

CHAPTER 8

DEALING WITH THE EMPLOYEE AND EMPLOYEES' RIGHTS

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CHAPTER 8

DEALING WITH THE EMPLOYEE AND EMPLOYEES' RIGHTS

1. DEALING WITH THE EMPLOYEE.

a. Supervisor's Concerns. The substance testing process is a very serious procedure, and the first-line supervisor will be dealing with the involved employee from the time reasonable suspicion first arises until the results of the test are known. Throughout that period, which may span several days, the supervisor's actions should be guided by the following:

- (1) Safety of the employee and others;
- (2) Potential disciplinary action up to and including dismissal;
- (3) Proper enforcement of the state's substance abuse rules; and
- (4) Employee rights and privacy.

b. Initial Contact. A supervisor making initial contact with an employee suspected of violating the substance abuse policy must take control of the situation. The Department has an obligation either to verify this suspicion and order the test or to determine what, other than substance abuse, may have caused the circumstances upon which the initial reasonable suspicion was based. Upon initially contacting the employee, the supervisor should:

- (1) Inform the employee of the observations and why they are cause for concern.
- (2) Listen to the employee's explanation and give it appropriate consideration before reaching a decision to test.
- (3) Maintain as much privacy and confidentiality as possible.
- (4) Be direct, factual, firm, calm, and professional.
- (5) Avoid apologizing for the actions or engaging in pointless debate or discussion.
- (6) If the employee is threatening or violent, seek the assistance of another supervisor or manager before continuing with the process.

(7) Seek medical help immediately, if appropriate.

(8) Keep the employee under continuous observation until the sample is collected or the decision is made not to test. Do not allow the employee to consume large amounts of liquid and note any unusual actions. This is a critical step in the process. The employee must not be given the opportunity to dilute the urine sample or to make preparations to either beat the test or contaminate the sample. (Refer to Chapter 7, *Testing Process and Standards*, paragraph 3.d.)

(9) Do not allow the employee to converse with fellow workers.

c. After Approval. After initial discussions with the employee, the supervisor's reasonable suspicion of substance abuse may still exist. If this is the case, this reasonable suspicion must be approved by the confirming official as detailed in Chapter 6, *Reasonable Suspicion*. Once this has been accomplished, the supervisor should:

(1) Inform the employee that a decision has been reached to administer a substance test.

(2) Assure the employee that the sample will be collected in a proper setting.

(3) Advise the employee of the possible consequences of a positive test, which could include termination from state service.

(4) If the employee refuses to cooperate, inform the employee that this refusal will result in a request for adverse action and could lead to termination from state service.

(5) Make arrangements for testing and, if necessary, transportation.

(6) If a uniformed employee is involved, take and secure the employee's duty belt and weapon until such time as the employee is released to duty.

d. Employee Status. Since the decision to test will be based upon reasonable suspicion of substance abuse, the employee should not be allowed to return to duty until the test results are known to be negative. The employee should be placed on dock status for the remainder of the shift on the day of the test or refusal to take a test. This is appropriate since the employee is suspected of substance abuse and is incapable of working for the remainder of the shift. In most instances, on the day following the test or refusal to take a test, the employee should then be placed on paid administrative time off, subject to approval through the chain of command to

the appropriate Assistant Commissioner. The employee should remain on this status until the test results are known and/or a decision is made regarding administrative action. In those instances where only alcohol is suspected, the employee should be returned to full duty the following day if completely recovered from its effects. (Refer to Highway Patrol Manual [HPM] 10.2, *Internal Investigations Manual*, Chapter 2, *Authority and Requirements*.) The following criteria will apply after a substance test has been conducted or the employee refuses to submit to a test when directed:

