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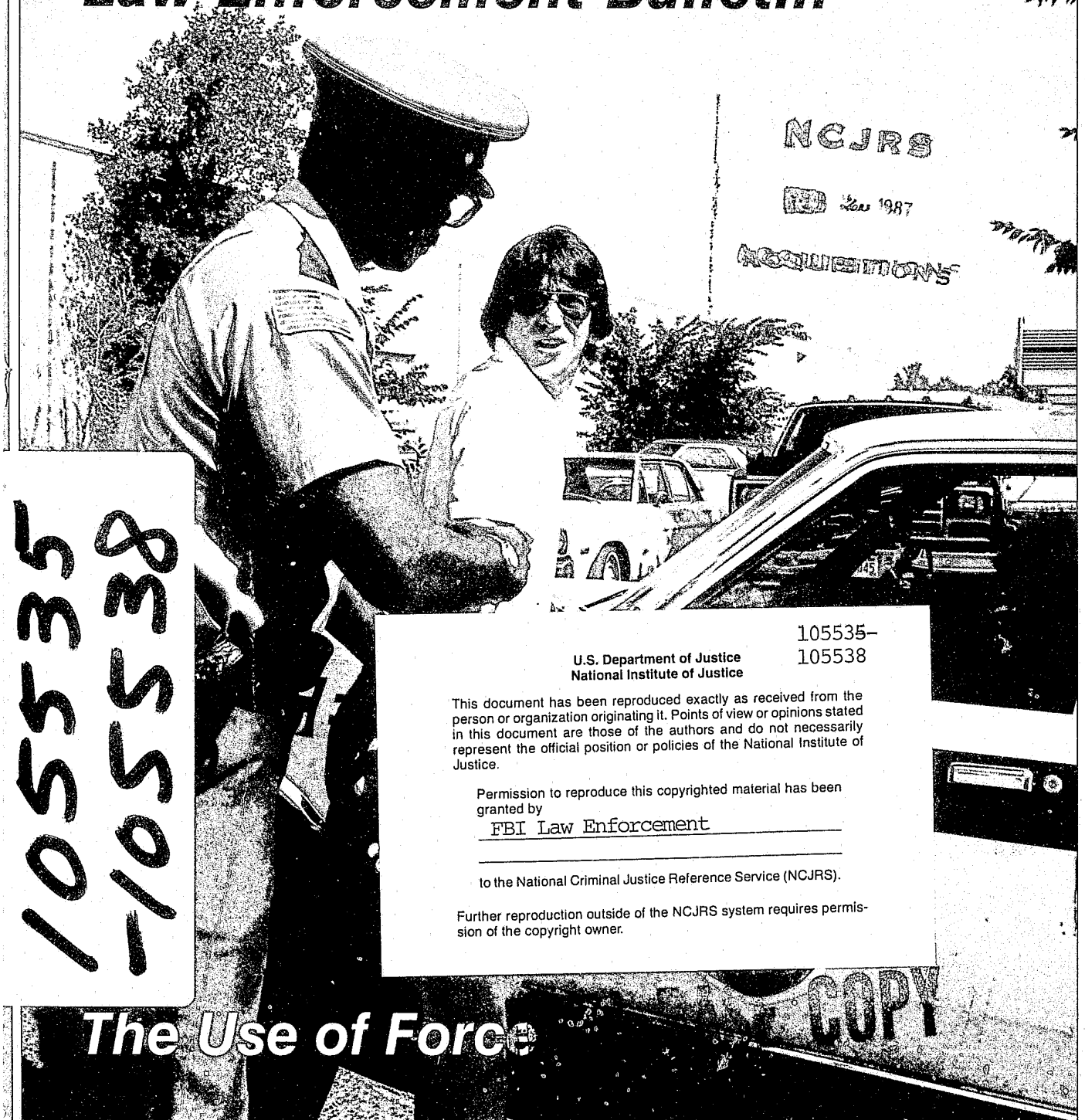

The Use of Force

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The St. Paul, MN, Police Department developed a pure research project designed to measure the resistance encountered by police officers and the force used to overcome that resistance.
See article p. 6.

