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ABSTRACT

This document contains witness testimonies and prepared statements from the Congressional hearing called to examine drug abuse in the workplace, how the public and private sectors are dealing with this problem, and the issue of urine testing. Opening statements are included from Representatives Charles Rangel, Benjamin Gilman, Frank Guarini Mel Levine, E. Clay Shaw, Jr., Lawrence Smith, Michael Oxley, and John Conyers. Witnesses providing testimony include: (1) Peter Ueberroth, commissioner of baseball; (2) Charles Schuster, director, National Institute on Drug Abuse; (3) E. A. Weihenmayer, president, Wall Street Personnel Directors Association; (4) Peter Bensinger, corporate drug abuse consultant; (5) John Riley, administrator, Federal Railroad Administration; (6) James Taylor, director, Office of Inspection and Enforcement, Nuclear Regulatory Commission; (7) Charles Weithoner, associate administrator, Federal Aviation Administration; (8) Carmen Thorne, manager, medical testing and employee assistance, Washington Metropolitan Transit Authority; (9) Robert Angarola, attorney; (10) Paul Samuels, Legal Action Center, New York; (10) Douglas Rollins, director, Center for Human Toxicology, University of Utah; (11) James Mahoney, director, Employee Assistance Program, Philadelphia Council, American Federation of Labor Congress of Industrial Organizations, and (12) Rear Admiral Paul Mulloy, United States Navy, retired. Prepared statements and submissions for the record are included. (NB)

DRUG ABUSE IN THE WORKPLACE

HEARING

BEFORE THE

SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

MAY 7, 1986

Printed for the use of the
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(99th Congress)

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DRUG ABUSE IN THE WORKPLACE

WEDNESDAY, MAY 7, 1986

HOUSE OF REPRESENTATIVES
SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL
Washington, D.C.

The committee came to order pursuant to call at 9:15 a.m., in room B-318, Rayburn House Office Building, Hon. Charles B. Rangel (chairman of the committee) presiding.

Present: Representatives Benjamin A. Gilman, Frank J. Guarini, Mel Levine, E. Clay Shaw, Jr., Lawrence J. Smith, Michael G. Oxley, Walter E. Fauntroy, Joseph J. DioGuardi, and John G. Rowland.

Staff present: John T. Cusack, chief of staff; and Elliott A. Brown, staff director.

The CHAIRMAN. The Select Committee on Narcotics and Abuse Control will come to order as we have our hearing this morning. The Chair would first like to recognize Sir Jack Stuart Clarke, a member of the European Repertoire Parliament.

That's the British Parliament, right? It is the European Community. Which country? Of all the countries. I assume England is the country of its origin. All right. Would you be kind enough to introduce your chairman?

Mr. CLARKE. I would like to introduce Gianaco Butsico, who is my chairman and who comes from Greece. We had this special committee set up for 1 year initially, and we have come over to try to learn something from you. You are 18 months ahead of us, and I'm not proud of that, but we can learn.

The CHAIRMAN. If we weren't on the record, Sir Jack, I would give you a disappointing response, but—I also would like to recognize Peter Bensinger, former Administrator of the Drug Enforcement Administration who is with us, and I want to thank him for the contributions he made, and we will be hearing from him later.

Today, at the request of Frank Guarini, our distinguished colleague from New Jersey, the Select Narcotics Committee is conducting hearings on drug abuse in the workplace. We are trying to find out how the public and private sector is dealing with this very serious problem, especially as it relates to the controversial issue of urine testing.

I don't think it is any great secret that we are one of the highest drug abuse countries per capita in the world, and it is no secret that notwithstanding the efforts that have been made by our State Department, we have every reason to believe in the United Nations, in our State Department, and from the work done by our

staff committee, that we expect tons and bumper crops of cocaine, heroin, and marijuana to be flowing in the United States.

It has reached a point that our law enforcement officials have agreed that no amount of resources and energies would allow them to be able to protect our borders, and at the very best that we should expect a 10- to 15-percent interdiction or stoppage of that flow, which of course means nothing as it relates to our schools, our streets, and our workplaces. For that reason it is very important that we try to concentrate on education and prevention which leads us, of course, to the question of competition productivity, absenteeism, accidents, and injuries.

It seems abundantly clear in view of the recent accident and the Soviet problems that we are having in air control and railroad system, that we cannot be too diligent in seeing what the problems are and seeing how we are responding to that. So today we will be hearing from these different agencies in seeing how they cope with these problems, see what types of employee assistance programs are available for the witnesses, see to what extent the larger companies are using some type of urine testing for drugs, to get a feel for the legal, constitutional as well and policy questions that are involved with drug testing, to review the accuracy of these tests, and to hear from some of the representatives of labor to find out their concerns as to whether or not the test they are giving, as a punitive matter, or part of an overall substance abuse policy.

We have a number of expert witnesses today, but before we get involved in that, I would like to yield to my distinguished ranking Republican member from the State of New York, Benjamin Gilman.

Mr. GILMAN. Thank you, Mr. Chairman. I want you to know how we all appreciate having the opportunity to dig into this very important issue, an issue that was highlighted by the President's commission report recently on crime and how critical it is to the entire issue of narcotics. The further our committee explores and examines the narcotics problems, the more we recognize the extensiveness and the complexities and the overwhelming odds that we have in battling this international crises, and it is international in scope, and it is for that reason I am so pleased to be visited today by Sir Jack Stuart Clarke, the Repertoire, and Dr. Gianaco Butsico, the President of the European Parliament's Drug Inquiry Committee that was recently established.

We need more and more of this kind of international cooperation if we are going to make a real dent into drug trafficking and drug abuse, and we still have a long way to go to raise the public's consciousness here at home and abroad with regard to the seriousness of this problem. Just recently the President has made this a national security issue, and hopefully that will enable us to bring in more and more of our military involved in the issue.

Drug abuse in the workplace is burgeoning as never before, and its impact on our society is growing each and every year. A number of some of our companies have already fashioned antidrug policies for their employees. It is clear that there are no uniform Federal guidelines or Federal strategies available to deal with this issue. However, whether large or small, each company or organization

must first acknowledge that there truly is a problem, and in like fashion assess and implement a proper and an effective response.

It has been conservatively estimated that there is a $100 billion cost to our economy due to drug abuse in the workplace—$100 billion. General Motors just last year issued a report that in their company alone it cost them over $600 million in losses for medical care, losses in productivity, losses of employees due to drug abuse. Today's hearing, in which we look forward to receiving testimony from public and private sector representatives, is an attempt to assess these related issues in a thoughtful and comprehensive manner.

There are many complex and diverse questions surrounding drug testing as an approach to try to reduce drug abuse. I hope that our Narcotics Select Committee will receive candid assessment regarding both the positive and negative aspects surrounding urine analysis testing for drugs, including the chain of custody of the specimen, the need for quality control over the testing, the lack of certification of drug testing labs, and the need to balance the competing interest between the employees' constitutional rights as compared to the employers' right to hire drug free employees and maintain a drug free environment.

Just this past week I had an opportunity in my own constituency to meet with some labor leaders. It was interesting to note that some of our unions have adopted drug testing because they want to assure the safety of their fellow employees, employees that are involved in some very dangerous workplaces that need people who can react quickly and properly. I hope that today's hearing will help us find the answers to these issues, and I want to thank our witnesses for making themselves available to our Narcotics Select Committee for this very important purpose.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Gilman. Our committee has a variety of areas which we have been mandated to cover, but the member of the committee that has shown the most interest in this specific subject and provided the leadership for us is Frank Guarini, and the Chair yields to him at this time.

Mr. GUARINI. Thank you, Mr. Chairman. I want to thank you for bringing us together and holding this timely hearing. I also want to take the opportunity of thanking you for your constant forceful leadership. I know that we are here because of our growing national crisis in drug abuse and the dialog that is developed as to testing in the workplace. Certainly it was alluded to just a few moments ago by Mr. Gilman that we have an over $100 billion problem, and it spans out into many areas reaching epidemic proportions.

We know what it means to crime, an acceleration of crime, the health problems, the loss of social costs that we have, the broken families, the loss of human potential, and of course not long ago the major league sports have been rocked with illegal drug scandals, and increasingly we have a loss of productivity and questions of safety in the workplace which are tied into the problem. We know that besides sports that Fortune 500 is insisting more and more on preemployment exams, and of course it was quite shocking to the Nation that the President's Commission on Organized Crime

had recommended that all Federal employees and Government contractors be subject to mandatory drug testing.

There are serious questions that are involved—the fourth amendment, unlawful search and seizure; the fifth amendment, the amendment protecting us against the right of self-incrimination, the right of privacy. These have to, of course, be balanced against the public welfare and the public good. More and more drugs and cheaper drugs and purer drugs are found on our streets, so at the present time we know that we are losing the accelerating war against drugs.

As a result of the pervasive drug abuse and use of illegal drugs, the integrity of professional sports is in jeopardy, the quality of American-made products is declining, the safety of our roads and airways is unsure. The future of the American economy is undermined, as well as the health and well-being of our individual citizens. So, I think that these hearings are indeed timely, Mr. Chairman, and I look forward to the testimony that we will be taking.

I might say this, too, that the position of having the hearings is merely factfinding. It is certainly no indication of the individual members or the committee as to which way they are leaning on the subject. We want to air the entire subject matter and have a dialog with the different private and public sectors and determine and accumulate whatever facts we can on the subject matter.

The CHAIRMAN. Thank you, Mr. Guarini.

Before the Chair moves to hear our first witness, is anyone seeking recognition?

Mr. Levine.

Mr. LEVINE. Thank you, Mr. Chairman. First, Mr. Chairman, I would like to compliment you for calling these hearings, and I would like to compliment my friend from New Jersey for seeking these hearings. I think that the fact these hearings are being held today will be very helpful to the Congress in making important judgments on these issues.

I regret that I cannot stay very long for this hearing. I have a matter on the floor later today, and some other committees that are meeting simultaneously and will only be able to stay for a few minutes, but I did want to make a comment or two about the witness who will be leading off the hearing, and I think I will do that now even though he is not sitting in the witness chair at this point.

I was very pleased that the committee invited Peter Ueberroth, the commissioner of baseball to testify, and I was very pleased that Commissioner Ueberroth was able to come here to testify today. I am very pleased to call Commissioner Ueberroth a personal friend. He is a man that I have had the privilege of knowing for a number of years now, who had the bad judgment to move from Los Angeles to New York recently.

The CHAIRMAN. The gentleman's time has expired.

Mr. LEVINE. But I think he maintains the good judgment of keeping his permanent residence in Los Angeles.

Most significantly, Peter Ueberroth has been a real leader in a variety of areas not just in southern California, but throughout the country. He has caused me some personal problems in that my 4-year-old son, Adam, regularly says to me, "Daddy, when can we go to the Olympics again?" I am not able to promise him an answer in

the near term, let alone an Olympics such as the one that Peter Ueberroth chaired, but I think that it is no secret to the entire country that Peter Ueberroth not only did a marvelous job in presiding over the Olympics in 1984, but has been a real leader and a real inspiration to so many people in the country since he has been named commissioner of baseball.

I think that Peter has taken an extremely difficult and delicate subject in the area of drugs and has tried to balance the difficult and competing concerns of civil liberties on the one hand and cracking down on drugs on the other hand, and has played a real leadership role that all Americans can be grateful for with regard to this issue. So even though I will not be able to hear the entire testimony, I did want to make these brief comments complimenting you, Mr. Chairman, for having Peter Ueberroth here and complimenting Peter Ueberroth for the leadership that he has displayed in so many other areas.

The CHAIRMAN. The gentleman from Florida.

Mr. SHAW. Thank you, Mr. Chairman. I want to join with you and the other members in welcoming back our old friend, Peter Bensinger. I sort of cut my teeth in this particular issue back when he was head of the DEA, and I was a freshman here on this committee. I also want to welcome James Mahoney as well as the other witnesses, and of course, Adm. Paul Mulloy, who I am looking forward to his testimony.

Mr. Chairman, I believe that this may be the most significant hearing that this committee has had in the 5½ years that I have had the honor of serving on it, and I want to congratulate you and staff for putting together the witnesses that we have today, and of course I want to welcome Mr. Ueberroth who has been unquestionably a tower of strength in the United States with regard to the question of drug testing.

I have been very concerned in this particular area, particularly since I have returned from Southwestern United States with you, Mr. Chairman, in seeing the tremendous problem that we are having, the problem with the border in Mexico, and my conviction now that the supply side is not enough, that we have got to vigorously attack the demand side and do away with the demand if we are going to be serious about the use of drugs in this country.

Just the other day, I filed bill, H.R. 4636, which would require drug testing of all Federal employees who have top secret clearance here in this country. Yesterday on the floor I gave a special order on this particular subject. Mr. Chairman, after that special order I had numerous calls from around Capitol Hill from some Members wanting more information with regard to the bill. But what disturbed me most was a few calls and the caller thinking—the staff person calling from particularly congressional offices, and I will leave those offices unnamed as not to embarrass the Members—that thought the whole thing was damn funny.

It is not funny, Mr. Chairman. You know that, I know that, the members of this committee who have worked so hard to eliminate drugs and the demand for drugs here in this country know that there is nothing cute, or funny about the illegal taking of drugs. Also, Mr. Chairman, I am very concerned and becoming more and

more convinced that drug use here on Capitol Hill has gone beyond epidemic proportions, and that we have to do something about it.

I was told when filing this bill and first talking about drug testing on Capitol Hill that I was leading by my chin. I feel that I was, Mr. Chairman, and I feel that I still am. If we are not going to stand up and be counted, we who are responsible for writing the laws that we expect the rest of the country to abide by, and follow the example that baseball has set; follow the example that many of our Fortune 500 companies have, how in the world can we go to the American people and expect them to become drug free.