- (1) If a peace officer is involved, peace officer powers will be immediately suspended along with any requests for secondary employment. Additionally, the employee will be required to immediately surrender all state property (refer to Annex A). These suspensions will remain in effect until the results of the test are known. A decision will be made at that time whether or not to reinstate them. The provisions of this subsection do not apply to circumstances involving **only** the suspected use of alcohol.
 - (2) Supervisors shall ensure the employee is provided with a memorandum describing their rights and responsibilities regarding the outcome of the test (refer to Annex B of this chapter).
 - (3) Arrange to have the employee transported home. In no event is the employee to drive home.
 - (4) Employees who refuse transportation or cannot care for themselves shall remain at the office until arrangements can be made with family, friends, etc.
 - (5) If intoxication is so severe that it poses an immediate threat to others or to medical well-being, the employee should be transported to a custodial or medical facility, as appropriate.
- e. Memorandum to Employee. After providing a urine sample, the employee shall be given a memorandum explaining both the supervisor's role and the employee's rights relative to substance testing (refer to Annex B). Along with the memorandum provided to the involved employee, a list of items explaining substance testing, results, and employee assistance shall also be provided (refer to Annex C). The sample memorandum depicted in Annex C is available as a "Word" document. It is located under "General Templates" and is named "HPM 9.2 Annex C."
- f. Post Analysis. When the test results are known, the employee shall be returned to full duty if the results are negative and there are no other causes for action. The employee's dock time on the day of the test shall also be adjusted to a paid status. If the results are positive, the Office of Internal Affairs (OIA), through

the chain of command, should be consulted for guidance. Each case must be determined individually considering the circumstances. In conjunction with adverse action, supervisors are to consider the value of medical review and/or employee assistance programs.

2. EMPLOYEE RIGHTS.

a. Statutory. The enactment of the Department of Personnel Administration substance testing rules and this departmental policy do not in any way mitigate the rights guaranteed to employees under the Public Safety Officers' Procedural Bill of Rights Act (POBR) or the various Memoranda of Understanding (MOUs). Supervisors must also remember that the Commissioner has extended POBR protections to all members of the Department, except cadets. Any action with regard to substance testing must be evaluated in light of these rights.

b. Representation. Employees suspected of violating this policy shall be entitled to representation during any interrogative interviews that could lead to a decision to take adverse action against the employee.

(1) These interrogative interviews could occur before or after the sample is taken.

(2) This right to representation does not preclude a supervisor from making initial contact with the employee in an appropriate confidential interview setting to ask questions regarding abnormal behavior, inefficiency, absenteeism, tardiness, unusual appearance, etc. This is part of the process to eliminate substance abuse as a cause for reasonable suspicion.

(3) Supervisors are to carefully weigh the need to interrogate an employee before the collection of a sample. In most instances, an interrogation should occur after the sample is collected or at a later date when additional information is known.

(4) Unless specifically permitted in the MOU, an employee is not entitled to representation during the collection of the sample.

c. Medical Review. Employees shall be entitled to representation in any of their discussions with the Medical Review Officer (MRO) that occur subsequent to implementing this policy. The sample collection process shall include an opportunity for the employee to provide information about factors other than illegal substance use (such as taking legally prescribed medication) that could provide a

medical explanation for a positive test result. If the employee desires to provide such information, the following procedure shall be followed:

- (1) Information to be provided to the MRO is to be mailed "Personal and Confidential" to OIA, Attention: Medical Review Officer. The OIA Substance Testing Coordinator will then forward this unopened information to the MRO. The OIA will not review the employee's information or the test results.
 - (2) The envelope shall be opened by the MRO only upon a positive test result.
- d. Test Results. The substance testing policy also requires that the employee shall receive a full copy of any test results and related documentation of the testing process as detailed in Chapter 11, *Documentation*.
- e. Sample. At the employee's request and expense, the sample may be retested by that laboratory or another laboratory which has been certified by the United States Department of Health and Human Services under the National Laboratory Certification Program in accordance with Title 49, Code of Federal Regulations Part 40.81.