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Urinalysis Drug Testing Programs for Law Enforcement

(Conclusion)

"A urinalysis drug testing policy should provide an officer ... the same avenues of grievance and redress to which the officer would be entitled if facing the same sanction for some other reason."

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Parts I and II of this article focused primarily on the fourth amendment balancing test of reasonableness in developing a drug testing program and determining whether and when a urinalysis drug testing program could lawfully be instituted. There remains the discussion of additional constitutional issues raised once the program is implemented. Those issues include the constitutional requirement that a search must be reasonable in its execution; the testing procedure must be conducted fairly, with a respect for privacy and dignity; the drug testing must employ procedures designed to guarantee accuracy in the test results; and the test results must be properly used in an employment decision.

Implementing the Urinalysis Drug Testing Program—Administering the Urine Collection Process

Having concluded that urinalysis drug testing can be reasonable and lawful at its inception, a law enforcement agency must next concern itself with the steps which must be taken to insure that the drug testing program is reasonably executed. Four potential problem areas can readily be identified. They are: 1) Obtaining a urine sample, 2) dealing with an officer's inability to provide a urine sample, 3) providing notice of the testing program, and 4) assuring anonymity to the subjects.

The first problem area, obtaining the sample, deals with the degree of intrusion which will be employed to insure an uncontaminated sample is obtained. This, of course, requires a law enforcement agency to concern itself with protecting against contamination or substitution of the urine sample by the officer providing it and against contamination by equipment and personnel who aid in the collection process. The latter concern can readily be dealt with by a policy which requires the same rigid standards used in the collection and handling of criminal evidence to be applied to urine collection. The former concern is more troublesome.

The greatest protection against urine sample contamination or substitution by the provider would be to physically observe the sample being produced. Yet, observed collection is somewhat intrusive and may be considered an affront to privacy and dignity. One court has noted that observed urine collection requires that an "officer would be required to perform before another person what is an oth-

Special Agent Higginbotham

erwise very private bodily function which necessarily includes exposing one's private parts, an experience which even if courteously supervised can be humiliating and degrading,"[65]

While observed collection may be a necessary safeguard against contamination or substitution of the urine sample, a department might also consider other measures which will lessen the intrusion into privacy, yet maintain the integrity of the collection process. One such method involves the use of "clean rooms" or "dry rooms." Under such a program, a certain area or room, free from equipment or sources which might be used in an attempt to contaminate the sample, is used. All items, such as soap which might be used to adulterate the urine sample and water which might be used to dilute the sample, are removed. Then by searching or "cleaning" that area before and after each sample is obtained, the chance of contamination or adulteration by some object or item within the room is eliminated.

The use of a "clean room" or "dry room" also requires that steps be taken to guard against a substituted sample or the addition of a foreign substance brought by the officer and added to the specimen at the time of urination. Those risks can also be minimized. For example, announcing the demand to submit to urinalysis upon short notice provides little opportunity to prepare a substitute urine sample. In addition, if an officer does not know exactly when he/she must provide the urine sample, the risk of carrying some item or substance which could be used to adulterate the sample may be relatively small. Similarly, providing or requiring the officer to wear certain clothing in which a substituted urine sample or adulterating foreign substances could not be easily concealed would also minimize the intrusion into privacy but maintain integrity in the collection process.

There is no case law which rules for or against observed collection. It is an important issue, however, and must be considered from the legal, management, and morale viewpoints.

The second potential problem in the urine collection process is the treatment of an officer who is unable to immediately provide the demanded urine sample. While there is little doubt that an officer could lawfully be restricted to the stationhouse or other area during his/her tour of duty until the sample was provided,[66] situations will certainly arise which, for a variety of reasons, make it impossible for the officer to provide the urine sample immediately or upon demand.