We cannot, Mr. Chairman. This is why I have also subjected my office to drug testing, and while I am leaving the results of that testing to confidentiality, I will say this, that I was delighted with the results, and this was done by every member of my Washington staff, and it was done voluntarily. I am pleased to say that our office has stood up and been counted. I am looking for other offices. I know that the junior Senator from Florida, Paula Hawkins, also had similar testing done in her office.

We must, Mr. Chairman, lead by example here in this country, and until we do we cannot expect the rest of the country to follow us.

The CHAIRMAN. Mr. Smith of Florida.

Mr. SMITH. Thank you, Mr. Chairman. I appreciate you scheduling these hearings today. They are of great importance for us and great importance for people of the United States. I think that the whole controversy surrounding the question of domestic use of drugs, especially as it relates to the workplace, whether the workplace be Capitol Hill, or whether it be Fargo, ND or south Florida, is a question that has frankly torn many Americans, because it involves a numerous amount of legal, ethical, and moral questions, which really have yet to be firmly anchored in any one camp, the whole question of polygraphs, the whole question of urine testing, the whole question of whether or not we should make tests mandatory or make them voluntary, or make tests available, or test only people with top secret clearances, which by the way, includes probably all the Members of Congress.

It is a significant question, but one that needs to be examined on a very, very important basis. In addition, I am extremely happy that you have scheduled the witnesses that you have. I want to join my friend from Florida in welcoming Peter back. His hair is a little whiter than it was before, otherwise he looks trim and in good shape, and Mr. Ueberroth as well, because one of the problems that I hope that he will address is the phenomenon of a country which, from its official level, abhors the use and tries to at every possible turn outlaw and deny the use of drugs, and at the same time has a society that in some way idolizes people who use drugs. This is a very, very difficult problem for us.

We cannot be setting a double standard, nor can we have a message that is not clear and convincing to the young people in this country, and I hope that these hearings will be able to cut through some of the problems that we have and bring us closer to an answer that we need to find, and that is how do we attack the drug problem on all fronts. As Chairman of the International Narcotics Task Force, you and I have worked, as the chairman of this com-

mittee, you, have worked to try to end the foreign source growing, to work for interdiction, to work for better law enforcement, but we still don't have that one key element really in place, the drug education in this country to fight against drugs here by changing people's ideas.

I hope that these hearings will be a start of a series in what we will have as the bottom line of our full across-the-board approach to stopping the drug problem in the United States. Thank you.

The CHAIRMAN. The Chair would like to thank the gentleman for the contribution he makes to this committee as well as to Foreign Affairs.

Mr. Oxley from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman. I commend you for calling this hearing today on a topic of growing concern to employers and employees alike in both the public and private sectors, the risks and consequences of drug use in the workplace. I also want to welcome our witnesses, particularly the Commissioner, who has appeared before our committee in the past and to express my appreciation for your willingness to share your knowledge with us.

The subject of drug abuse in the workplace has received considerable attention lately as the demand for drugs, especially cocaine, in this country has escalated. Although there are no solid statistics on how widespread the use of drugs on the job really is, we do know that cocaine abuse has become a serious nationwide problem. It has been estimated that there are between 5 and 6 million people who are regular cocaine users in this country. Cocaine abuse is no longer confined to the rich or to the big cities. It permeates every level of society and all areas of the country, including many small towns and rural areas I represent in north central Ohio.

The population of Richland County, for example, one of the nine counties in my congressional district is about 120,000. Just last year, a major bust took place at the General Motors plant there. GM took the unusual step of hiring undercover security officers to pose as workers at the plant. A 7-month investigation culminated in the indictment of 29 plant workers and the confiscation of marijuana, cocaine, and LSD. GM has expanded the internal sting operation to at least eight other plants and to its headquarters. Nearly 200 people, most of them GM employees, have been arrested. GM estimates that at least 1 of every 10 workers has used drugs or alcohol on the job, and this became a front page story in the Wall Street Journal not too long ago.

Another drug bust took place in my district just last month. A drug trafficking ring was discovered operating in several small towns, and one of the alleged traffickers was an elementary school teacher. A 7-week investigation netted an estimated 800,000 dollar's worth of cocaine. There has never been anything like that in north central Ohio before.

We are here this morning to learn more about how we can prevent the use of drugs in the workplace. Various methods already are in use, including compulsory drug testing, lie detectors, and drug-sniffing dogs. One or more of these methods are used by 25 percent of the Fortune 500 companies. Similarly, several government agencies test employees or potential employees for drug use,

as does the Defense Department in its uniformed military personnel.

The vast majority of workers in this country do not use drugs on the job, and they do not want to work with people who do. In the case of the GM drug bust I just described in Richland County, many workers who had grown to fear the drug traffickers at the plant applauded when they were escorted to waiting police vans from the plant.

Clearly, the use of drugs in the workplace is a serious problem. It is costing us dearly in lowered productivity, medical expenses and added security measures. I look forward to learning what our witnesses today believe can and should be done. Thank you, Mr. Chairman.

The CHAIRMAN. We have been joined by a gentleman that has gained an outstanding reputation in the country in the House of Representatives that does not serve directly on this committee, but John Conyers, the gentleman from Detroit, MI, does give us support and joins with us this morning.

Mr. CONYERS. Thank you, Mr. Chairman, and, members, good morning. I am here as the chairman of the Criminal Justice Subcommittee, and the work that you are doing is extraordinary. I also want to thank you for inviting me to sit with the committee whenever it is possible, and I normally wouldn't have anything else to add to that, except for this weekend in my district on a Saturday afternoon, I was invited by one of my staffers to go to block club meeting that was going on right in her neighborhood.

I got there a little bit before the 3 o'clock meeting was to start, and the president, a neighbor, a woman, came in a little bit distraught because the youngster in the house next door to her had just overdosed the day before, and they had just found the body Saturday morning. As I sat and talked with these neighbors in my district, they began to tell me of the drug houses they knew that existed, Mr. Chairman, in their block, and of their inability and fear to report it because of the reprisal that they knew would come, and I suppose that what goes with it is the fact that the police could offer them no security. But as they began talking about this, I began to feel all over what little I knew about this drug problem.

So I am here to commend you for the past hearings that you have held where we have looked at the schools and the problem of the youngsters. This is a human and sociological problem. It is not a pure criminal justice problem, and I think to the extent that this subcommittee on both sides of the aisle have begun to see this problem in its human terms, I think that that is going to point the way toward a solution. So I commend you, not just for today, but for the very important work that is going on here.

Our Nation is under a drug seige. We are being deluged by drugs. We are losing control of our communities, of our schools, of our children and our families, and it is very, very important work that we are undertaking here. Thank you for allowing me to say that this morning.

The CHAIRMAN. Thank you. On that note, we call our first witness, Peter Ueberroth, who is the commissioner of baseball.

Commissioner, the committee and the Congress would like to thank you for accepting our invitation to testify. You may testify in any manner you like. If you have an opening statement, by unanimous consent and with objection that statement will be entered into the record.

First, I would like to say that in the Congress and probably on this committee, there are just as many different views about urine testing as we have members, but I don't think anyone has doubted the courage that you have had to deal with a very serious and controversial problem as it deals with America's pasttime. You have a tremendous responsibility in keeping the reputation of that fine sport at the highest possible height, and to that extent you have the support of the committee. You may proceed as you see fit.

TESTIMONY OF PETER UEBERROTH, COMMISSIONER OF BASEBALL

Mr. UEBERROTH. Mr. Chairman, members of this committee, I thank you for your invitation. I thank you for the opportunity to appear before you today. I do not have a prepared statement due to the time constraints. I have a brief set of comments, and then I would be pleased to answer any of your questions to the best of my ability.

I am here today because I am angry, because I am scared, and because I am committed to helping this country declare war on cocaine, marijuana, and heroin, and to help win that war. I will tell you that baseball is defeating the problem. Frankly, the battle is over. There will be a flareup or two that you may hear or read about, but the institution of baseball has returned proper dignity to itself, and would hope to be an example for other institutions, maybe more important institutions like junior high schools and also, baseball players can again become the role models for the millions of youngsters that are out there that you know well about and represent every district that is represented here in Washington.

I am here both as baseball commissioner and also as a private citizen, and I will be pleased to discuss the methods that baseball has used. I used that word, "methods," because there are many different things that have to be done. There is no single solution. Drug testing is not a single solution. There is no single solution to declaring war on drugs.

I have spent the better part of the last several years with corporate leaders in every major city in this country, with educational leaders, and with law enforcement leaders. Certainly every major city that has a major league baseball team was represented and I would like to tell you what my current conclusion is, as current as meeting with the board of education in New York yesterday, and 2 days earlier with some heads of law enforcement in Los Angeles.

The conclusion is that we are, you are losing the war on drugs, and that in the last 6 months the war has changed, escalated, and it is much more serious. By the time statistics and hearings catch up to that problem, the war may no longer be winnable. If you will allow a simplistic statement, as a parent, as a citizen, and as base-

ball commissioner, I see only four general areas of devastation out there that can really change the culture of this country.

One we publicize a lot, and it is called nuclear energy, whether it is powerplants or accidents or warheads, it is in that category. Another is called terrorism and it gets a lot of ink. Another is called finance, and it doesn't get much attention, but it does present some problems. Financial devastation obviously will have an impact on all the people in the Third World countries and cause starvation and disease and other things. And last, but probably not least, certainly first on my list, illegal drugs.

That problem is tearing this country apart. I don't need to tell you that, but I think it is tearing it apart for future generations. We are not making the war on drugs a national priority. We are divided on the issue. You know, we talk about and you talk about and this Government reacts to something called terrorists from Tripoli because, indeed, hundreds of Americans have been attacked by terrorists over the past months and years, and we seek to risk anything and everything to stop those terrorists, but for some reason we can't get the courage, and we even admitted this morning that we can't do anything about the terrorists in other countries—maybe seven or eight countries who grow the poisons our kids are taking. And those terrorists who are within our own borders who make money by doing the illegal business of feeding this to us, those terrorists we seem to permit not to kill hundreds, but to kill thousands, to destroy our society, and we can't make that a priority, and we can't take risks to stop that. Rather we debate.

Let me get specific. In the last 6 months I have traveled to the major cities and talked to leaders in law enforcement and talked to other leaders, and I must say that in my own opinion, talking to users and talking to those who suffer, two things have happened, and I would like to try and encourage you to keep some of your exploration simple. Don't get so complex that you get confused.

Two things have happened, and the chairman can speak more to that subject, probably, than anybody, because he knows it very well, and incidentally cares about doing something, and this is one of my reasons for agreeing to be here.

What has happened is that the quality of the product that is being sold to the American public has changed dramatically in the last 6 months. Quality has become better, if you use the term "better" to mean far more devastating, far more quickly addictive, far more destructive of peoples lives, and by the time you get all the studies proving that, it will be too late.

Primarily I could talk about the quality of marijuana and the change there, I could talk about the quality of heroin and the change there, but I would rather just mention what you know very well, and that is cocaine. The old scenes that are still shown on television and in movies of the line that people need to toot or snort or whatever are getting to be passé in the major cities because crack has taken over.

Crack allows somebody to skip all the processes of difficult chemistry and a youngster 10 years old or 12 years old with some paraphernalia and a cigarette lighter can free base in effect and take this substance in a way that is so highly addictive that on an Easter break, a youngster can try some with some friends for the

first time and they can find themselves chemically dependent and addicted by the time that Easter break is over. So the quality has gone straight up, and the price has come way down.

The chairman can tell you that the New York street price today, where I just left, is $8 to $10, literally everyone can afford it, because you don't even need the $8 to $10, you need three friends who have $8 to $10, and you will buy their supply, and you will get yours free. The marketing of this product has been beautifully done. It is better than the Japanese know how to market, better than Madison Avenue knows how to market. The people doing this are very effective, that is beyond debate.

They are very smart. Make it cheap, hook youngsters, and once you have done that, you have got your market built in for years.

Solution: I implore you to realize that there is no single solution to even a small part of this problem, whether it be baseball or anyplace else in the workplace. Solutions are broad, are obtainable by this country, are obtainable in large measure by you, and I have seven quick points to make. One is you have to do something at the origination point. It is called aid and trade or trade and aid, and it is not just government, it is the private sector, it is everybody that does business with that country. There should be no corporation that can stand proud and say, "Yes, we continue to trade with X country, and we make great profits in that country, and that country makes great profits from us," at the same time we know that that country is really profiting on the demise of our Nation. So we have to look at aid and trade, at the nations corrupting us and helping to corrupt us, on the supply side. Second, you are going to hear a lot more effective testimony than mine on the borders, but as a citizen, I absolutely advocate that we have got to quit being babies. If we declare war on some terrorists in Tripoli, when the hell are we going to declare war on terrorists bringing poison across our borders?

I was involved in the security setup for the Los Angeles Olympic games, and I used to fly over 300 military helicopters in southern California every day in my own helicopter. I would be told by law enforcement people why the 300 helicopters could not be used to help the games, and we had to get other helicopters from across the country. Those military helicopters that are sitting there ready for military purposes should not have been used to secure a 2-week sporting event, but they darn well should be used to protect the border with Mexico where they are dumping into our country poison that is killing kids, killing a lot more kids than any terrorist bombing is about to do or has done.

Third, the law is something that you have something to do about. In New York City, peddlers of crack are going free because an undercover cop would have to buy 600 units of crack to satisfy the requirements for providing a class A felony against that pusher.

Fourth, you have heard testimony about law enforcement. All I can do is second what your esteemed member said. In every city that goes on, law enforcement really is forced to look away. It is a problem that overwhelms them.

