urine collection container with his/her payroll number on it and the member will be asked to verify the payroll number. This container, at a minimum, will hold eighty (80) milliliters (ml) of urine. The technician will instruct the member to enter the enclosed lavatory stall and submit a specimen. In view of the enclosed lavatory the technician shall keep observation of but under no circumstances enter said lavatory (except when he/she reasonably believes an emergency exists) and will wait until the member exits with urine container in hand. The member will then be instructed to keep the technician under observation at all times during the subsequent processing and packaging of the specimen.

F. Guidelines For Specimen Testing: In view of the member the technician will open the sealed collection container and measure the temperature of the specimen. Assurance shall be given that the temperature measuring device used will accurately reflect the temperature and not contaminate the specimen. The time from urination to temperature measurement is critical and in no case shall exceed four (4) minutes. If the specimen is not measured for temperature within four (4) minutes or the specimen temperature is outside the range of 32.5 - 37 C / 90.5 - 99.8 F, a new specimen will be required, adhering to the procedure set forth in Section VI.E. second paragraph forward.

The technician still under observation of the member will then record the member's payroll number, specimen temperature, specific gravity, ID number, test code and date collection was done in the appropriate places in the laboratory's official log book. The technician will then proceed to label two (2) Sample Submission Vials with the members payroll number, code number of the test to be done and client account number. Member shall verify that the payroll number as recorded on the vials is correct. The technician shall then pour an aliquot (approximately 40 ml) of urine from the collection container into the labeled Sample Submission Vials. Submission Vials will then be firmly capped and a strip of "confidential" tape will be placed over the cap of the vials and pressed into place down the sides of the vials. The member will then initial the confidential tapes. Continuing under observation by the member the technician will check on the requisition the appropriate code

for the "Substance Of Abuse" test to be performed and will print his/her name on the appropriate lines of the Chain of Custody sections of the requisitions.

The member will then initial on the appropriate line of the Chain of Custody portion of the requisitions, verifying that the sample has been properly secured and is, in fact, his/her urine specimen. The technician will then place the Sample Submission Vials and a copy of the completed and signed requisition in the primary pocket of the Chain of Custody bags. The two paper strips on the bags will then be removed exposing two adhesive surfaces. The bags will then be sealed with the urine samples and original requisition inside by folding the two adhesive surfaces together and pressing firmly.

Concluding the specimen collection, still under observation by the member, the technician will place Part II of the requisitions into the secondary pocket of the Chain of Custody bags. The member will be asked to examine the bags in view of the technician to verify the integrity of the Chain of Custody seals then initial the sealed bags in the appropriate blank spaces located over the adhesive seals. One (1) Sample Submission Vial will be preserved for the member and the other Sample Submission Vial shall be secured until testing.

1. To deter dilution of specimens in the lavatory stall, the facility shall be required to maintain bluing agents in the toilet tank so the reservoir of water in the toilet tank always remains blue.

2. The accompanying technician during all phases of the

collection procedure shall wear latex gloves to protect the integrity of the specimen.

3. The facility will keep an adequate supply of disposable sanitary paper toilet seat covers for usage.

4. A member will be advised and upon request be given sealed bottled water to facilitate urination.

5. At no time will physical force be used by a department and/or a facility employee to compel a specimen.

6. A member required to drug test within this Article shall have the absolute right to representation or an attorney present at any or all times.

7. The collection facility shall use the same gender technician for urine collection.

8. The member, upon returning to his/her work location shall hand deliver the drug testing form to the shift commander for proper distribution.

G. Chain of Custody and Transportation To Laboratory: For the duration of this Article "Bay Shore Clinical Laboratories" (BSCL) shall be responsible for all urine collection pursuant to this agreement. Urine collection shall only take place at BSCL facilities. If urine collection occurs at a BSCL facility offsite from the laboratory all personnel handling the specimen(s) shall attest to custody by documenting same on the Chain of Custody report. Failure to document the chain of custody shall result in the voiding of all test results. The laboratory and collection sites shall not be modified without prior approval of the Milwaukee Police Association.

H. The Toxicology Department employee will proceed to test the urine sample(s) from the Submission Vial for substances of abuse according to the following procedure. The initial substance of abuse test shall consist of an EMIT Immunoassay specimen screen utilizing the following cutoff values in subsection 1. Only positive EMIT specimens shall be tested for confirmation. A positive EMIT specimen shall be tested using gas chromatography/mass spectrometry (GC/MS) confirmation test utilizing cutoff values in subsection 2. The following cutoff values (EMIT and Confirmatory) shall not be changed or altered and/or any substances added without prior approval of the Milwaukee Police Association.

1. EMIT Cutoff Level:

Marijuana metabolite.....100ng/ml
Cocaine metabolite.....300ng/ml
Opiate metabolite.....300ng/ml

1. Morphine.....300ng/ml
2. Codeine.....300ng/ml

Phencyclidine (PCP).....25ng/ml
Amphetamines.....1000ng/ml

1. Amphetamine.....1000ng/ml
2. Methaphetamine.....1000ng/ml

2. Confirmatory Test Level:

Marijuana metabolite.....15ng/ml
Cocaine metabolite.....150ng/ml
Opiates.....300ng/ml

1. Morphine.....300ng/ml
2. Codeine.....300ng/ml

Phencyclidine (PCP).....25ng/ml
Amphetamines.....500ng/ml

1. Amphetamine.....500ng/ml
2. Methaphetamine.....500ng/ml

3. If a member's specimen tests positive (Confirmatory Test Level) a portion of it shall be retained and preserved for three hundred sixty-five (365) consecutive calendar days from the transmission of the positive test results by the MRO and longer upon written request of the employee's representative.