There is no single solution to this problem. It is complicated by the nature of the drug abused and the human body's metabolism of that drug. Depending on the drug which was abused, the quantity of drug consumed, and the activity of the officer between the time of drug abuse and drug testing, evidence of drug abuse may be detected through urinalysis for only short periods of time up to several weeks.[67] Accordingly, some risk to the integrity of a urinalysis drug testing program is posed if an officer is allowed to leave and return later to provide the urine sample. Yet both legal and management problems arise when an officer is required to remain at the testing site, particularly beyond his/her tour of duty. One solution

"Drafting and implementing a sound urinalysis drug testing policy requires the consideration of an equal number of legal, managerial, medical, and scientific issues."

might be to request the urine sample at the beginning of the shift, knowing that in nearly all cases, a urine sample can be obtained sometime within the same workday. A department's recognition of this issue and its attempts to balance the competing interests of the officer and the department will aid in satisfying the fourth amendment requirement of reasonableness.

The third area of concern is the notice which is provided to tested employees. While the efficacy of a urinalysis drug testing program could be destroyed by advance notice of the exact date and time of each individual instance of urine collection, general notice of the drug testing program will not impede its efforts and should actually increase its deterrent effect.

If an officer receives notice that drug testing will routinely be performed and that drug abuse will be detected by a program of urinalysis drug testing, his expectation of privacy is somewhat diminished.[68] Accordingly, the balancing test required to make the collection and drug testing of urine reasonable under the fourth amendment tips, to some degree, toward the law enforcement agency. Therefore, it is suggested that education and publication of the policy within the department be made a part of a decision to implement a drug testing program.

Lastly, to minimize the impact on an individual officer's privacy, it is suggested that as much confidentiality as possible be provided to the names of individuals who are selected for urinalysis drug testing. It is important to protect the individual from any stigma which might attach to being required to submit to urinalysis. Even though urinalysis drug testing programs may not be borne out of distrust for officers, it may well be perceived by the officers as a situation where they are presumed guilty of drug abuse and must prove innocence. Although little can be done by law enforcement management to prevent officers from discussing it among themselves, attaching a shield of anonymity and privacy to the selection, the urine collection process, and to the laboratory testing phases as well helps keep this inquiry into private affairs to a minimum.[69]

Due Process Requirements

Having addressed the fourth amendment issues in developing a urinalysis drug testing policy and the situations in which actual drug testing might take place, the next step in completing a comprehensive drug testing program is to insure that the proper due process procedures are followed to protect an officer's property interest in his/her job. For example, a urinalysis drug testing program must insure proper laboratory testing procedures are employed. If not, the urinalysis test results may be inaccurate and unreliable as a basis for making an employment decision. This could result in a due process violation.[70] The primary considerations in the due process analysis are: 1) Chain of custody, 2) reliable test results, and 3) use of the results in employment decisions.

Chain of Custody

Chain-of-custody requirements were mentioned earlier in the discussion of efforts which should be taken to minimize the intrusion into privacy during collection of the urine sample. The importance of strict chain-of-custody requirements is self-evident. If a law enforcement executive intends to make an employment decision on the basis of a positive urinalysis test result, the executive must be certain that the urine sample which tested positive for illegal drugs can be shown to have been provided by the officer who is subject to that employment decision and that the urine sample was free from contamination. Thus, a comprehensive urinalysis drug testing policy must provide guidance on the handling of the urine sample from the time of its collection until the test results are obtained. Many agencies or departments may perform the testing in-house. In that case, control over chain of custody is easier. However, if a law enforcement department or agency decides to contract with an independent laboratory for the actual urine drug testing, the contract must include provisions for tight chain-of-custody procedures.

Another facet of chain of custody concerns the preservation of the urine sample if it tests positive for drugs. If that test result is the basis for an adverse employment decision, is preservation required to provide an opportunity to the officer to have his/her own independent testing performed? In *California* v. *Trombetta,*[71] the Supreme Court appears to have answered in the negative.

In *Trombetta,* the defendants were convicted of driving while intoxicated based on the results of a breath test which measured the defendants' blood alcohol concentration. The defendants appealed their convictions claiming that the State's failure to preserve samples of their breath denied them due process. In rejecting that argument, the Supreme Court ruled that the duty of the State to preserve evidence for the defendant "must be limited to evidence that might be expected to play a significant role in the suspect's defense."[72] In defining the boundaries of that requirement, the

Court adopted a two-prong analysis wherein the "evidence must possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[73]

The *Trombetta* Court then ruled that under the facts present in the intoxicated driving cases before it, the breath samples were more likely to be inculpatory than exculpatory and that the defendant had the ability to raise and cross-examine on the issues of faulty calibration, extraneous interference with machine measurements, and operator error. Accordingly, the two-part test of facially exculpatory evidence and unavailability of comparable evidence could not be met.