Fifth is the private sector, and I must say it has the worst record of all. I couldn't be here before you—because I represent the private sector. My life is in the private sector, incidentally. It has

been and will be. We have done the least. Don't compliment us, because what do we do in business when we hear about the problem? We try to find out who is involved, who is dealing, get them out of the company, make the problem go away. We don't want to hear about it. We don't want our shareholders to hear about it. We don't want to know about it.

The young people of this country watch 4 hours of television, by some people's estimate—some people say as many as 6 and 7 hours a day. The corporations that buy all those advertisements are going to have to take on some responsibility in this war on drugs, and realize they have a chance to educate. They educate them to buy products. They had better educate them to not do drugs. So the private sector is where I focus my efforts, as I told you, as an individual on the war against drugs.

With regard to my sixth point, schools and institutions—the Federal Government had better wake up to the fact that schools and institutions need help. I look at the films being shown to youngsters. You want to turn off a youngster, use a 1960 drug education film on a 1986 kid. The film was made before he or she was born. The styles, the whole thing is a joke. Everybody laughs at it. At least the educators are trying. They must get Federal support.

Last, is parents, probably the most important of all, and that is not your responsibility. It is every mother's and fathers responsibility, but I get frightened as I speak. I'll speak to six major institutions in commencements this year in different parts of the country, and speak in campuses at least once a week all across this Nation.

What I see parents talking about scares me. If one youngster gets a bad blood transfusion and comes down with AIDS and goes to school the next day, in the auditorium of the school, there will be 1,000 parents screaming and hollering. But in that same school, let the police crack a cocaine ring and arrest 18 people, and there have been 4 deaths of students from overdoses of drugs, and you can't get 22 parents to show up.

It is not your responsibility alone. It's not mine. It's not the people that are covering this. The Nation had better declare war on drugs. The solutions are all interrelated. Here in America, we look for a single solution. Go ahead and do this or do that. We look for a single lead in our stories. You have to deal with partisanship at times. There are two parties in this country.

In America, I think there are two new parties now. One is the party that cares and will commit to this war, and the other is the party that talks, debates and avoids the problem. I was involved in an event that everybody said would leave a billion dollars in debt, but because a lot of Americans cared about it, no real thanks to me, it had a surplus. It made $250 million which goes to youth in this country.

This drug issue is not an issue of budget, because in any economy from time to time you have to spend money to make money. There is no way Government can spend money that will produce a more net positive effect on the budget of this Nation than to stop drugs. There is no better investment. You must spend money to make money, and if you are going to talk about budget deficits, you had better darn well start looking at that angle.

You will hear the estimates, $100 billion and the rest. It doesn't matter how much it is. If our economy decays, if General Motors can compete, but the rest goes to hell, we will not have done our job. You will have not; I will have not. I commend you on what you talk about here in these sessions. I thank you for it. I am pleased at the invitation. As one citizen, my commitment will not change. If I am in this job—if the owners throw me out, I am in another job. It doesn't matter. We have got to fight.

I, for one, have enlisted in the war against drugs. I thank you, and would be pleased to answer your questions.

The CHAIRMAN. Commissioner, I can't tell you how proud I am of the position that you have taken. You should not have this responsibility. Enough problems that organized sports people have without you having to provide the leadership in this country. But I am certainly glad that you are doing it, because we don't find anything being done in our churches or in our synagogues by those people who really have made a personal spiritual commitment toward this Nation when it ignores the dangers that are grabbing our children.

Chief Justice Warren Burger, recently told me that he considered the drug epidemic a far more serious threat to our national security than communism, and as you well-pointed out, when we hear from our President, we hear about communism; we hear about terrorism, and yet even when he addressed the United Nations, not one word was said about the threat of a disease and epidemic that is threatening the fragile democracies in South America, and some believe even in Central America, and what it can do to us.

This is a nonpartisan committee. We don't find the leadership in this administration or in the one that preceded it. We are reduced to the level of having to work with the advertising council because we can't find it recorded when our Secretary of State has called in his counterparts from throughout the drug-producing countries. We can't find where our ambassadors to the United Nations have made this the same type of priority as we have of the issues. We don't even see it on our foreign policy agenda as a priority item.

So we have not declared the war, and if we are losing it, it is because not enough people are fully aware of how serious it is. Our local and State police know, because as everyone knows, they have almost given up in the struggle, and out of a $17 billion educational Federal fund, $3 million is set aside for conferences for local and State educators. And so we will have to think of ways to join with you to take advantage of your position which should be just in sports, to see what we can do to at least alert this administration and others that we are not prepared to lose the war before we see that it has been declared.

And I would like to just state for the record that if we didn't have Nancy Reagan, we wouldn't have anybody. I understand that we have lost our Assistant Secretary of State, who is in charge of these affairs, and the tragic thing is, Mr. Commissioner, nobody knows that we lost him. We have to do some things—we don't know whether there is going to be a replacement. We don't even know whether there is a need for a replacement, but we will be working with you.

My only question is a legal question, and that is, is it in the player's contract that he is guilty of a breach of contract if indeed they are not drug free?

Mr. UEBERROTH. Let me first state that I am not a lawyer, and second, those kinds of debates will be contested. It depends which lawyer you ask, which group of lawyers you ask as to the answer to that question. But I think it is fair that I comment on testing, because it is a subject that I know something about, and baseball players and drugs.

My own personal study—I am not a technical expert—started back in 1979 when we found that at the time of the 1980 Olympic games there was no internationally accredited drug testing laboratory in the United States, so the Lake Placid Olympics needed to go to Canada to get their athletes tested on an accurate and an accredited basis, because, as you know, in amateur sports, the penalties are very severe. They brand people for life if they have in their systems one of the many, many, many, tens upon tens of substances that are prohibited in international sports now.

We built the first internationally accredited laboratory privately in Los Angeles and donated it to UCLA, and it is thriving. I am happy to tell you that there are many more now. But before we get off on the subject of testing and civil liberties, and whether it is right, OK for people to OD and die or not, let me tell you what is going to be, I think, maybe not totally pleasing to everybody here. My own position on testing is that, one, it is certainly not a cure-all; two, it is an emergency measure; three, everybody shouldn't have to do it.

You are going to hear all kinds of debate on whether it is accurate or not. If it is done very carefully and very thoroughly, it is indeed accurate. Of the thousands of Olympic and amateur athletes, not one ever even disputed the accuracy of any testing. The hundreds and hundreds of professional baseball players who are in the minor leagues are being tested last year and this year, and not one has ever disputed the accuracy. Frankly, we would test them again if they ever did dispute it. So the accuracy issue is one that people will debate time and time again, and every kind of safeguard has to be set up if anyone is ever going to do drug testing, to protect the individual.

Further, in baseball, we protected something else. I know the ladies and gentlemen of the media are behind me, and I have encouraged them to try and break our system. The system guarantees absolute confidentiality for any of the minor league players tested. Remember baseball has more professional athletes than probably all the other professional sports combined. So we have that much more responsibility. There are roughly 3,000-plus minor league players and 1,000-plus, give or take, major league players, depending on 40-man squads, and in the minor leagues we have been testing, and there is never a single individual whose problem has been disclosed at all. You have never read one name in the press, and you are not about to, and you won't.

It is a doctor-patient relationship. The commissioner can never know. The player's team can never know. But I can tell you the only thing that I do know, the only information that is made available to me is we had a number of players being tested positive from

illegal drugs when the testing started that was very unsatisfactory, and not to anybody's liking at all or understanding.

Now that testing has begun and is continuing the number of people testing positive for illegal drugs is infinitesimal, and we may get to the point where testing is no longer necessary. The last item on testing—I view testing in the same way as I view the blackout laws that prohibited me from turning on the lights in my house during World War II and I was very angry about that. I could not read a book, and I couldn't turn on the lights, nor could we have a fire in the fireplace.

That violated my rights every which way. I was inside the sanctity of my own home, but I couldn't turn on a light because it was against the law. I'm against that kind of law, but it was a law of an emergency nature that helped us face a problem, which was a war. We have to declare war on drugs, and drug testing is one of many, many partial solutions. It is not the most important one, but it should be used from time to time when safety is a factor, when drug problems are evident, to find out the magnitude of the problem.

You can test with anonymity where you don't even record who is being tested, but at least you find out the proportions of the problem, how many people in X group have a problem. So when safety is a factor, whether that is in the air or operating nuclear reactors or on the rails or wherever it may be, then you may need testing. Management and labor in the private sector have to become enlightened and have to realize that they have to fight this war, too. It is not just up to you.

Drug testing is a serious issue. It must be done very carefully. You must not violate people's confidentiality, but you must get it done.

The CHAIRMAN. Mr. Gilman.

Mr. GILMAN. Thank you, Mr. Chairman. I realize we have a number of members and a number of witnesses and we have a 5-minute rule. So, I'll be brief.

Mr. Ueberroth, in answer to the chairman's question, which I don't think you have responded to, what is the regulation now in baseball with regard to the drug testing?

Mr. UEBERROTH. Well, the player signs a contract, and the contract says that the player must be physically fit, must do all possible to have his best ability to perform. I would submit to you that if he is taking illegal drugs, he is no longer physically fit, and he has not done his best to be able to perform.

Mr. GILMAN. And what is the peralty?

Mr. UEBERROTH. The penalty is a legal remedy between the two people that are under contract. The commissioner does not have authority to take steps against that individual. It is a legal fight, and you will see it battled in court.

Mr. GILMAN. Has it been tested yet, Mr. Ueberroth?

Mr. UEBERROTH. No, not completely, no.

Mr. GILMAN. So then there is a finding, but there is no mandate or any penalty. Is that what you are saying to us?

Mr. UEBERROTH. The law is not yet tested. The lawyers have not yet—they are filing suits in various places about that.

Mr. GILMAN. What is your responsibility as the commissioner once there is a finding?

Mr. UEBERROTH. The responsibility of the commissioner is very limited. I have some suspension authority, and I have fining authority up to a maximum of $500. Now I am not going to embarrass any player by fining him only $500, but that is the maximum authority of the commissioner.

Mr. GILMAN. So has any penalty been imposed as a result of any prior finding?

Mr. UEBERROTH. Well, you are starting to get into a difficult area because it has to do with taxation and other questions. I can suspend a player. That is subject to grievance and can be overturned by an arbitrator. That's the system.

Mr. GILMAN. Have you imposed any fines?

Mr. UEBERROTH. For illegal drugs?

Mr. GILMAN. Yes.

Mr. UEBERROTH. I have not, at this date, imposed any fines.

Mr. GILMAN. Have you removed any player as a result of narcotics abuse?

Mr. UEBERROTH. I have removed players for a year. They chose not to contest my removal, and rather to become a positive force in society. I gave them an option. I gave them the option of either fighting my decision, which would be suspension from the game, or deciding to do what I thought they really wanted to do, and that is to pay back society and spend their time working with youngsters and fighting drugs, and to use some of their money on a voluntary basis to fund groups within the cities where they play ball to help fight drug abuse. Players are doing that.

Mr. GILMAN. So then you are allowing them to play ball providing they do some of these community services.

Mr. UEBERROTH. Yes, that is correct. If you want to go back, I don't know where you are going, but you had better go back to the Government's actions if you are speaking of a group of players that I recently dealt with. These are players that were given immunity from prosecution by the Government for their testimony and I am not going to presume to judge that one way or the other. There was action preceding my action.

Mr. GILMAN. Just so we are clear on what the regulation is in the baseball industry——

Mr. UEBERROTH. There is no regulation in the baseball industry, but go ahead and I will try to explain it.

Mr. GILMAN. Well, if there is no regulation, are you doing it then on a man-to-man basis in each contract? I am not too clear on what the administrative decision is with regard to drug abuse in the field of baseball. What are you recommending?

Mr. UEBERROTH. I am not recommending baseball. I am going to work with the people within baseball and take care of that. I have got to understand your question a little better, and then I will try and answer.

Mr. GILMAN. I am trying to understand what rules the players are operating under with regard to drug abuse in baseball.

Mr. UEBERROTH. Well, from the commissioner's position, not drug abuse. Drugs shall not be tolerated, and I am going to take action within the limits of my authority every time with every player that

I can, realizing that there are arbitrators that are going to overturn what I do, and so sometimes I have to take a unique stance that accomplishes my goals without necessarily having to go to court and dragging it out over 5 years.

The baseball players understand one thing. We said, "Enough is enough," to drugs. We are not going to tolerate it. The methods I use are going to have to be methods that I design for each and every individual case, but the problem is history.

Mr. GILMAN. And up to now there has been no suspensions?

Mr. UEBERROTH. There have been suspensions. I have given each of them an alternative in the case of those suspensions.

A practical answer is my predecessor suspended people for months at a time. The arbitrators always overturned it, and the suspensions have ended up being 10 days and 12 days, and that kind of thing. I don't think that that is significant in a player's life, so I have tried a different avenue, which appears to have worked.

Mr. GILMAN. And up to now there have been no fines imposed.

Mr. UEBERROTH. No, there have been no fines imposed by me.

Mr. GILMAN. Do you foresee any change in your approach to this problem?

Mr. UEBERROTH. I don't see any major change, no.

Mr. GILMAN. Do you know whether any of the other major sports are imposing any stiffer regulations than you have imposed in baseball?

Mr. UEBERROTH. There is a debate about what that means. I don't think so. The answer is I don't think anyone will be anywhere near as stiff. If you talk about the reality of do you have an impact on the player so that the player understands the risk of fooling with illegal drugs, I think baseball has a lead position.

You know, I have to say the debate in the newspapers is always between the Players Association and management, the owners. I'm kind of in between those two groups. I have to tell you they both care very much, and they are the driving force along with the players themselves, who have the dignity to get the drugs out of our game.