4. Any test result falling below the Cutoff levels as described in Section V. H. 1. & 2. shall be transmitted as negative using the word "NEGATIVE" with no further description on the transmission regarding the analysis. The envelopes will be delivered by courier to the Medical Review Officer. All envelopes will be stamped "Personal and Confidential."

5. During the term of this Article the agreed upon facilitie(s) shall not subcontract EMIT and/or Confirmatory testing and shall perform all work with their own personnel and equipment. Further, the facility shall at a minimum, adhere to the Mandatory Guidelines for Federal Workplace Drug Testing Programs published on April 11, 1988 and as amended, by the Department of Health and Human Services unless specifically agreed to the contrary by this agreement.

VI. DISCIPLINE

A. During the term of this Article specimen test results shall be reviewed and interpreted by a Medical Review Officer herein after referred to as "MRO." The MRO shall be a licensed

physician in the State of Wisconsin with specific expertise in substance abuse disorders. The physician may be selected by the City subject to approval by the MPA. In the event agreement is not reached, the physician shall be selected by the Wisconsin Medical Association.

The MRO shall not handle Workers Compensation claims for the City of Milwaukee or any contractor hired by the City to adjust Workers Compensation claims while employed as the MRO.

1. The Department shall be responsible to supply the MRO, no later than on a quarterly basis, a department roster indicating a telephone number and address for each member. The MRO shall be required to keep on his premises a safe, to retain this Department roster.

2. It shall be the responsibility of the MRO to review all test results delivered by the courier. All negative results received by the MRO shall be corresponded to a name from the roster and notice shall be by First Class Mail to the member and MPA Secretary/Treasurer within one (1) working day of receipt of such negative result.

3. If the MRO receives test results that are positive (exceeding the GC/MS ng/ml cutoff values), the MRO shall contact the affected member for an 'in person' consultation and review of medical records a member submits for consideration. The MRO shall also contact the test facility to have a second GC/MS test conducted, pursuant to Section V.H.1., 2. and 3. from the retained and preserved specimen referenced in Section V.F. hereof. The MRO will

refrain from contacting the Department until after reviewing relevant biomedical factors, medical records, the results from the secondary GC/MS test from the same vial and all other mitigating circumstances. If the test result is still confirmed positive the MRO shall forward the test results to the Internal Affairs Division Commanding Officer in a sealed envelope stamped "Personal and Confidential." The employee shall be entitled upon request to complete copies of all reports, documents, test materials and results.

4. All time required of a member and time spent with the MRO for the 'in person' consultation including one (1) hour travel time shall be deemed Overtime as defined in Article 15 of this agreement.

B. All discipline involving a member who has a confirmed positive test for illegal drug use, verified by the MRO, shall be administered by the Chief of Police. Discipline may include discharge for a confirmed positive test (except as provided under Sec. II) however, rehabilitation may be utilized as an alternative at the discretion of the Chief.

1. Any member that enters rehabilitation and subsequently tests positive, confirmed by the MRO, either by the conditions set forth in Section II, III or IV may be discharged.

2. Drug test results obtained by the Milwaukee Police Department shall not be used against a member in a criminal

or civil proceeding, except a disciplinary hearing at the Fire and Police Commission.

VII. HANDICAP DISCRIMINATION

A. Consistent with the American With Disabilities Act of 1990, nothing within this Article shall be construed to exclude from relief or protection an individual with a disability an individual who:

1. has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in such use; or

2. is participating in a supervised rehabilitation program and is no longer engaging in such use; or

3. is erroneously regarded as engaging in such use, but is not engaging in such use.

B. In the event a member within the parameters of this Article claims an inability to urinate due to medical reasons, the technician at the collection facility shall make an appointment with the Medical Review Officer. The MRO shall prescribe accommodations to facilitate urination while adhering to Section V. Drug Testing and Collection Procedure. All time required of a member within this subsection to help facilitate urination shall be deemed overtime as defined in Article 15 of this Agreement.

VIII. PUBLICATION OF PROGRAM

All members will be fully informed of this Article via In-Service Training and each member shall be delivered a copy of this Article before any drug tests are administered consistent with this program. All newly hired members shall be given a copy of this program within the first week of employment from their initial date of hire and thereafter explained in detail during Academy Recruit Training. Upon execution of this Article, it shall replace the existing Article 64 and be incorporated within the agreement.

IX. HOLD HARMLESS AND INDEMNIFICATION

The City agrees to indemnify and defend the employee organization (MPA) from any liability or claim of liability which may arise as a result of this agreement. It is expressly understood that the City of Milwaukee shall provide legal counsel if required at the City's expense and undertake all costs and related expenses of defending against any litigation including the cost and expense of settlement. The employee organization agrees to cooperate in that defense. It is further understood that this indemnity and defense provision shall apply to claims made by members of the MPA wherein the legality of the programs contemplated herein or any part of said programs is at issue. The City will not indemnify or defend the employee organization against any claim that the organization or anyone acting on its behalf improperly or negligently advised, represented, or performed services for an employee with respect to any event

subsequent to the effective date of this agreement with respect to the Drug Testing Program, disciplinary proceedings arising from the program, or any other right or liability or the employee related to the program.

X. RETENTION OF RECORDS

A. All records relating to the implementation or continuation of the Drug Testing Program and the individual drug test documents shall, as to the individuals affected be maintained by the Department on a confidential basis and treated as privileged documents which may not be released except with prior notice to the MPA and the written consent of the individual member. Further, any documents or information received by the MRO from a member shall be kept and maintained by the MRO as confidential medical records. It is further agreed that any data or statistics generated pursuant to these programs shall not be released for publication and may not be used by either party in collective bargaining procedures.