The preservation of positive testing urine samples seems to be controlled by *California* v. *Trombetta.* The requirement to preserve positive testing urine samples would be legally required only if the urine sample was obviously exculpatory—an unlikely possibility—and there was no chance to develop the defense of erroneous test results through cross-examination—also not likely.

However, this is not to say that urine samples should not be preserved. While preserving positive samples may not be required as a matter of Federal constitutional law, preservation may be a necessary requirement under State law or civil service regulation. In addition, preservation of the urine samples to provide an officer with the chance to contest the laboratory findings would promote a sense of fairness and enhanced reliability in the testing procedures. A department might find that preservation of positive-testing samples for at least the period of time allowed to contest any adverse employment decision based on those test results is a reasonable measure which will be perceived by the officers as an attempt by management to adopt a fair drug testing program.

Reliability of Testing

The second due process issue is reliability. Again, the logic to support the requirement of reliable test results is self-evident. Clearly, terminating a tenured officer's employment based solely on a urinalysis drug test result that may not be accurate would be a deprivation of property (the job) without sufficient cause (due process).

The issue of reliability of urinalysis has been litigated in the courts and has centered on drug testing done by immunological assay. This is a testing methodology by which the chemical bonding reaction between the chemical metabolites found in urine and genetically engineered antibodies may indicate drug usage. A legal problem with such tests is that the results are based on an *indication* of drug use but not on the actual *presence* of drugs in the urine. In addition, there is the possibility of "false positives," a test result which falsely indicates that drugs are contained in the urine when in fact they are not. Though the degree of "false positives" is relatively low, about 5 percent, courts are divided over whether a 95-percent accuracy rate is sufficient to support a disciplinary decision.[74]

Because of the division in the courts on this testing procedure, the better practice is to require that a confirmatory test be performed on the urine sample if the initial test proves positive. In choosing a methodology for a confirmatory test, it is best to choose one which will measure the actual *presence* of drugs in the urine. The best method is gas chromatograph/mass spectometer testing (GC/MS). "The GC/MS test is generally considered the most accurate test available in the scientific community."[75] The GC/MS test will definitively determine, through the analysis of the compound's molecular structure, whether a urine sample actually contains drug metabolites. If this, or another similar confirmatory test is performed, a sound basis exists upon which the employment decision can be made.

Employment Decisions Based on Positive Test Results

The next issue involved in due process is the actual employment decision. Regardless of the sanction imposed against an officer whose urine sample tested and was confirmed positive for the presence of illegal drugs, if it economically disadvantages an officer's property interest in his/her job, that officer is entitled to certain procedural due process guarantees as a matter of Federal constitutional law.[76] While it is beyond the scope of this article to delineate the exact requirements of procedural due process, the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[77] A urinalysis drug testing policy should provide an officer, who will be subject to an employment sanction, the same avenues of grievance and redress to which the officer would be entitled if facing the same sanction for some other reason.

Due process also requires that the employment decision be made for a valid reason. This is sometimes referred to as substantive due process. In determining whether drug abuse detected through urinalysis is sufficient grounds for an employment decision in the context of public employment,

"... education and publication of the policy within the department should be made a part of a decision to implement a drug testing program."

courts must be satisfied only that there is a rational nexus between the decision and a governmental interest which is advanced by that decision.[78] For the reasons discussed earlier in the analysis of governmental interests in determining fourth amendment reasonableness, it appears clear that an employment decision based upon a confirmed, positive urinalysis drug test would meet that standard and satisfy the requirements of Federal substantive due process.