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ANNEX A
REMOVAL OF PEACE OFFICER POWERS

State of California

Business, Transportation and Housing Agency

M e m o r a n d u m

C O N F I D E N T I A L

Date: January 1, 2012

To: Officer A. C. Smith, #25061

From: **DEPARTMENT OF CALIFORNIA HIGHWAY PATROL**
Rocky Flat Area

File No.: 90.A12404.000T

Subject: RELIEVED OF DUTY

Effective January 1, 2012, at 0800 hours, you are relieved of all duties, rights and powers arising out of your employment, including your peace officer powers as authorized by Penal Code Section 830.2 pending the results of your recent substance test. Although you will no longer possess peace officer status, you must still consider yourself a member of this Department and are directed to cooperate with the Department and answer all questions asked regarding your activities on or off duty.

Any approved Secondary Employment Activity Request you have on file is hereby suspended until further notice.

With the service of this memorandum, you are directed to immediately surrender all state property to your supervisor.

Your failure to adhere to the directions and/or prohibitions of this memorandum may result in adverse action against you.

J. P. SOUZA, Captain
Commander

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ANNEX B

EMPLOYEE RIGHTS – SUBSTANCE TEST

State of California

Business, Transportation and Housing Agency

Memorandum

C O N F I D E N T I A L

Date: January 1, 2012
To: Officer A. C. Smith, #25061
From: **DEPARTMENT OF CALIFORNIA HIGHWAY PATROL**
Rocky Flat Area
File No.: 90.A12404.000T
Subject: EMPLOYEE RIGHTS RELATIVE TO SUBSTANCE TESTING

The purpose of this memorandum is to inform you of your rights relative to the substance test you submitted to on (DATE), at (TIME) hours. It is intended to assist you in specifying your return to duty.

Under Section 599.964 Title 2 CCR, you are entitled to representation during any interrogative interview which could lead to an adverse action subsequent to the completion of a breath and/or urine test. You are also entitled to have a representative present during any discussion you may have with the Medical Review Officer (MRO) relative to the substance test results.

You may provide information to the MRO regarding factors other than illegal drug use, such as taking legally prescribed medication, which could cause a positive test result. You may request the assistance of a representative while preparing this memorandum. Information you provide to the MRO is to be mailed "Personal and Confidential" to the Office of Internal Affairs (OIA), Attention: MRO. The OIA will then forward this unopened information to the MRO.

You are entitled to receive a full copy of any test results and related documentation of the testing process. You may also request, at your own expense, an additional test by the original testing laboratory or by another laboratory which has been certified by the United States Department of Health and Human Services under the National Laboratory Certification Program in accordance with 49 CFR, Part 40.81.

Once the test results are known, the MRO will submit to this command a memorandum explaining the results. A copy of this memorandum will be provided to you. Any questions you have relative to the substance test may be directed to your immediate supervisor.

J. P. SOUZA, Captain
Commander

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ANNEX C

SAMPLE MEMORANDUM FROM COMMANDER TO EMPLOYEE REGARDING TESTING, RESULTS, AND EMPLOYEE ASSISTANCE

State of California

Business, Transportation and Housing Agency

Memorandum

C O N F I D E N T I A L

Date: January 1, 2012

To: Officer A. C. Smith, #25061

From: DEPARTMENT OF CALIFORNIA HIGHWAY PATROL
Rocky Flat Area

File No.: 90.A12404.000T

Subject: EMPLOYEE REFERENCE MATERIAL REGARDING SUBSTANCE TESTING, RESULTS, AND EMPLOYEE ASSISTANCE

This memorandum serves to provide you with a brief description of departmental policy, procedures, and employee rights and responsibilities relevant to substance testing. Refer to Highway Patrol Manual (HPM) 9.2, *Substance Testing Manual*, for detailed information.

INCONSISTENT AND INCOMPATIBLE ACTIVITIES:

The Department of Personnel Administration defines alcohol impairment as .04% Blood Alcohol Concentration (BAC) or greater; however, the Inconsistent and Incompatible Activities Statement contained in HPM 10.3, *Personnel Transactions Manual*, Chapter 14, Annex A (General Conduct and Misuse of Position), prohibits an employee from reporting to work with the odor of an alcoholic beverage on the employee's breath. Any detected level would be the basis for adverse action. Nothing restricts a supervisor's ability to take administrative action for levels below .04% BAC as determined by a breath sample, citing the Inconsistent and Incompatible Activities Statement as the authority for the action.