The proof is going to be what you see in the future years. We are not going to have a problem.

Mr. GILMAN. You indicated from a testing that there was a substantial amount of drug abuse. What magnitude in percentage amongst your players?

Mr. UEBERROTH. I wouldn't tell you.

Mr. GILMAN. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Guarini.

Mr. GUARINI. I want to welcome you here, and I am very pleased as to your commitment that you have made, and I just want to observe that last year at the summit, a statement was made as to drugs being an international priority amongst the leaders of the country, whereas this year not one single word has been said.

Following up on the questions, there is one thing I would like you to clear. You said that it is a matter between the doctor and the player; that there is confidentiality. Now, is there some place that that has to break out of confidentiality if there is positive testing so that it doesn't remain confidential. When does it get to you as the baseball commissioner?

Mr. UEBERROTH. It does not get to me. It cannot, will not, has not.

Mr. GUARINI. Then how can you take action if you have no knowledge?

Mr. UEBERROTH. Because I don't.

Mr. GUARINI. Then there is no individual cases that you could take action on personally but just give policy?

Mr. UEBERROTH. No. You are going to have to take time to understand it, if you like, because it works. And you will have a lot of testimony on what doesn't work.

Drug use is a complicated subject. It could be a player who has a trace of marijuana. It could be a player who is upside down with cocaine. It could be a player who has real serious problems. It could be all kinds of things.

If a player tests positive, the doctors are the experts. I am not the expert. On a doctor-patient basis, they go nose to nose immediately with that player. There is ongoing testing with that player, and the proper steps are taken, doctor-patient, to be sure that player does not develop dependency on illegal drugs.

Mr. GUARINI. Is he allowed to play?

Mr. UEBERROTH. If in the opinion of the doctor that is in his best interest to be sure that there is no continuation of illegal drug use.

Mr. GUARINI. At what level is there a breach of contract that could be declared between the player and his team as a result of the usage of drugs?

Mr. UEBERROTH. It gets back to Congressman Gilman's question, and that is for the lawyers to decide. In this case, the player could be taken out of the game by the doctor. Then, obviously he is not responding to treatment. We are not stopping the problem before it is more severe. What some people would like to see is a sport that waits until the individual goes public, is on his belly with drugs, and then you boot him out. That is a failure to both parties.

Everybody has failed if there is a youngster who has gotten so heavily addicted to drugs that he is on his belly, and then you kick him out of the game and show how tough you are. Rather we will intercept the player before he is in serious trouble and set up a doctor-patient relationship, catch it instantly, keep that relationship until we can be guaranteed that he is no longer on drugs.

Mr. GUARINI. Now, where do you have jurisdiction as the baseball commissioner, after there has been a determination by the doctor that he is not taking advice and he is not accepting treatment?

Mr. UEBERROTH. It hasn't come up. I have jurisdiction there. It hasn't come up.

Mr. GUARINI. Would you suggest that these same kinds of procedures be acceptable in other private sectors, say, Fortune 500, or would you say that baseball is unique in that application?

Mr. UEBERROTH. I think you have to design an emergency procedure if you have a problem. If you are an air traffic controller, you have one set of problems. In baseball, we are dealing with an awful lot of youngsters who are coming out of a society that has maybe failed them, and their average age in the minor leagues must be 22, 23 years old.

Our thought was let's not wait until a player embarrasses himself, reports to some institution or gets arrested or mixed up in a Pittsburgh-type investigation. Let's be responsible. Let's stop it, first, at the first blink of an eye, and let's confront it medically and get people counseling, help, education, all those things, right now, and it works. Nose-to-nose with unrelenting medical people who care about only one thing, that that individual is not going to have a problem and kill himself with drugs.

That same doctor may take the individual out of the game, hence, he will lose income, hence he could lose his career if it is medically determined that he has got a problem so severe that he can't any longer go forward.

Mr. GUARINI. In your view, Mr. Ueberroth, should there be in place in industry a system or should we wait until a crisis develops and then apply ourselves according to the type of problem we have?

Mr. UEBERROTH. I think you have to, if you are fighting a war, you have to make a different decision in each battlefield. You have to take a look. If there is no problem, has been no problem, there is no history of a problem, and you want to line up all those people and say drug testing is something new that we think is going to protect us, I think that would be a terrible mistake.

Mr. GUARINI. Well, lastly, let me ask you if you can comment on the President's commission that said that all Federal employees should be tested. Should it be that pervasive?

Mr. UEBERROTH. It should not be, in my opinion. It should not be that pervasive. You should not test all Federal employees. You should test on two points: Where there is a visible problem, or where there is a safety factor involved, a major safety factor, then you had better test.

Remember, baseball can even qualify where safety is concerned. I encourage you to stand up at the plate, don't even bring a bat, when a Dwight Gooden throws the ball. Nobody wants a Nolan Ryan or any of the great fast ball pitchers to be throwing a ball under any kind of influence, so that there is a safety factor in baseball, too. Where safety is involved, clearly some kind of testing is something I would recommend.

It doesn't have to threaten anybody's privacy. It could be totally without any names, no way of recording who is positive or who is not, just a test sample that says OK. There were 100 employees. One hundred were tested. It was one positive for something fairly minor. You are done. Forget it. If it is a place where major safety is involved, don't wait until two airplanes crash. Don't wait until there is a nuclear accident. You had better do that on a fairly regular basis to see that the underbelly of that system is not attacked.

Mr. GUARINI. Yes, everybody drives a car, so even if there is no safety in the workplace, still a man behind the wheel of a car could be dangerous instrumentally, so therefore the public is at risk if you really keep analyzing the question.

Mr. UEBERROTH. I think you should also be practical as to what is acceptable in our society. You did not cause, I did not cause, but we both had a hand in causing, a society where the percentage numbers are very high for people who are experimenting with and

using drugs. I don't think you can put the entire country under martial law.

You ought to develop a plan that is practical and may be acceptable by industry, by the private sector, by the public sector.

Mr. GUARINI. Thank you.

The CHAIRMAN. The Chair would like to recognize the presence of two members of the committee, Mr. DioGuardi from New York and Mr. Fauntroy from the District of Columbia, and we thank both of you for joining the committee.

Mr. Clay Shaw.

Mr. SHAW. Thank you, Mr. Chairman. Mr. Ueberroth, in response to the other question, you said there was two factors. One was safety. I don't believe you said what the other one would be.

Mr. UEBERROTH. One is safety and one is where you have the knowledge that there is a problem. If there is no manifestation of a problem—if they wanted to shut off the lights in my house, and there was no World War II, that is obviously something I am against. Unfortunately, this problem manifested itself very well and very clearly and it is very easy to see.

Mr. SHAW. I understand that. So in the question, to bring it on further, is to perhaps someone driving a mail truck, if you suspect a problem, would you have that individual subject to——

Mr. UEBERROTH. Not as a long-range solution, but as a short-range solution I think you have to do it.

Mr. SHAW. So what you are saying in answer to Mr. Guarini's question was that you would not subject all Federal employees to drug testing——

Mr. UEBERROTH. No.

Mr. SHAW [continuing]. But you would make all Federal employees subject to it should there be a reason to test it.

Mr. UEBERROTH. Yes, a clear, verifiable reason, yes, I think that under those circumstances you ought to test.

Mr. SHAW. What Members of Congress, their staff or Federal employees who have top secret security clearances?

Mr. UEBERROTH. I'm not going to get the law enforcement experts, those I know very well, to tell you about that. I would hope they would show some leadership and maybe volunteer.

Mr. SHAW. Mr. Ueberroth, I'm glad to hear you say that. You were my inspiration and my office's inspiration to volunteer for drug testing, which we have completed. Also, the stance and uncompromising position that you have taken and being the strength that you are in your own industry for my filing a bill which would require mandatory drug testing of Federal employees with top secret security clearance. I think this is awfully important.

I was thinking about the part of your testimony where you drew a parallel between the outrage of parents as to the presence of one AIDS victim in the classroom and who the parents have not really been mobilized to the point where they are today. I personally got very interested and very deeply involved in the question of drugs because of the fact that I do have children. This is something that perhaps the Mothers Against Drunk Driving should begin mobilizing that type of thing, and perhaps get the fathers even more involved than they are.

You made reference in your statement that you were angry. I subscribe, as I am sure you do, because of the action that you have taken, that you don't get mad, you get even. I think in this particular regard, the best revenge is success, and in your small area in baseball, you have had a success. I hope we can start looking at some successes in the workplace.

Mr. UEBERROTH. You know, our success is going to be recorded over this year and next, and we are not going to go out and brag about it, but baseball players are quality individuals. Most of them didn't have a problem. The problem will be over with. It would not be so important that we get rid of our problem if it weren't for the fact that we are a domino institution, because we fascinate the public. We are the national pastime. We are the fabric of society.

If the word gets clearly out that our little institution has solved its problems due to all kinds of means—drug testing is just part of it—if that is successful, it does encourage junior highs to say that they can also solve their problems. And every part of this society has to go to work.

Mr. SHAW. You are certainly clearing the air as far as the role model that you athletes are. The American public holds athletes in higher esteem than they do members of Congress, but perhaps we can correct that ourselves by setting a better example for the American people.

The CHAIRMAN. Mr. Oxley.

Mr. OXLEY. Thank you, Mr. Chairman.

Commissioner, I remember when I was a youngster and a baseball fan even then, I had a chance to visit a locker room of a major league team, and I remember how shocked I was when I walked into the locker room and saw several of the players actually smoking cigarettes, and a couple of them were drinking beer. I guess that never left me. I guess at a more innocent age, I was somewhat shocked by that.

Then I remember reading about one of your predecessors, probably one of the greatest commissioners in baseball, Judge Landis, reacting to the Black Sox scandal in which he actually banned some players for life after that scandal of an apparent attempt to fix games in the World Series.

Then we come to the 1980's and we have the revelations of a good number of players who have obviously admitted to abusing drugs on a rather large scale. A lot of people, I think, were at least interested in what may have happened to those players. I am not necessarily advocating that in your position those players should have been banned for life, but there are a lot of people, frankly, who felt that that should have been the case, and indeed your comments, which I thought were excellent, and as a matter of fact it is too bad that just C-SPAN is here, and not the major networks to hear your comments, but a lot of people were frankly, I think, looking for something perhaps of a firmer nature from the commissioner's office if we are indeed at war with drugs.

If indeed that is a war, then perhaps some of those people had a legitimate reason to say that perhaps the penalty should have been more severe than were meted out. Would you care to comment on that?

Mr. UEBERROTH. I would be pleased to. Judge Landis was operating in 1920, and not today. He will go down probably as the greatest commissioner. There was no way possible that in 1986, given the laws of the land, that this commissioner could have banned those players for 20 days, much less life. So it is impossible. All those who would have liked that to have happened, it is frankly impossible. It would be overturned in 7 minutes, and it would have looked like a joke.

This commissioner could have grandstanded, banned them for life and have it all turned over in 2 weeks, and everyone would have said, "He tried hard," and that's that. The truth is they didn't deserve banning. The truth is the Government had already made a decision that these people were immune. Most of them had beaten their problems. They had tried to become positive people in society, and in fact they have. History will prove that most of these youngsters are going to make a very meaningful commitment and are making a very meaningful commitment to making this country better in fighting drugs.

Sometimes a convert is the strongest advocate. But the truth is that there is no way that if a baseball player did commit any kind of crime that the commissioner has the authority to, or should probably, ban him for life. That doesn't happen anymore. People can commit murder and go serve 18 months. I think you know that. So somebody on a baseball team who was lured into using illegal drugs shouldn't necessarily be treated any different than the rest of us.

Athletes will be treated differently because they are going to always be in the public eye. Frankly, they get paid enough money that that is one of the risks that go along with the job. But to answer your question specifically, the rules are quite clear that the fining authority of the baseball commissioner is $500, and the suspensions, historically, are pretty well overturned, and the longest they ever last is a few days.

Mr. OXLEY. Commissioner, you had a chance to, I think, interview each of the players.

Mr. UEBERROTH. Yes.

Mr. OXLEY. Without breaching any confidentiality, was there a thread that ran through the basic reason why they first started to abuse drugs. Is there something that tied all of them together that would cause them to experiment with drugs? Did you get any kind of feel for why this whole thing started in the first place?

Mr. UEBERROTH. Yes. The answer—a simple answer and short in terms of all your people that need to testify is they thought it was kind of OK. They thought that society said it wasn't very dangerous.

Remember the term "recreational?" Remember the term that doctors used, experts used, "recreational drugs." A recreational drug that can cripple? I don't know. That is recreational suicide. They were under that kind of influence, and then they, you have got to remember, had an awful lot of money and an awful lot of free time. You put those ingredients together, and whether it is stockbrokers, lawyers or whatever, you have the perfect setting for a drug problem.

I report to you today that we also have a drug problem that is blowing up at the junior high level at the $8 and $10 rate. It is out of control. We are losing battles on all fronts.

Mr. OXLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Fauntroy.

Mr. FAUNTROY. Mr. Chairman, may I request unanimous consent to enter my opening remarks at the appropriate point in the record?

The CHAIRMAN. Without objection.

[The opening statement of Mr. Fauntroy appears on p. 92 .]

Mr. FAUNTROY. I would certainly like to add my commendation to the commissioner for the moral leadership that he is giving in that very important position and the obvious commitment that you have ending drug abuse in athletics generally. My colleagues have asked most of the questions which I wished to ask you.

I have the feeling, however, in terms of your responses that you are out here with a popgun after an elephant.

Mr. UEBERROTH. If I could interrupt, I had a different term. I had a slingshot against a herd of buffalo.

Mr. FAUNTROY. Oh, I see.