One related issue bears mentioning. The Federal Rehabilitation Act,[79] applicable to States which receive Federal funds through revenue sharing,[80] prohibits discrimination in employment on the basis of handicap. It has been successfully argued that both alcoholism and drug addiction are handicaps, and therefore, any sanction imposed against the employee constitutes discrimination on the basis of a handicap.[81] It is possible that an officer detected as a drug abuser could claim the protection of this statute to avoid any sanction imposed upon him.

However, the statute prohibits discrimination against a handicapped person only if, with or without the handicap, that person is otherwise qualified to perform the job. That definition of a qualified employee excludes any employee whose continued employment would endanger the health and safety of the individual or others.[82] Although the courts have not totally resolved this issue, a convincing argument can be made that a law enforcement officer who abuses drugs, even more than an officer who is an alcoholic, is not qualified to perform the job because of the threat to public safety, harm to public confidence, ineffective testimony as a witness, and harm to morale and officer safety caused by such drug abuse. Accordingly, whether the officer is or is not handicapped by reason fo drug abuse, the Federal Rehabilitation Act should not shield him from disciplinary sanction.[83]

The final issue in terms of employment decisions based on a urinalysis drug testing program is the refusal to submit to testing. A comprehensive policy should provide guidance on the consequences of an officer's refusal to provide a urine sample when ordered. If the policy is written to encompass and resolve the legal issues discussed in this article, then it may also provide for sanctions, including termination, for the failure to provide the sample on demand.[84]

CONCLUSION

The problem of drug abuse by law enforcement officers and officials already exists. Although the exact scope of the problem may be unknown, it is unlikely to disappear or even diminish unless affirmative steps are taken to identify those officers and officials who are involved in drug abuse. In addition, many agencies have a need to act in advance of a known problem to prevent its occurrence at all. Both goals can be accomplished by adoption of a urinalysis drug testing program. If the program is carefully designed and implemented, it can withstand a legal challenge. For those law enforcement agencies or departments which believe such a program is necessary, the following steps are suggested as part of the design and implementation of a urinalysis drug testing program.

First, identify the conditions within the agency which dictate the need for a drug testing program. Second, design a program through the cooperative efforts of management, labor, legal advisers, medical, and scientific personnel.[85] Third, decide why drug abuse is intolerable in the agency and clearly notify and educate each officer and official of that fact. Fourth, identify situations in which urinalysis drug testing will be required. These may include pre-employment testing, training and probationary periods, promotions or changes of assignment, during scheduled medical examinations, observed behavior which constitutes at least reasonable suspicion, serious incidents of on-duty conduct, or as part of a universal test-random selection model. Fifth, provide adequate safeguards for the protection of privacy and dignity consistent with the need for integrity within the testing process. Sixth, establish tight chain-of-custody requirements which apply from collection to preservation of the urine samples. Seventh, insist on reliable testing methods, with confirmatory tests mandated on positive-testing urine samples. Eighth, provide appropriate channels and procedures for the officers and officials to both explain and contest the results of a drug positive urinalysis. Finally, determine the sanction appropriate for detected drug abuse and apply it consistently.

Drafting and implementing a sound urinalysis drug testing policy requires the consideration of an equal number of legal, managerial, medical, and scientific issues. Using experts in these areas to carefully design a policy will improve the effectiveness of the department and provide individual officers with the type of work environment which permits them to best fullfill their sworn duties.

FBI

Footnotes

[65]*Caruso* v. *Ward, supra* note 46, slip op. at 6.

[66]*See I.N.S.* v. *Delgado,* 104 S.Ct. 1758, 1763 (1984) ("[o]rdinarily, when people are at work their freedom to move about has been restricted, not by the actions of law enforcement officials, but by the workers, voluntary obligations to their employers").

[67]*Supra* note 23.

[68]*See McDonell* v. *Hunter,* 612 F.Supp. at 1131 (D. Iowa 1985).

[69]*See Shoemaker* v. *Handel, supra* note 60, at 1107.

[70]Both the 5th and 14th amendments to the U.S. Constitution prohibit the United States and State government, respectively, from depriving a person of his liberty or property without due process of law. *See also, Jones v. McKenzie, supra* note 42.

[71]104 S.Ct. 2528 (1984). *But see, Banks* v. *F.A.A.,* 687 F.2d 92 (5th Cir. 1962) (holding due process requires preservation of a urine sample).