Accordingly, the following are examples of types of activities that are incompatible with, or unfavorable to, public service insofar as all employees of the California Highway Patrol are concerned:

1. Drinking of intoxicants while on duty or in uniform.

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2. Reporting for or returning to duty when not completely recovered from the effects of alcohol, or with alcohol on the breath.

If your breath sample tests positive for alcohol, regardless of the level, you could be found in violation of the Inconsistent and Incompatible Activities Statement.

Additionally, you may be subject to random testing for a period of one year, unless otherwise stipulated, subsequent to your test results.

DOCUMENTATION:

According to Section 599.962 (c), Title 2, California Code of Regulations (CCR), any observations which lead to reasonable suspicion shall be documented. Additionally, a copy of that information will be provided to the employee within 48 hours *except* when it is not reasonably possible or where other timeframes are dictated by the applicable Memorandum of Understanding (MOU).

As such, a Reasonable Suspicion Report will be prepared on a CHP 202X, *Workplace Substance Abuse Investigation Report*, and marked "Confidential." Since there is an expectation of a 48-hour turnaround, this document may be handwritten or typewritten. Supervisors are not required, however, to provide you with immediate documentation of the cause for reasonable suspicion. In most instances, 48 hours should be sufficient time for the supervisor to prepare a thorough report of the circumstances and submit it to the confirming official for review.

After completing the report, the supervisor must sign the document and submit it to the manager who approved the substance test. The manager/confirming official must then sign the document indicating the review and concurrence with the reasonable suspicion. You will then be required to sign the report. Once the Reasonable Suspicion Report has been finalized, you will be entitled to receive a full copy of any test results and related documentation of the testing process (599.964[d] 2 CCR).

ASSISTANCE:

The Department recognizes that pressures and stress may cause problems in interpersonal relationships, finances, work, and marriage, and contribute to the misuse of alcohol and drugs. Employees and the Department will benefit if personal problems are handled with a minimal impact on job performance and efficiency.

In order to assist you with resolving any pressures, crises and stresses, along with any personal problems you may be experiencing, the Department is offering the services of

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the Employee Assistance Program (EAP), as described in HPM 10.5, *Employee Assistance Manual*, Chapter 1. This program was established by the State of California as part of the state's commitment to promoting employee health and well-being. Offered at no charge to you, the EAP provides a valuable resource for support and information during difficult times, as well as consultation on day-to-day concerns.

The program operates under a departmental contract with a private statewide counseling organization, Managed Health Network (MHN). The MHN's counselors can help you address many problems you may be experiencing, such as family or marital difficulties, problems with alcohol or drugs, or feelings of depression.

You or your family members may contact MHN directly. Supervisory or departmental knowledge or approval is not necessary. The MHN may be accessed through the statewide toll free number (800) 646-9923. Information is also available via the MHN website at www.mhn.com. This service is confidential and you will receive assistance in obtaining an appointment with a counselor. The number of free counseling sessions you are entitled to is dependent upon your bargaining unit agreement. In addition, your spouse and children are also entitled to a number of free counseling sessions.

It is also feasible for a supervisor to suggest you contact MHN because of a work performance problem. Such a suggestion may be offered as a means to improve your performance; however, contact with MHN remains strictly voluntary.

Should you decide to attend any sessions with MHN, you may use sick leave if properly documented by a STD 634 (Absence and Additional Time Worked Report). If you wish to maintain complete confidentiality, your absence may be covered by vacation or some other available method, such as scheduling the appointment during off-duty hours.

Information concerning identity, diagnosis, or treatment will not be disclosed to the Department, or to anyone else, unless the person using EAP specifically authorizes it in writing. The only exceptions are when MHN is legally required to release information, when records are lawfully subpoenaed, when there is a clear and imminent danger of physical violence by a patient, or when there is reason to suspect child abuse or molestation. This is the same degree of confidentiality as is provided by a private physician.

The State of California operates the EAP program through a private, professional organization to afford the protection provided by patient confidentiality.