Mr. UEBERROTH. I didn't use it.

Mr. FAUNTROY. It does distress me that your powers to suspend are obviously nonexistent and certainly Mr. Landis, in his time, quite properly assessed the fact that if that kind of thing were to go unchallenged and to continue, baseball would be few in America. Certainly those of us who play it and those of us who watch it, the prospect of someone throwing a 110-mile-per-hour ball down the strike zone and missing, or of someone being at the plate not able to respond, is life threatening. So it does distress me, Mr. Chairman, that you are apparently as helpless as others to deal with what is an epidemic in the country, and that could threaten life.

Mr. UEBERROTH. Congressman, please permit me to disagree. In life you want results. Baseball will accomplish, has accomplished, and is accomplishing the elimination of drugs. That's what you want. If you want the union to agree and management to agree that after four episodes with illegal drugs, you could get the guy out for 3 years or 4 years, we will agree to that. But it is not going to do a thing to stop drugs in baseball.

We are stopping drugs in baseball. We are going to be and are successful. It is over. You are not going to hear of any more baseball scandals from these days forward. So the key thing is success, and the key thing is to win that war or our little part of it.

If someone offered me the power, unlimited power to throw people out of baseball if they were drug abusers, I would refuse that power. I am not some great authoritarian who wants to sit there with that much power, because Congress doesn't have the power, the courts don't have the power. I think that nobody should be given that power of life and death, because the baseball player can't go get another job in the same industry.

An advertising executive making a half a million dollars, who gets fired for drug abuse, can go to work for another advertising agency. A baseball player doesn't have another baseball league to go to that is going to pay him a half a million dollars. He may get

a job for $500 or $1,000 a month somewhere, but he doesn't have that opportunity. So I wouldn't take the authority if it was offered.

That day has passed. My responsibility to the baseball players, to the millions of kids that follow baseball is to get drugs out of baseball. It is done.

Mr. FAUNTROY. I, finally, certainly understand Mr. Oxley's concerns about how it is that athletes get involved, and I think you have helped me to understand a good bit by suggesting that is all right and that is recreational and that it doesn't bother you.

How effective are these antidrug lectures that professional athletes give at our schools?

Mr. UEBERROTH. Well, you have to ask educators. Educators tell me when an athlete will go and talk to youngsters, it has a very, very, very positive effect. A lot of them do a lot. Nobody is recording all that a guy like Eddie Murray is doing for kids. I mean he is doing it in seven different areas, from camps to ballparks to whatever. Most of the ballplayers are good. Those that have had trouble are doing the same thing. That is not going to be very big news and not very reportable. But every time an athlete can tell a youngster stay clean, get off this stuff, say no to drugs, it is helpful.

Mr. FAUNTROY. I would just like to commend you for that and encourage it because certainly it has that effect on me, and I am sure Mr. Oxley, as well, would agree.

Mr. UEBERROTH. Thank you.

Mr. GUARINI. Would the gentleman yield just for one second?

Mr. Ueberroth, the problem that some of these athletes have go back to their high school days, their college days. They are deep-seated within an individual. You are optimistic that you could cure these people with the therapy and get them off drugs after they have had the problem for almost all of their adult life?

Mr. UEBERROTH. See the message is, first of all, clear to a major league baseball player that it is not tolerated anymore. It is simply not tolerated. It is not tolerated at any level. At the minor league level when they enter, and they all enter there, they are going to be tested, and they are not going to get away with it. They are clearly not going to get away with it.

Now, you find a youngster who comes from an inner-city high school who has a problem who has never had attention. He has never had counseling. He has never had education. He has never had any break at all, and you wait until he is 19 and you find him and then you say, "Aha, we caught one," and you throw him out of the game? Wrong.

What you do is you establish rapport with that individual, and you give him a chance to be clean, and I mean clean clean. He is going to be continually tested. If he doesn't make the commitment, and you don't get it done, that person is out of the game in effect, because he is in an institution going the next step to get the cure.

If somebody cares enough about his profession, in this case a baseball player, it is usually a chance out of pretty bad socioeconomic area anyway. As long as he knows it is not condoned, the chance of his coming forward with a problem becomes less and less.

Mr. GUARINI. It also serves notice on college athletes and high school athletes that want to become professional ballplayers, too.

Mr. UEBERROTH. The key thing that I see going wrong there is the confidentiality. If you exploit for media purposes every college athlete who has had a problem or has a problem, you are going to be self-defeating. What you have got to do is make it clear that he can't be in this game, it is not tolerated, and you use all kinds of methods to do it.

I have to compliment—our union is doing one heck of a fine job. They have the same objective. Get drugs out of the game. I heard somebody say something about smoking and beer. I get thousands of pieces of mail on something which is a major problem. It is not No. 1 in priority among drugs, but it is important; it is called chewing tobacco, and it is a cancer causing substance.

The union spends a great deal of time on that, constantly educating baseball players, taking them through the problem. The usage of chewing tobacco is coming way down in baseball. It is a legal substance, not illegal. I'm not going to ban it, but we are going to get rid of it. You have got to say, "No." You have got to start taking a look at your little piece of society and say let's make it a little better. Either progress or retrogress. Let's quit letting them retrogress.

Mr. GUARINI. Thank you.

The CHAIRMAN. Mr. DioGuardi.

Mr. DIOGUARDI. Thank you, Mr. Chairman, and again I commend you for your excellent testimony, Mr. Commissioner.

Mr. UEBERROTH. Thank you.

Mr. DIOGUARDI. I was interested in Congressman Shaw's observation that he voluntarily tested, and I was going to interrupt him, but I couldn't. It is interesting that last week I had the occasion at my annual physical, Mr. Chairman, Mr. Shaw, and I asked Dr. Carey to extend the testing so that I would be voluntarily tested for drugs. I think that we should take that leadership position here, and I commend you, Mr. Shaw for having done that, you and your staff.

But do you know what he told me? He said, "Mr. DioGuardi, we don't have the money to do it. I can't test you for drugs." I said, "You have got to be kidding me. Would you test me anyway and then bill me?" He says, "Well, I think I can do that."

I don't know where you got the money for your staff and for you, Congressman.

Mr. OXLEY. If the gentleman will yield, I found the same thing so I paid for it myself.

Mr. DIOGUARDI. OK, well if you talk about where the money is for the drug problem, you can start right here. Here we have Members of Congress that want to be voluntarily tested for drugs, and I was shocked to find out, Mr. Chairman—Chairman Rangel, that this was not addressed in some formal way before, and now I have got to rethink whether or not I have got enough money now to put my own staff through this.

I think that this staff should take a leadership role, not in mandating for any Congressman or Congresswoman to be tested, but at least allowing for the option.

The CHAIRMAN. If the gentleman would yield, is the purpose of the member taking this test to determine whether the member is using drugs?

Mr. DIOGUARDI. The purpose is to assure the public that people in positions of leadership cannot only publish their tax returns and their financial statements, which are nice to do and I think are important, but also to do some other disclosures which are equally important.

The CHAIRMAN. Well, I might suggest to the gentleman that if it is for that purpose that your campaign committee should be able to provide that service.

Mr. OXLEY. Would the gentleman yield?

Mr. DIOGUARDI. I think it is broader than that, Mr. Chairman.

Mr. OXLEY. Would the gentleman yield on that?

Mr. DIOGUARDI. Yes, sir.

Mr. OXLEY. It is interesting that you brought that up, because that was also my second thought after I found out that it was not a proper House expenditure. I checked and found with the Ethics Committee that it wasn't a proper function of the campaign committee because if that is subjecting your office to it, that becomes an official function of the office which would then view your campaign fund as a slush fund, which the rules of the House clearly prohibit, but I would like to tell the gentleman from New York that perhaps he would like to cosponsor another bill of mine that would make it a proper House expenditure which would be an amendment to the rules of the House of Representatives.

I feel very strongly about it, and I feel that we would get many Members that would volunteer their office for testing if there was that procedure.

Mr. UEBERROTH. Mr. Congressman, if the amount of money is not all that extreme, I could get a few of my friends together, and we would pay for the whole bunch of you.

Mr. OXLEY. Commissioner, that would also be illegal.

Mr. UEBERROTH. The thing that fascinates me, Congressman, as you do say, you are under great scrutiny, all of you, every tax return, everything you do, every $10 lunch, $100 lunch, whatever. All that is scrutinized, but we can take—I'm an accountant. I am not a lawyer. I am an accountant by training. We watch every dime that everybody spends in this country, but we can send some blank checks abroad, as we have discovered in a country in southeast Asia, and not even know where the money goes and not account for it.

One of my principal points in the seven points in trying to stop this thing is aid and trade; we have to go back to the countries that grow dope, promote dope and fire it across our borders like guns, and start questioning that aid. Where does that money go? Who gets it? Follow it down like they do Congressmen's—every dime that comes from us, and let's stop it from happening.

Mr. DIOGUARDI. Mr. Commissioner, you have made my case. I am only the fourth certified public accountant in Congress today. So we are both accountants. Out of 535 people, 100 Senators, 435 House Members, only 4—and Congressman Shaw is also a CPA—only 4 of us can claim the disciplined training of a certified public accountant.

Part of my frustration after 22 years in the accounting profession is that we have no plans here in Congress. Everything is reactive, totally reactive. This committee, I think, is doing a great job, and

Congressman Rangel is, but the system stinks. We can't come up with a strategic plan. We will let an IRS agent go because of the deficit, when we know that he is worth his weight in gold when he does audits because we need to know that the budget has to be balanced every year.

What you are suggesting in your testimony is a plan, and we need a plan for the future. Every dollar that is put into drug abuse now probably saves $20 in 5 years, but for some reason this body can't look beyond 1 year. The system has got to be changed. We don't even have a capital budget. We will $100 million building on a budgetary line along with any expenditures for education of drugs, so how can we plan?

Mr. UEBERROTH. Let me just give you an overtone. I hear partisan politics arising a little bit. Let me just say one thing. As a country we reacted and we declared war on terrorism because it is a very visible kind of threat. A far more serious threat the terrorism of drugs in this country, and we are not declaring war, and we somehow found the budgets and the manpower and the people, and the public support, and everything else, and the congressional support to go do something against people that were making a mockery of us, but there are nations that are making a mockery of the United States with a lot less publicity and a lot more effectiveness attacking the underbelly of this country, and we are not doing anything about it.

Mr. DIOGUARDI. Thank you.

The CHAIRMAN. Thank you, Commissioner, on behalf of the Congress and this committee. We will be setting a special brain trust to incorporate some of your ideas and to see whether or not we can just strengthen our partnership because there are just so many people giving up.

We heard police commissioners talking about legalization. We hear school teachers saying take the profit out. So when it gets that scary, to use your phrase, I think it is time for us really to draw the wagons together and see whether or not we can come up with some better ideas. You have brought some exciting testimony, but more important than that, you have brought us a challenge, so we will take a page from your book and see where we go from there.

You will be hearing from us, and we will try to adjust the meetings around your schedule.

Mr. UEBERROTH. Thank you.

The CHAIRMAN. The next panel is "Drugs in the Workplace." Dr. Charles Schuster is the Director of the National Institute on Drug Abuse. From the Wall Street Personnel Management Association, we have Mr. E.A. Weihenmayer. Of course, I have already thanked Peter Bensinger, the former DEA Administrator and Corporate Abuse Consultant for being with us.

We are forced to operate on the 5-minute rule in order to reach the rest of our committee objectives today, and so if there is no objections from the committee, we will allow at this time for your entire statements to appear in the record and perhaps if you could highlight that testimony in the 5 minutes allocated, we will then be able to question more. And if there is no objection—the Chair hears none—we will start with Dr. Schuster from NIDA.

TESTIMONY OF CHARLES R. SCHUSTER, DIRECTOR, NATIONAL INSTITUTE ON DRUG ABUSE

Mr. SCHUSTER. Thank you very much, Mr. Chairman and members of the committee. I would like to thank you for inviting me here today to testify on the overall problem of drug abuse in the workplace, as well as the issue of drug testing as a specific means of decreasing drug abuse.

Although it is difficult to obtain precise figures from business and industry on the cost of alcohol and other drug abuse, we know that substance abuse related to accidents, loss of productivity, loss of trained personnel, theft, insurance claims, and security costs has made a significant enough negative financial impact to force many employers to address the issue.

For several reasons it has been difficult to obtain precise data on drug use from surveys conducted in the workplace. Businesses are reluctant to share with the public any data they might have collected for fear that they might reflect poorly on the quality of their work or product or services. Employees are reluctant to report drug use to their employers or at their place of work for fear of threat to their job security.

We are, however, beginning to get data from several NIDA-sponsored studies which have examined the relationship between drug use and work-related variables. These recently completed studies have shown that current marijuana users have high rates of job turnover, especially when they are concurrently drinking and using other drugs. For example, the time between job entry and termination for workers with current drug use is 10 months shorter for men and 16 months shorter for women than for nondrug users.

A national NIDA survey of adults aged 18 and older examined the relationship between drug use and absenteeism from work. More current marijuana users missed 1 or more days of work in the past month because of illness or injury than did nonusers. This was also true, I might add, for cocaine. Indeed, a more striking difference in drug use groups, however, was in the number of persons who cut or skipped work. Seventeen percent of the current marijuana users skipped 1 or more days of work in the month prior to this survey versus 6 percent of nonusers. Similarly, 17 percent of cocaine users skipped 1 or more days of work in the month preceding this survey, versus 7 percent of nonusers.

In summary, then, these data from these studies clearly indicate that marijuana and cocaine use are associated with great job instability and increased job absenteeism.