[72]104 S.Ct. at 2534 (1984).

[73]*Id.*

[74]For cases holding immunological assay tests reliable, *see Harmon* v. *Auger,* 768 F.2d 270 (8th Cir. 1985); *Jensen* v. *Lick,* 589 F.Supp. 35 (D. North Dakota); *Hampson* v. *Satran,* 319 N.W.2d 796 (North Dakota 1982); *Smith* v. *State,* 298 S.E.2d 482 (Georgia 1983). *Contra, Jones* v *McKenzie, supra* note 42; *Higgs* v. *Wilson,* 616 F.Supp. 226 (W.D. Kentucky 1985); *Wykoff* v. *Resig,* 613 F.Supp. 1504 (N.D. Indiana 1985); *Storms* v. *Coughlin,* 600 F. Supp. 1214 (S.D.N.Y. 1984); *Wilson* v. *State,* 697 S.W.2d 83 (Tex. App. 8 Dist. 1985); *Isaacks* v. *State,* 646 S.W.2d 602 (Tex. App. 1 Dist. 1983).

[75]*Williams* v. *Secretary of Navy,* 787 F.2d 552, 555 (Fed. Cir. 1986). *See also,* T. Schults, "Fundamentals of Employee Drug Testing," 3 Inside Drug Law 1, April 1986.

[76]*Cleveland Board of Education* v. *Loudermill,* 105 S.Ct. 1487 (1985).

[77]*Mathews* v. *Eldridge,* 424 U.S. 319, 333 (1975).

[78]*Kelley* v. *Johnnson,* 425 U.S. 238 (1976).

[79]29 U.S.C. § 791.

[80]31 U.S.C. § 6716.

[81]*Kulling* v. *Dept. of Transportation,* 24 M.S.P.R. 56 (1984).

[82]*See* 29 C.F.R. § 1613.702(f).

[83]*See McLeod* v. *City of Detroit,* 39 F.E.P. Cas. 225 (E.D. Michigan 1985).

[84]*Everett* v. *Napper,* 632 F.Supp. 1481 (N.D. Georgia 1986); *Cp. Tucker* v. *Dickey,* 613 F.Supp. 1124 (W.D. Wisconsin 1985).

[85]The issue of whether urinalysis drug testing must mandatorily be the subject of collective bargaining is beyond the scope of this article. One unreported decision from Florida has held that under the collective bargaining statutes of Florida, it is an issue which must be brought to the bargaining table. *See Fraternal Order of Police Lodge No. 20* v. *City of Miami, Florida,* Fla. P.E.R.C. Case No. CA-85-041, December 11, 1985.

Preliminary Bombing Figures Show Decrease

According to preliminary figures of the FBI's Uniform Crime Reporting Program, bombing incidents decreased 10 percent during the first 6 months of 1986, as compared to the same period of 1985. Of the 377 incidents reported, 295 were explosive and 82 were incendiary; yet, actual detonation or ignition occurred in 297. Explosive bombings were down 14 percent, while incendiary incidents increased 9 percent in volume.

The 1986 bombings resulted in 6 deaths, 122 injuries, and an estimated property damage of over $1.4 million. None of the bombing incidents were attributed to terrorist groups.

The 6 fatalities represented a decrease from the 10 deaths reported during January-June 1985. Among those killed were 4 perpetrators and 2 intended victims.

The number of persons injured as a result of bombings in 1986 was 122, up substantially from the semiannual 1985 total of 44. Of those injured, 86 were the intended victims, 22 percent innocent bystanders, 12 were the perpetrators, and 2 were law enforcement officers.

Residential property was the most frequent bombing target, accounting for 32 percent of the attacks. Eighteen percent of the incidents were directed at vehicles and 12 percent at commercial operations or office buildings. The remainder were distributed among various targets.

Geographically, 131 bombing incidents were recorded in the Western States, 114 in the Southern States, 74 in the Midwestern States, and 43 in the Northeastern States. Puerto Rico reported 14 incidents and the U.S. Virgin Islands had 1 incident.