

CHAPTER 6
REASONABLE SUSPICION
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CHAPTER 6

REASONABLE SUSPICION

1. GENERAL. Drug or alcohol testing is most frequently implemented for employees who exhibit behavior and/or symptoms which suggest substance abuse. Employee testing has been repeatedly upheld by the courts where there is reasonable suspicion to believe the employee was impaired. California Code of Regulations (CCR) Section 599.960 authorizes substance testing for employees serving in designated sensitive positions when reasonable suspicion exists, and permits a program of random drug testing for excluded and exempt state employees who are peace officers under Part 2, Title 3, Chapter 4.5, Section 830.2(d) and 830.5 of the Penal Code (correctional officers and parole officers). Confining substance testing to sensitive positions only when there is reasonable suspicion reflects a balance between the state's need to have a drug-free workplace and the employee's constitutionally protected right to privacy. Testing has been focused on those instances when the state's need is most compelling and where less intrusive methods, alone, cannot be relied upon completely.

2. DEFINITION.

a. Reasonable suspicion is the good faith belief based on:

(1) Specific articulable facts or evidence that an employee may have violated the substance abuse policy; and

(2) Substance testing could reveal evidence in support of a violation.

b. Reasonable suspicion exists only after the appointing power or a designee (confirming official) has also considered the facts and/or evidence and agrees that they constitute a finding of reasonable suspicion.

3. ELEMENTS.

a. Good Faith. Any determination of reasonable suspicion must be made in good faith. It cannot be made with malice, personal motive or as an act of reprisal. Both the supervisor and the confirming official must honestly and critically evaluate the facts and/or evidence before arriving at the conclusion that reasonable suspicion exists as a basis for substance testing.

b. Articulable Facts. Reasonable suspicion must be based on specific, identifiable facts and/or evidence. It cannot be based on hunches, intuition or "gut feelings." Substance testing is a sensitive matter involving many legal issues. The

basis for reasonable suspicion must, therefore, be specific enough to be clearly documented and readily explained to the employee, the confirming official, the employee's representative (when appropriate), and, when necessary, Administrative Law Judges, arbitrators and the courts.

c. Initial Suspicion. Reasonable suspicion is typically triggered by something that is abnormal about the employee's behavior which attracts the supervisor's attention. This can include such things as:

- (1) An industrial accident.
- (2) Unusual demeanor or appearance.
- (3) Atypical behavior.
- (4) Abnormal work performance.

NOTE: Substance abuse is by no means the only cause for unusual events or behavior in the workplace. An accident can be caused by inexperience, atypical behavior can be the result of stress, and physical symptoms can be caused by legitimate medical problems. It is incumbent upon the supervisor to assess available facts and circumstances surrounding each event before determining that substance abuse may be the root cause.

d. Criminal Investigation. Supervisors investigating suspected substance abuse must remain aware of possible criminal violations (i.e., 11377 Health and Safety Code [H&S], 11350 H&S, 23152a/b Vehicle Code). If the supervisor believes criminal violation(s) exist, a criminal investigation should be conducted prior to the administrative investigation. Every effort should be made to maintain a separation between the criminal and administrative investigations. (Refer to Highway Patrol Manual [HPM]10.2, *Internal Investigations Manual*.) Furthermore, to preserve the integrity of any evidence gathered during a criminal investigation, the nature of the investigation should be clearly explained to the employee, since participation in field sobriety tests, including the Preliminary Alcohol Screening device (PAS) test, is voluntary during a criminal investigation. After the criminal investigation is completed, the administrative investigation can be started. For uniformed employees, evidence gathered during a criminal investigation can be used to support the administrative investigation; however, the administrative investigation cannot be used to support the criminal investigation.

NOTE: Per California Labor Code Section 432.7, criminal arrest/investigation reports involving nonuniformed employees may not be used to support an administrative investigation unless the incident described in the report resulted in a conviction. In these instances, administrative investigators may conduct interviews

of criminal investigators to gather evidence in support of the administrative investigation.

e. Closer Observation. When substance abuse cannot be ruled out, a closer observation should be made. The nature of this observation will depend on the particular qualifications of the involved supervisor and attendant circumstances. Uniformed supervisors are trained and experienced in various sobriety determination techniques and may wish to use them. Supervisors should realize, however, that conventional balance and coordination tests may have limited value for establishing a reasonable suspicion for substance testing. This is because they were developed to identify someone who is too intoxicated to drive. A positive test will result from a blood alcohol level of .04 percent for substance testing versus the .08 percent for driving under the influence. Supervisors must remember, however, that any detected level of alcohol is prohibited by the statement of *Inconsistent and Incompatible Activities*. (Refer to HPM 10.3, *Personnel Transactions Manual*, Chapter 14, *Inconsistent and Incompatible Activities*.) As such, adverse action can be sought by citing Government Code (GC) Section 19572(r) – *Violations of Prohibitions Set Forth in Accordance with Section 19990 GC*. Some uniformed supervisors also possess drug recognition skills which can be utilized to further establish reasonable suspicion. Use of the PAS device to establish reasonable suspicion is not authorized. If reasonable suspicion is established, any subsequent chemical tests must still be administered using a breath alcohol analyzing instrument which meets the State Department of Health Services standard. Nonuniformed supervisors who may not be trained nor experienced in these techniques must rely on observations which do not require additional expertise. (Refer to Annex A.) Nonuniformed supervisors should seek the assistance of a uniformed supervisor to corroborate reasonable suspicion, whenever possible. In any situation, a second opinion will help to ensure all factors are considered and put into proper perspective. A second opinion will also strengthen the state's case in any potential appeal or litigation.

f. Substance Abuse Investigation Interview. If the Substance Abuse Investigation Interview is conducted, the supervisor should keep in mind the employee's rights under the Public Safety Officers Procedural Bill of Rights Act (POBR). Only those questions pertaining to the employee's possible need for medical attention should be asked. Deviation from this could lead to incriminating questions being asked, resulting in a possible violation of POBR. Examples of questions which may be acceptable are listed below:

- (1) Are you sick or injured?
- (2) Do you have a medical condition which may be causing the impairment?
- (3) When did you last sleep? Eat?