Although private industry has been somewhat reluctant to discuss drug programs or policies as well as data on drug use by their employees, this attitude is changing. Within the last year, a major transition has taken place in the business world. Progressive companies have begun to adopt a position that society has a drug problem. Since you must draw your work force from this society, employers must develop policies and programs to deal with this problem.

Since its inception, NIDA has taken the lead in assisting business, labor, and industry, as well as other governmental agencies in

the area of drug abuse education, prevention programs, early detection and treatment efforts in the workplace. NIDA's Research Technology Program has been instrumental in the evolvement of the scientific basis for the assays which are suitable for the detection of drugs in body fluids and these new technologies have made drug testing a valuable demand reduction tool.

Since the Department of Defense and other Federal agencies have implemented testing in an effort to detect and reduce the incidence of drug use, the incidence of drug use by members of the Armed Forces and agency staff has shown a continuing downward trend. We believe a major portion of this significant decrease in illicit drug use is because of the mandatory urine testing. However, I do not believe that drug testing by itself is the solution to controlling the problem of drug abuse, but it can be an extremely useful tool within the context of an overall program or policy that stresses treatment, prevention, and education.

In an effort to be of assistance to both labor and industry, NIDA has recently prepared a question-and-answer booklet which provides answers to many of the numerous complex issues associated with employee questions about drug screening. I have a copy of that available if anyone would like to see it.

A major concern for all of us is the accuracy of drug testing. NIDA advises that the accuracy and reliability of these methods must be assessed in the context of the total laboratory system. First, the need to use assay systems which are based on state-of-the-art methods and rigorously controlled procedures are essential, particularly where the consequences to the individual of a positive result are great. If the laboratory uses well-trained and certified personnel who follow acceptable procedures, then the accuracy of these results should be very high.

With the growing use of urine analysis, some type of guidelines for proper use are essential; imposed either by the urinalysis industry itself or by Federal or State regulation. NIDA plans to issue a research monograph this fall on Guidelines to Technical Aspects of Urinalysis. This document will consist of chapters written by experts in the field addressing the many technical issues associated with urinalysis.

Another way in which we have tried to be helpful to business and industry is illustrated by the conference we convened last month here in Washington. This conference was to share information and develop a consensus on the best policies, procedures, and strategies for reducing drug abuse in the work force. I am pleased to say that over 150 companies participated, and as a result of this meeting, NIDA expects to produce a consensus document within the next 60 days which will give further guidance to business and industry on these important issues.

Although we have made progress in addressing the problem of drugs in the workplace, frankly we need more information in certain areas in order to continue advancing in this arena. We need evaluation studies to better assess the impact of drug abuse on business, as well as to determine the efficacy of employee drug testing programs. Therefore, we are now working with some of the Nation's largest businesses to design and carry out such studies.

We also need better data on the use and abuse of alcohol and drugs among employees in different occupational groups and work roles. This will enable us to better understand the impact of the work environment itself on the drinking or drug-taking behavior of employees. Finally, I believe it is essential we further assist private industry by providing technical assistance for the development of certification procedures and quality assurance guidelines for urinalysis laboratories.

In summary, the workplace provides an excellent forum for dealing with drug abuse through education, prevention, early intervention, and referral for treatment. I would like to stress, from someone who has just come from a university setting and a treatment background, that if you can engage people while they still have employment prior to the time that their drug problem has gotten to the point where they have lost their job, lost their family relationships, et cetera, you stand a much better chance of doing something effective with them in terms of successful treatment.

We are trying to encourage the development of work force policies that will be powerful and effective enough to make a significant impact on this country's drug-taking behavior and contribute significantly to our overall demand reduction strategy.

This concludes my formal statement. I will be happy to answer any questions you may have.

[The prepared statement of Mr. Schuster appears on p. 95.]

The CHAIRMAN. Thank you, Doctor.

The Chair now recognizes Mr. Weihenmayer, chairman of Wall Street Personnel Management Association.

TESTIMONY OF E.A. WEIHENMAYER, PRESIDENT, WALL STREET PERSONNEL DIRECTORS ASSOCIATION

Mr. WEIHENMAYER. Good morning, Mr. Chairman, Congressmen. I don't know that my comments will have the drama of our national pastime, but Wall Street is a pretty exciting place, too. I am the director of human resources for Kidder, Peabody and a member of the firm's operating committee. Kidder, Peabody is one of the largest and oldest Wall Street firms. We have 6,500 employees, 65 offices in the United States, and we are headquartered in New York City. I am the chairman of the Wall Street Personnel Management Association which umbrellas 40 of the largest firms in the securities industry. These companies have approximately 150,000-plus employees.

We know that drugs are dangerous and have heard testimony to that effect this morning. This weekend in New York City some young man on crack walked into a police station and said he just stabbed and killed his mother. Governor Cuomo has just announced a major initiative in New York because of the drug problem. These are the things that are public and visible, but I assure you that inside companies, on a much less public basis, there is great concern, great concern over employee drug use. Kidder, Peabody, for example, has 225,000 clients. These are men and women, retirees, widows, widowers, many IRA's, small accounts, and obviously some quite large accounts also. Managing these accounts, trying to grow these accounts in a responsible way, is an awesome

responsibility. Just recently, for example, we had a cashier in one of our offices who was skimming the checks of an elderly individual who had an account with us. Every time a small deposit was made, these checks would be skimmed off basically to support her drug habit and the drug habit of her boyfriend. The amount in that case was $10,000 in total.

At the other extreme is another recent case, happening within our own firm, a multi-million-dollar bond theft. The individual who was involved here made the first three thefts to resell the bonds to organized crime at a small portion of the face value, basically to support a drug habit, and the next 13 sales which he made were under a death threat, and he got no money. The thefts originated because of a drug problem.

Fortunately, in both cases the clients suffered no losses, but certainly we still have a problem. We are asking principally really that you share our concern and help us. I want our industry not only to encourage self-addressing this problem, to institute drug prevention programs, and believe, in fact, that we should be held responsible for doing this.

We do try to help ourselves. We train our account executives to uphold the trust that I referred to earlier. We certainly teach our managers to monitor accounts carefully. We insure all of our accounts in the event the system does break down. We bond all of our employees, and when we interview prospective hirees, we screen them extensively, and try to conduct good reference checks, not just the perfunctory letters that we all send out. We call previous schools, previous companies, previous supervisors. We conduct these reference checks, and we conduct fingerprint examinations under regulations of the New York Stock Exchange.

Lately, we have become alarmed at the national drug epidemic. We are concerned about employee drug use. There is no reason, we assume, that Wall Street should have any less of a problem than the Nation. If you were to walk around on Wall Street, you would be amazed at the accessibility of drugs. And, of course, on Wall Street there is ample money to pay for these drugs. So we believe that we at least have the same problems that our country has.

Kidder, Peabody and other securities firms have embarked on a number of drug prevention programs. We have a five-point program which I would like to share with you. We think it is a balanced program. It indicates, and we hope reflects, the responsibility we feel to our clients, but it also is sensitive to and, I hope, reflects the compassion that we feel for employees.

First, we have a written policy which is distributed to all employees. It basically says that having controlled substances in your system without medical authorization is against company policy. We don't focus on when the drugs were taken. We don't say where they were taken, and we don't say whether you are job impaired. We simply say that you can't have drugs in your system.

I would think from hearing your comments today that you would share with me the feeling that we in industry are better off if we have a drug-free environment—safer, less fraud, better efficiency, better attendance, a more productive industrial system. I think you would share that belief with me.

We feel we have a business right to work toward, to strive toward, a drug-free environment. We also feel we have a legal right. And we certainly want to reflect the responsibility that we have to our clients.

The second thing that we do is to require all new employees to sign a policy acknowledgement. They acknowledge the policy, and they also acknowledge that the company will take steps in the future, without those steps being specifically defined, to insure adherence to the policy that I mentioned earlier. We give this policy acknowledgement to employees in the enrollment process, as part of the enrollment procedure. This has been signed by over 1,000 employees since we initiated this program, and we have had no incident resulting from it.

The third thing that we do in the New York general metropolitan area is to conduct a drug screen on all new employees, a urinalysis, either preemployment or on the first day of work. Now, any positive that results from a first test is, without the firm even knowing about it, automatically sent for a reconfirmation within an expensive, and I am told, 100-percent scientifically accurate retest and confirmation. We never get information just on the first positive.

We have tested 526 people. Only 38 have tested positive. I think that is very low. Why do I think it turns out to be such a low number? Well, we certainly advise individuals that they are going to be tested. We know that some people walk away from the policy we have, from the drug testing that they are going to take. We know that this happens, and as far as we are concerned, that is fine. We also know that it is possible to manipulate the test. Specific drugs are predictable in terms of how long they stay in the system. But still, despite that, and despite the fact that this testing is not a perfect answer, it does set the tone for a drug policy and overall prevention program which we think makes sense. We have had no employee problems develop from the 526 people that we have tested.

You would be surprised probably to learn that we have hired some of the 38 people, not many, but, some that tested positive. These were people that some before and some after the test admitted that their use was social and infrequent. They pledged to discontinue their drug use. They signed the policy acknowledgement, didn't fight us on that score, and then agreed to be tested at any time within the next 6-month period. We have conducted those tests. Of course, we made this hiring decision in coordination with the hiring supervisor, and management was involved. I can say that every employee who was hired on this basis has been cooperative in the retesting process.

The fourth point of our program is specific training for supervisors and managers in drug-related matters. You would be surprised how generally uninformed supervisors and managers can be about the drug issue. We also conducted drug education among our employees.

The fifth step of our program is an employee assistance program set up with an outside organization of professionals to help employees beat their drug problems. There are two ways you can use the EAP, the employee assistance program. One is self-referral. An em-

ployee may call directly to the EAP and on a totally confidential basis, with Kidder paying for all of the diagnosis, start to take steps to resolve the drug problem that the employee has.

Second, we as a company on occasion do refer employees who have performance problems which we feel are due to on some sort of personal problem, which often times means a drug problem. In that case there still is a reasonable extent of confidentiality, but we do get some feedback. We have the same employee assistance program outlet for alcohol.

That is our five-point program. Maybe there should be a sixth point, which I have not mentioned, because we do not screen current employees now except for cause. It is a weak link in our drug prevention program. Why don't we do it? We are simply letting the legal and social issues clarify themselves, because while we have been advised that testing our current employees would be legal, we also recognize that viewed from an employee standpoint, there are certain invasion of privacy issues. So we have made no decision on this issue yet. When we do make the decision, we clearly are going to have to weigh these concerns versus our responsibility to 225,000 clients.

We are comfortable in testing airline pilots, bus drivers, nuclear powerplant operators, Dwight Gooden, because he has a 100-mile fast ball. We are concerned because of physical safety.

What about the financial safety of 225,000 clients? It seems to me—I find it so easy to make that connection—that not only do we have a responsibility as an industry, but we have an obligation to make sure that we provide a drug-free environment which can better ensure our clients the trust that they deserve. We hope that you share our concern in this. I am certainly encouraged with all the positive commentary and the concern that has been represented here today.

A drug-infested industry is not good for anyone, and I would just implore you to work with us. Help us if we need legislation to clarify the testing issue. Help us to work toward a drug-free environment in industry. Thank you.

[The prepared statement of Mr. Weihenmayer appears on p. 106.]

The CHAIRMAN. Mr. Bensinger, welcome back to the committee. You are in a different capacity, but we are glad to have you.

TESTIMONY OF PETER BENSINGER, FORMER DEA ADMINISTRATOR, CORPORATE DRUG ABUSE CONSULTANT

Mr. BENSINGER. I appreciate the opportunity to come together with old and knowledgeable friends. I think your congressional oversight role is critical. You know the ravishes of drugs from personal visits you and your committee has made to treatment centers to locations throughout this country. You have seen the loss of life. You have been to our borders. You have been overseas in the growing countries and supported families of law enforcement officers killed in the line of duty.

I won't make a long speech, but I do have tremendous respect for what this committee has done and can do. I also think you have got a key continuing role in what could be some new areas for the committee and its oversight. What are the Federal regulators? How are

they dealing with the problem of drugs in the workplace in industries in which they regulate, and how, themselves, are they handling their own employees with respect to the issue of drug testing and drug policy? Here I am talking about regulatory agencies and Health and Human Services, the Department of Transportation, the Justice Department, agencies which in turn audit and regulate private industry and are putting very detailed guides which I think are needed and rules affecting the railroad, airlines, other agencies and companies that are oversaw by the Federal Government.

I think the issue of drug testing needs to be fully aired out, discussed, floored, debated, decided. My sense is different than that of Commissioner Ueberroth's. I don't think you test solely on the basis of safety or if there is a demonstrated problem. Knowing the availability of drugs in this country, the pervasiveness of drugs, I can't think of an industry or a company that could sit back—or law firm for that matter—and say, "We are free from drugs. We don't have to worry about testing until somebody gets arrested from our company."

I would urge the committee's attention to Kidder, Peabody and other employers who are doing preemployment testing, and when you get into testing, you will be able to look at preemployment testing, fitness for duty testing based on observed behavior, for cause testing based on credible information which would lead an employer to believe that someone has violated their company rules, either by observed use, even if the person didn't act out of normal or credible reports, postaccident testing, posttreatment testing much as someone who is getting involved in an employee assistance program, coming back to the workplace, and then acknowledging their responsibility to stay drug free.

From a treatment standpoint, that is an important coercive force because people on drugs, whether it is alcohol or illegal drugs, it is a disease of denial, and the threat of a drug test is a significant deterrent. Finally, the periodic, announced test, which is characterized by random testing. This is given quiet a bit of attention in the press. I think that companies should not abandon consideration of that initiative. I think they should reserve the right to do it. I think in many cases there are compelling reasons why it can be effective. I think you will have an excellent witness in Paul Mulloy to talk more about that.