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EMPLOYEE STATUS:

If substance abuse involving the use of drugs is suspected, you will not be allowed to return to duty until the test results are known to be negative.

You will also be placed on dock status for the remainder of the shift on the day of the test or refusal to take a test. This would be appropriate since you are suspected of substance abuse and may be incapable of performing your duties for the remainder of the shift. You may then be placed on paid administrative time off, subject to approval through the chain of command to the appropriate Assistant Commissioner. You may remain on this status until the test results are known and/or a decision is made regarding administrative action. In those instances where only alcohol is suspected, you will be returned to full duty the following day if completely recovered from its effects (refer to HPM 9.2, Chapter 8). The following criteria will apply after a substance test pursuant to reasonable suspicion of substance abuse involving the use of drugs, or if you refuse to submit to a test when directed:

If you are a peace officer, your peace officer powers will be immediately suspended along with any requests for secondary employment. Additionally, you will be required to immediately surrender all state property. The suspensions will remain in effect until the results of the test are known.

Arrangements will be made to transport you home. In no event will you be allowed to drive home. If you refuse transportation, you shall stay at the office until arrangements can be made with family, friends, etc. Notwithstanding any provision of this policy, if your impairment is so severe that it poses an immediate threat to others or your medical well being, you may be transported to a custodial or medical facility.

TEST RESULTS:

Once your test results are known, you shall be returned to full duty if the results are negative and there are no other causes for action. Your dock time on the day of the test shall also be adjusted to a paid status. If the results are positive, you may be subject to disciplinary action up to, and including, dismissal.

EMPLOYEE RIGHTS:

The enactment of the Department of Personnel Administration substance testing rules and departmental policy do not in any way mitigate the rights guaranteed to employees under the Public Safety Officers Procedural Bill of Rights Act (POBR) or the various MOUs.

Officer's Name

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Date

Additionally, the Commissioner has extended POBR protections to all members of the Department, except cadets. Every employee suspected of violating this policy shall be entitled to representation during any interrogative interview that could lead to a decision to take adverse action against the employee.

1. These interrogative interviews could occur before or after the sample is taken.
2. Your right to representation does not preclude a supervisor from making initial contact with you in an appropriate confidential setting to question you regarding abnormal behavior, inefficiency, absenteeism, tardiness, unusual appearance, etc. This might be part of the process to eliminate substance abuse as a reason for unusual appearance or behavior.
3. Unless specifically permitted by your MOU, you are not entitled to representation during the collection of the sample.

You shall be entitled to representation during any of your discussions with the Medical Review Officer (MRO) that may occur as a result of the urine test. This will allow you to provide the MRO with information regarding factors other than illegal substance use (such as taking legally prescribed medication) that could cause a positive test result. You may accomplish this through the following:

1. Your information shall be marked, "Personal and Confidential" and mailed to the Office of Internal Affairs (OIA), Attn: MRO. The OIA will then forward this unopened information to the MRO.
2. The envelope shall be opened by the MRO only upon a positive test result.

Subsequent to your test results, you shall receive a full copy of any test results and related documentation of the testing process.

At your request and expense, a sample may be retested by the assigned laboratory or by another laboratory that has been certified by the United States Department of Health and Human Services under the National Laboratory Certification Program, in accordance with 49 CFR, Part 40.81.

RECORDS:

To minimize the stigma associated with a substance test, negative test results and the documentation regarding reasonable suspicion for the test shall be maintained apart from

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your personnel folder unless you request otherwise. This information shall be forwarded to OIA as confidential material, and will be maintained in a separate file for five years or until such time as any litigation arising from circumstances leading to the test has concluded, whichever is longer.

Positive test results and the documented reasonable suspicion report will become part of the request for adverse action file. This information will be maintained for a period of five years and handled consistent with guidelines established for these files by the California Government Code and departmental policy.

ADDITIONAL INFORMATION:

If you have any additional questions regarding this matter, you may contact your immediate supervisor for assistance.

U. R. NAME, Captain
Commander

ACKNOWLEDGEMENT:

Employee's Signature

Date

cc: (Original to file, copy to employee)