- (4) Did you bump your head?
- (5) Are you currently under the care of a doctor or dentist?
- (6) Have you taken any medication or drugs?
- (7) Do you feel the effects of the medication or drugs?

g. Anonymous Tip. An occasion may arise when a departmental supervisor will receive an anonymous tip regarding an employee's substance abuse. The following criteria shall apply when acting upon an anonymous tip:

- (1) When considered credible, tips may be the basis for initiating closer observation of the employee to determine if other articulable facts or evidence exist which establish reasonable suspicion.
- (2) If closer observation does not yield facts or evidence to support the conclusion that the employee has violated this rule, an anonymous tip alone is not sufficient to order a substance test.
- (3) Whether or not a test is authorized, an internal investigation may be initiated pursuant to the procedures outlined in HPM 10.4, *Citizens' Complaint Investigations*, and/or HPM 10.2 if appropriate.

h. Reliable Informant. A supervisor might also receive information regarding substance abuse from a reliable informant. The California Department of Human Resources (CalHR) requires that the informant be a peace officer who is willing to publicly testify on behalf of management, should that become necessary. Additionally, CalHR also requires that the employee in question be told who the informant is, what the informant said, and be given an opportunity to respond to this as part of the determination of reasonable suspicion. Reasonable suspicion is a good faith belief based on specific articulable facts that the employee has violated this policy and that testing could reveal evidence of that violation. Depending upon the circumstances, information from a reliable informant alone could be the foundation for reasonable suspicion. Supervisors must be extremely careful when basing reasonable suspicion on information of this nature.

i. Confirming Official. The CalHR requires that each initial determination made by a supervisor be approved by the Commissioner or the Commissioner's designee. For the purposes of the Department's substance testing program, this confirming official will be the first designated manager in the supervisor's chain of command. The role of this confirming official shall be to:

- (1) Consider the facts and/or evidence and agree whether or not they support reasonable suspicion;

- (2) Ensure accurate and proper application of the rules;
- (3) Provide guidance and direction; and
- (4) Authorize the substance test.

NOTE: In the event the aforementioned manager is unavailable, the chain of command shall be followed until another manager is contacted to act as the confirming official. In no event shall the confirming official be the suspected employee's immediate supervisor or the person who made the initial observation leading to reasonable suspicion.

j. Abuse Revealed. There is also a requirement that reasonable suspicion must be accompanied by the belief that substance testing could reveal evidence of drug and/or alcohol use. The purpose of substance testing is to determine current impairment rather than past behavior. Therefore, information about an employee's actions several weeks earlier alone would not establish reasonable suspicion under these rules. If, however, this information is coupled with some contemporary behavior or incident(s) involving the employee, reasonable suspicion could be established.

k. Documentation. All of the elements upon which reasonable suspicion is based must be documented and distributed as indicated in Chapter 11, *Documentation*.

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ANNEX A

COMMON INDICATORS OF DRUG INFLUENCE

Drugs and alcohol cause a variety of physical and emotional effects. This summary lists the ones that are: (1) more commonly reported for each drug and (2) most readily observable by the supervisor who is not a professional in this area. It does not include effects that would require special skills in field sobriety testing or medical examination to detect (e.g., pupil reaction, vital signs).

Supervisors should use this information as a general guide to help support other evidence of drug impairment. These are not fool-proof indicators in themselves, since:

- many of the signs can be caused by factors other than drug use, and
- the signs may not always be evident when drug use has occurred.

Supervisors must, therefore, consider all of the available information and its context before any conclusions are reached.

Marijuana

- Red, glassy eyes
- Droopy eyelids, drowsy appearance
- Euphoric/giggly
- Slow or slurred speech
- Impaired perception or attention
- Poor balance, unsteady
- Marijuana odor
- Green coating on tongue

Cocaine

- Dilated (large) pupils
- Unusually rapid speech, walk, reaction, breathing, etc.
- Mood elevation, irritability
- Restless, anxious, itching
- Powder debris on nasal hair
- Sweating

Heroin

- Constricted (small) pupils
- Droopy eyelids
- Slow or slurred speech
- Drowsiness, sedation
- Slow or staggering walk
- Excessive thirst

PCP

- Illusions, hallucinations, disorientation
- Blank stare
- Drowsiness, slow or slurred speech
- Agitated, combative, violent
- Chemical odor on breath or person

Depressants (including alcohol, barbiturates, sedatives, etc.)

- Slurred speech
- Unsteadiness
- Odor (for alcoholic beverages)
- Uncharacteristic or inappropriate behavior

Stimulants

- Restlessness
- Body tremors
- Excited, talkative, and anxious
- Exaggerated reflexes

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