I don't think anyone has a civil right to violate the law whether on the job or off the job, and using illegal drugs anywhere is against that law and has impact not only on the person, but on people in the general public, coworkers, and society.

The terrorism references were excellent, and I want to cry out when I see we are going to spend $4 billion on bricks and mortar, and I don't know how much they are spending on intelligence collection and enforcement in this antiterrorism. But if you took 10 percent of that $4 billion and put it to collect information and put some informants into those terrorist groups—and I am sure their agency is doing that—I'd feel better. I think also if we look at the money spent fighting drugs compared to that $4 billion, you will find that is a fraction thereof.

I talked with the chairman before and Representative Shaw about a forfeiture fund in which the assets of the drug traffickers

could be used to finance their own destruction. We have got toxic waste problems. We have a superfund for toxic waste. I would commend the Congress to consider taking the billion dollars or more that will be collected this year in cash, real estate, stocks and bonds or properties from drug traffickers and turning it around to use against this group for education enforcement prevention programs.

You will hear someone say we are turning the policemen into bounty hunters. That isn't what has happened at EPA. I think your law enforcement oversight, the internal security safeguards and the congressional oversight of law enforcement, rather than facing a new problem, could probably encourage law enforcement to go after the money and the assets which are really the reason the traffickers are starting in the first place.

I think the issue of the bookkeeper that Mr. Weihenmayer made reference is a good one. Someone who is in accounting, someone who is in processing files, someone who is not running a locomotive or an airplane can have a traumatic impact on a company, its employees, and the public health and the security of financial assets. So I would not exclude such employees from drug testing whether in private industry or public agents.

I would add one or two other comments. I think testing is an important tool. It is not a panacea or a magic wand. It needs to be complemented by education for all employees, by a written policy, by supervisory training, by testing of, if necessary, employees managers for cause and fitness. I think contractors for private employers in the Government need to be put on notice that there policies need to reflect a drug-free, alcohol-free environment. I think that you have to have an employee assistance program.

If you want to have your testing program readily accepted, I think that program, though, should not be a safe haven for someone in violation of the company policy. I think EAP should neither be a cause for, nor prevent the imposition of discipline for a clear company policy. I see some encouraging signs in private industry in facing up to the reality of this issue, and I think that that is going to be needed because the information I have is much like that of the congressmen's opening statements; that the availability of drugs is higher, the purity is higher, the price is lower, the overdose deaths are up, and the likelihood of suppressing narcotics at the source is not very encouraging.

Mr. Chairman and members of the committee, I appreciate being invited to appear before you, and I would be happy, as you know, to answer any questions.

The CHAIRMAN. Thank you very much.

Chairman Rodino, a senior member of this committee and chairman of the Judiciary Committee, will be introducing a resolution sometime this week calling for a White House conference on this very serious matter. Most all of the members of this committee will be joining in with him.

Pending that, however, the chair will be reaching out to ask some of the people in the private sector as to whether they would be willing to join a task force, a brain force to get new ideas as to where the Congress could and perhaps should be moving. Mr. Weihenmayer, I am making that statement based on what you said;

that where the private sector is reaching out trying to do something, at the very minimum the government should be there to give you the type of assistance that you need, and so you will be hearing from us.

Dr. Schuster, of course, you would be invited, but recognizing the severe restrictions that the governmental employee has. We would like to have this a little broader, but we will be calling upon you for consultation and advice and direction.

Mr. Gilman.

Mr. GILMAN. Thank you, Mr. Chairman. With regard to the entire panel, and I am addressing the questions to all the panelists. Are you all in agreement—and I take it you are—that drug testing certainly is recommended for industry for the private sector?

Mr. Bensinger says, yes. Dr. Schuster?

Dr. SCHUSTER. In conjunction with other aspects of a program, as I think all of us have agreed drug testing in and of itself is not the complete answer. It should be viewed as part of an overall policy.

Mr. GILMAN. Let me refine the question. Drug testing together with a consultation program and treatment, would you all favor that?

Dr. SCHUSTER. I would say that drug testing should be——

Mr. GILMAN. Would you put the microphone in front of you?

Dr. SCHUSTER. My view is that drug testing is a very powerful tool. I think that Mr. Ueberroth stated that it may be essential in certain industries that this be carried out. I think that it is a matter that has to be judged on the basis of each and every workplace.

Mr. GILMAN. Do you think there is a significant enough problem to warrant whatever costs might be involved? Do you think the problem is that significant?

Dr. SCHUSTER. Given the fact that we know that, particularly among younger people in the 18- to 30-year age group, significant number of people who are using illicit drugs, I think each and every employer should consider using drug testing in their own place of business.

Mr. GILMAN. Thank you. Mr. Weihenmayer?

Mr. WEIHENMAYER. I would certainly support it. I would be concerned that, if any boundaries are ever drawn, they will be drawn too narrowly. For example, we talk about physical safety. Then we talk about financial safety, and then someone questions, well how about the person who is driving a car and runs into somebody and kills them because he happens to be using drugs. I don't think you can draw any lines within a very well-defined area of concern.

I think that there are too many situations where in which testing is warranted. I would also add that, while this is not the point of my testimony, certainly if the workplace became more drug free, we would affect the demand tremendously. That may be the way in which we want to attack the drug problem in conjunction with efforts made on the supply side.

Mr. GILMAN. Well, I think that this is one of the underlying purposes of getting to drug testing in the workplaces, as well as the safety of fellow workers.

I don't quite understand the distinction that you draw between the new pre-employment testing and the existing. What is the fine

line of putting a policy out for new employees of making them get tested? What is your total work force in your company?

Mr. WEIHENMAYER. 6,500 people.

Mr. GILMAN. So you are testing a very minor number in your entire work force. Why the reluctance in going ahead with the remainder? If it is such an important aspect with new employees, why isn't it important with existing employees?

Mr. WEIHENMAYER. It is an important aspect. As a matter of fact, we are in some sort of transition toward completing our drug prevention program. Our management committee, the top 10 people in the firm, have indicated that they would set an example by putting themselves through this voluntary drug screening.

Mr. GILMAN. Again, I don't understand that reluctance. So you are doing it with new employees. You are giving them a policy. You are making them go through the testing. Why do you draw that distinction?

Mr. WEIHENMAYER. I suppose it is one of pragmatism, a recognition that the social and legal environment, frankly, is a little bit unclear.

Mr. GILMAN. Why is there less of a turmoil in the new employees than in the old employees?

Mr. WEIHENMAYER. I think, practically speaking, we are in a stronger position to test a new employee or a person that wants to be an employee, and maybe to reject that person, among other reasons as well, if he is a drug user.

Mr. GILMAN. Well, are you saying that you would be reluctant if you found one of your old time employees handling these million dollars that are using their funds for narcotics, you would be reluctant to discharge them?

Mr. WEIHENMAYER. No, we would certainly—under any fraud situation, dismiss the employee immediately, whether or not the person was using drugs.

Mr. GILMAN. Do you think it is important to try to find out who in those areas of responsibility are involved in that kind of abuse?

Mr. WEIHENMAYER. I believe so, but there is a body of opinion that if and when that is done, there will be other voices besides the companies that will be heard, and I am not speaking just about the employees. You may, frankly, have testimony here today of people who will dispute whether or not we have a right to test all of our employees.

I am asking you, sir, and your committee to help us clarify the situation so that we can proceed more comfortably in doing what we think needs to be done to resolve or address this drug problem in American industry.

Mr. GILMAN. Well, what I am saying is I don't think you need any clarification or any laws to do it. It is something that a company can do by way of a contract with their employees. I would think that you might want to take a look at what you have amongst the existing employees, and I would urge all of our private sector in any of those areas of responsibility where they have people in positions of responsibility to take a good hard look at what we are confronted with.

Mr. WEIHENMAYER. I am hoping, frankly, to learn from testimony of other people and the exchange that they have with the com-

mittee, about the general sense of this very critical issue. The things that I outlined in the five-point program are really not all that controversial. The controversial thing, I believe, is testing current employees on a random basis. It is not quite so simple as just to go ahead and do it.

Mr. GILMAN. Just one more question. I know my time is up.

Mr. Bensinger, as the former administrator of our drug programs, any recommendations about what we should be doing that we are not doing at the present time, and not just addressing it to drugs in the workplace?

Mr. BENSINGER. Well, I think going beyond the issue of drugs in the workplace. My sense would be that the resources still concern me, particularly those at the State Department level, and I would say that in addition that the Government's new initiative, NIDA perhaps taking the lead in stimulating and providing forums, perhaps even giving some certification guidelines to labs should be encouraged. I think that the impact of drugs is going to need to be addressed everywhere. We have not done it very well—in schools, at home, at work, overseas, even within our own governmental units.

I think you will need a full court press everywhere. But in the industry you have got some leverage, and you are going to reach 120 million people in the workplace who are parents, who need the education, who need to reduce—the acceptability of 8 percent is appalling if that is a good figure, and 8 percent is not uncharacteristic. It could be 20 percent positive people, and that is dealing with drugs, Ben, that are going to get out of the system very quickly, cocaine in hours, in its principle metabolite in less than a day and a half. So you are not going to pick up because of the testing and time sensitivity of the drug, the total drug use of anybody applying for a job.

Now, I think the Government needs to more, more in its overseas efforts, fund its programs not on an annual basis, but over 4 or 5 years, turn the traffickers' money against themselves and use some of the Federal education resources far more effectively. In the field of prevention, I think the NIDA budget is woefully inadequate. With its present director, I know a committed individual, I just don't think that fighting a $100 billion problem with available funds in prevention will do the job.

I think having forums is great. They may have to do more with FDA in some oversight.

Mr. GILMAN. And one quick question—thank you, Mr. Bensinger—to Dr. Schuster. What are you doing to try to encourage more education out there amongst our young people?

Dr. SCHUSTER. First of all, we have the national clearinghouse which provides a variety of materials to treatment personnel and the school systems.

Mr. GILMAN. But besides the literature, what are you doing that encourages States to do more about drug education. We are appalled to find how few States have any mandatory educational programs.

Dr. SCHUSTER. NIDA's primary responsibility in this area, at the present time, is to provide information to those people who seek it from us.

Mr. GILMAN. Do you have any responsibility that encourages States to do more by way of education?

Dr. SCHUSTER. We certainly are in contact with all of the State agency people who are involved in the area of drugs.

Mr. GILMAN. Are they doing enough?

Dr. SCHUSTER. No.

Mr. GILMAN. What are we doing to encourage more?

Dr. SCHUSTER. We are a resource for providing them with information. We also hold workshops for the State drug abuse agencies so they can get the most up-to-date information to dispense throughout their States. In addition, we are working on developing joint efforts with the Department of Education targeted at school-age youngsters.

Mr. GILMAN. I yield to the chairman.

The CHAIRMAN. Thank you, Mr. Gilman.

Dr. Schuster, we are not here to embarrass you, but your agency is doing absolutely nothing, and to say that you are working with the Department of Education means that you are doing less. We have had hearings throughout these United States. We have talked with city and State officials. They have no curriculum, no program, and the best that we can come up with as an oversight committee is that your agency and some others may from time to time invite people to attend on a volunteer basis a conference or two in Washington. So I know that you can't be proud of your agency's record or lack of it, and certainly you are not responsible, but we don't want you to be trying to be creative and thinking of things that you would like to be doing, because we have already checked it out.

Dr. SCHUSTER. I would say to you, sir, that I think the drug problem is becoming increasingly recognized.

The CHAIRMAN. Dr. Schuster, don't do this to your profession. This epidemic has been going on for two decades.

Dr. SCHUSTER. Absolutely.

The CHAIRMAN. And it doesn't help us all as partners in government to say that your agency, the National Institute of Drug Abuse, is recognizing the problem.

Dr. SCHUSTER. No, sir. I said that in my brief sojourn here in Government, which has only been the past few months, everywhere I go—to the Department of Justice, the other departments—everyone is now talking about demand reduction. Everyone generally acknowledges that supply reduction is not the complete answer to this problem by any means.

The CHAIRMAN. Dr. Schuster, when the Drug Enforcement Administration and the Justice Department is talking about demand reduction, then you know this is the last game we have in town. I mean it is tragic that they have to do it, but it would be helpful if you could send to this committee what you think could be done, or what you would want to be done, or where the Congress should be moving. But if the law and order people are saying they can't do anything, if the State Department are not doing anything, then certainly when it comes to reducing demand, and you are saying that they are looking at it as a possible area to get involved in——

Dr. SCHUSTER. Actually there are numerous programs now within the Department of Justice, within the FBI and many of the agencies——

Mr. GILMAN. If I might interrupt, Dr. Schuster, it is not Justice that has to educate our young people. Yes, they have some worthwhile programs going out into some of the schools periodically, and some of the sports people do it, but that is not a national educational program. What we are concerned about—when I go to my own State and find the Commissioner of Education reporting to us that out of a $6 billion State education budget, last year they devoted only $140,000 to all the health programs, including alcohol, including sex education, including narcotics. This year they raised it to the grandiose sum of $170,000 out of a $6 billion budget.

Something is radically wrong when you have a major problem, and our enforcement people tell us that if we don't get to the youngsters by the time they reach their sixth and seventh grade, forget about them. What are we doing at a national level to encourage, to mandate that kind of education?

We have a measure in, joined with our Chairman, Mr. Rangel, and a number of members on this committee in providing close to $1 billion additional funds as seed money to the States to try to encourage them to move further. What is your agency doing to try to do just that very thing, to encourage greater education nationwide, not just making literature available.

Dr. SCHUSTER. Well, sir, I would say that activities certainly in the area of prevention services are limited. You must understand that this is not even a budgetary item at NIDA. It is mandated primarily as a research organization—to gather knowledge and to provide this knowledge for the use of others. I would welcome the opportunity to engage in more active prevention types of activities.

One of the things I would point out——

Mr. GILMAN. But, Dr. Schuster, if I might interrupt, you said you would meet with the education commissioner. What do you do in these meetings? How do you work together? You say there is some sort of a relationship.

Dr. SCHUSTER. No, I said we are about to establish this type of a relationship. We are concerned—I am personally concerned as the new Director at NIDA—with getting a better picture of the governmental programs in the area of prevention. As I mentioned to you, everywhere I go individuals are talking about demand reduction, and, I, as yet do not have a clear picture of the total package that the Government is involved in.

Mr. GILMAN. Well, I would hope that now that you recognize that there is that problem and are hearing so much about it as we have been hearing about it for years, that you would work closer together with the education commissioner and try to evolve a nationwide program on education. There isn't a mandate out there. There isn't an awareness of the need to do that apparently.

The CHAIRMAN. Mr. Guarini. I fail to understand the gentleman's recommendation. If there is no programs from the Department of Education, and he is doing all of the research, and he has no way to put it out, what in God's heavens—he has got to share it with the Secretary of Education.

Mr. GILMAN. We hope that some program would be evolved that could be——

The CHAIRMAN. Well, we would have to get a third agency involved.

Dr. SCHUSTER. No, sir, that information does go to the Department of Education.

The CHAIRMAN. But they don't do anything with it, Dr. Schuster. So I am saying we have to find some third agency, because all their research is someplace in Washington. It is not in my district.

Mr. GUARINI. Thank you, Mr. Chairman.

Doctor, this comes down to how you perceive your role, how you perceive the responsibilities of the National Institute on Drug Abuse. Do you feel that you have an educational role that you should be involved in the thrust forward and go into the States and being active? Is that what you think your mission is?

Dr. SCHUSTER. As I pointed out in the beginning, the National Institute on Drug Abuse, as you are well aware, at one time was responsible for treatment, prevention and a variety of areas, the total package in terms of the area of drug abuse. Since implementation of the block grant, NIDA's primary mission has become one of funding research in such areas as developing new treatment modalities for those who are already dependent upon drugs, as well as research into new techniques for prevention.

Mr. GUARINI. So you have become a research institute?

Dr. SCHUSTER. Primarily.

Mr. GUARINI. So you don't view yourself as having an educational role.

Dr. SCHUSTER. No, I would not say that. Research is not an end in and of itself. I think our primary purpose is to be able to provide the data that is needed by the public, by treatment people, by people in prevention based upon the scientific research which we carry out.

Mr. GUARINI. Now, do you have an adequate budget to do the job that you think you have the responsibility to do?

Dr. SCHUSTER. You are talking now about research?

Mr. GUARINI. About NIDA as you conceive your job. Has the Gramm-Rudman cut back on your funds? Have you gotten the funds that you expect? Can you do adequately the job with your budget as it is so structured?

Dr. SCHUSTER. It is obviously true that we could conduct more research and we might move more rapidly with additional funding. I think that probably the area in which we have been most criticized is in the area of the prevention clearing house and the educational aspects of our program, because the Gramm-Rudman did disproportionately affect that. That is simply because those funds come out of our operating budget, and some of those costs are fixed.

Dr. GUARINI. So that Gramm-Rudman has crippled your efforts to a certain extent.

Mr. SCHUSTER. I would not say it has crippled them, but it certainly has curtailed them.

Mr. GUARINI. It has curtailed your efforts.

Mr. SCHUSTER. Yes.

Mr. GUARINI. Thank you.

Mr. Weihenmayer, if you had your druthers, would you test everybody in the workplace periodically rather than at random when there is a cause?

Mr. WEIHENMAYER. I believe that the only way that you are effectively going to make a big dent in the drug problem in industry is by periodically testing all employees in industry.

Mr. GUARINI. And would that be regardless of the job or regardless if they were a clerk in the file department, or whether they were a manager of funds that made a responsible decision?

Mr. WEIHENMAYER. In our industry, we would have a hard time finding individuals who could not in some way impact on the manipulation of an account.

Mr. GUARINI. Down to the point of the people who sweep the floors in the building?

Mr. WEIHENMAYER. Certainly you could contrive a situation where someone who does that job has a drug problem, needs money, and is sifting through drawers to find account information on which they take action. You could contrive any sort of situation like that. I think the answer is that rather than argue about—which is what would happen if you said you were going to do four-fifths of the work force—rather than argue about where that line is going to be drawn, you just say that testing is unfortunately a necessary evil.

I am not advocating it as something that is positive and good and welcomed, but I think it is something that we need to do.

Mr. GUARINI. So what you would do, then, is test everybody in every industry in the workplace as a matter of serving the public interest.

Mr. WEIHENMAYER. I would only ask that industries have the situation clarified so that, if we choose to test in our company or in our industry, we feel comfortable in making the decision, that we are on the right legal path and on a sound footing. I don't believe we ought to mandate testing all employees on a national basis. I think companies should feel, though, that they are on solid ground to take the actions which they deem necessary to keep their drug environments free.

Mr. GUARINI. How do you handle confidentiality in your company?

Mr. WEIHENMAYER. Two confidentialities which are important: regarding the Employee Assistance Program, which employees refer themselves to, we really never get any information from the EAP as far as which employee has self-referred themselves to the organization for help. We, honestly, legitimately do not get the person's name. We pay the bill, but based on a number, and we don't know the situation.

In terms of the drug testing, the testing information is held in a separate file. It is only in one office that is administered by two people. We do not keep all the actual reports, but do keep the report that the lab makes just on a yea or nay. It does not go into the departments.

Mr. GUARINI. So the employee is protected in a confidential manner.

Mr. WEIHENMAYER. Well, I did tell you that if we hire an employee who tested positive and we have done that in a few cases—before we do hire that person, there has been a discussion with the supervisor, because we feel that the supervisor deserves to know that we have taken the step of hiring somebody who tested posi-

tive. This person signed the acknowledgement. This person indicated that his use was social and infrequent. He also indicated that he is prepared to discontinue his drug use.

On that basis and the basis that we will test him over the next months on a random basis, we feel comfortable in moving ahead in conjunction with the supervisor.

Mr. GUARINI. Would that be limited to marijuana, or would you also take that discretionary step if you were dealing with heroine or cocaine?

Mr. WEIHENMAYER. We haven't hired anyone that has used heroine. We have hired some people that claim social, infrequent and casual use of cocaine or a one, two or three-time basis, and we just happen to catch them. Certainly marijuana and cocaine are the issues with which we primarily are dealing. We have hired people that have used those, but on the basis which I have indicated to you.

Mr. GUARINI. Thank you.

The CHAIRMAN. Mr. Clay Shaw.

Let me say, Dr. Schuster, that I apologize to you personally for my outburst. It was certainly not directed at you personally, but an unfortunate outburst of frustration.

Mr. SCHUSTER. I appreciate that.

The CHAIRMAN. Mr. Shaw.

Mr. SHAW. Thank you, Mr. Chairman.

To follow up on the gentleman from New Jersey, in my particular office I made it known that confidentiality was of paramount importance. I think to conduct drug testing in any other way would indeed be an infringement upon employees' rights, and those rights I certainly hold sacred and wouldn't interfere with at all. The way it was handled in my office was that each of the staff members had an appointment to go over to Dr. Carey's office, at which time a representative from the lab was present.

They were given separate appointments. It wasn't a question of everyone lining up with a specimen bottle. It was done with complete dignity. I don't think anybody was embarrassed or unhappy about the way the test was handled, and the results were made available only to me. I felt very strongly about that, and I think for me to do have done otherwise would have interfered with rights individuals.

Mr. Weihenmayer, I would like to compliment you and your company on your statement and what you are doing. I do believe, however, that some type of random testing of current employees is perhaps called for so that everyone is on the same footing so that you don't have two classes of employees. I think that obviously that policy can be brought into effect over a long period of time so no one is getting ambushed. But I think just the presence of the threat of that possibility is going to be what keeps your employees drug free.

Obviously, you are not out to catch them. You don't want to catch them.

Mr. WEIHENMAYER. Right.

Mr. SHAW. You just want them to stay off the illegal substances.

Mr. WEIHENMAYER. If I could just ask sir, if you know of any companies that have introduced random testing which has gone

completely unchallenged by one body or another. It seems the social and legal environment is unclear at this point.

Mr. SHAW. Well, it is untested. It is a new environment that we are in. I think some of the railroad workers have tested it. I believe that Union Pacific has already gone through the courts with it, and from the information that I have, their accident rate is down some 70 percent as a result of that. One error with switch can cause a lot of damage to property and life.

Mr. BENSINGER. Congressman Shaw, the company that has embarked upon that is Southern Pacific, and they have a dramatic reduction in accidents, injuries, absenteeism. The oil riggers off shore have also done periodic, unannounced testing. A number of companies have been doing it in specialized situations.

Generally, in the oil rigging situation there have not been challenges, and some of the other industrial settings grievances have been filed, but I do believe that random, unannounced, periodic testing is perhaps the best deterrent to reduce and drive down drug use in industry or for that matter, in the military, and that an employer in looking at the 1970 OSHA regulations which require to provide a safe environment has a responsibility to protect all the other workers as well as the individual who may be concerned with the test. Their privacy rights are at issue here.

I think that the testing for the protection of the workforce in general for individual employees and for the public needs to be interpreted broadly, and will, as it works its way through the courts. We are seeing more arbitrators in the court look upon the safety of the workplace as really the single most important criteria.

Mr. SHAW. I have seen a common thread go through the testimony today, and that has been making it very clear that you are not out to catch anybody, but that upon finding the presence of drugs, the chance of rehabilitation and not an intermediate firing is the accepted procedure. Am I correct on that?

Mr. WEIHENMAYER. That's correct. I would like to point out an irony in the whole thing. If you, let's say, run an airline and there is an accident, and the accident was a drug-caused type accident, I am sure that there would be a great deal of public opinion, if not legal opinion, that the airline or we as an investment house would be liable for the lackadaisical precautions which we took in ensuring that our environment was proper for financial safety or physical safety.

On the other hand, frankly, industry feels constrained, principally because this legal environment has not clarified itself, constrained from taking the action that people, if an accident happens, say that we should have taken. So I think that we are caught either way.

Mr. SHAW. Well, I think it is important to note—I think that rehabilitation, on-the-job rehabilitation might very well be proper in your particular industry. I would hope that with regard to an air traffic controller that they would be taken off the line immediately until their rehabilitation was complete and certified, and an airline pilot.

Mr. BENSINGER. Mr. Shaw, I think in industry, at least with the companies we have worked with in the associations, if someone shows up positive for a drug test, they are not in a position, really,

to continue on assignment until they test negative and have completed an EAP program. The employer can't, in today's society, run the liability of doing nothing, and with 22 million marijuana users, 6 million cocaine users, and anywhere from 10 to 20 percent of the workforce using drugs on or off the job, not having a proactive program is doing nothing, and I think causing a sapping of our productivity and causing the accidents and injuries that have been described earlier.

Mr. SHAW. I have been told my time has expired. I would like to pursue that at another time, and I think the question of liability of doing nothing, could possibly not only lead to actual, but perhaps punitive damages in some instances.

By the way, Peter, you look very comfortable back before our committee.

Mr. BENSINGER. Thank you.

The CHAIRMAN. Mr. Oxley.

Mr. OXLEY. Thank you, Mr. Chairman. Mr. Bensinger, you may have been present when I talked about a situation that existed in the General Motors plant in my district which was written up in the Wall Street Journal. But the interesting thing about that situation was that General Motors determined that they had a real problem with not only using drugs on the premises of the plant, a rather large plant that employs over 3,000 people, but also the sale of those drugs, and as a result they met with the county prosecutor of Richland County, and it was the county prosecutor's determination that the best way to deal with the on site problem on the worksite was to bring in undercover security officers, have them pose as employees, which of course they did, and as a result it involved a good number of arrests on the premises.

We are told it at least slowed down if not arrested totally, the sale of drugs on the premises of the plant. Is that, No. 1, an effective means not necessarily excluding anything else, but simply an effective means of doing that. It may not be necessarily effective in this gentleman's business on Wall Street, but it is proven to be effective in my estimation in an industrial plant-type of situation.

Particularly for your background as the DEA Administrator, would you care to comment on that?

Mr. BENSINGER. Yes, I think the undercover investigative resource should be considered and used in private industry when appropriate. I think companies that go to the extent of providing education for their employees, the availability of an employee assistance program, training of supervisors, which GM has had an excellent reputation in doing, and still find it has got a drug problem, must address it and the utilization of undercover investigators or canine searches from time to time are appropriate, helpful and important tools.

We advise clients to consider them in situations where there does appear to be a continuing problem despite education, availability of EAP. You are not always going to have a visible for cause information on testing, so I would say an undercover investigation such as GM mounted was appropriate and would have the net impact of reducing drug sales and bringing drugs on to company property.

Mr. OXLEY. Is it your advice when you are asked by your clients to involve local law enforcement initially?

Mr. BENSINGER. Yes, at any time there is going to be an undercover investigation, our advice is to contact local law enforcement. The company has the option of reaching out for perhaps a private investigative firm, perhaps resources from the State or local law enforcement agency itself. But where companies can get into difficulty is to try to keep within their own jurisdictions the violations of the law, and any drugs found on a company's property, the company personnel director and safety director don't have an option. They must call the police and turn that suspected material over to them.

So, undercover investigations are only effective with the cooperation of State and local police and prosecutive units.

Mr. OXLEY. We had some testimony when we were in San Diego that there had been undercover officers used in school, which was fascinating to me in that you could get an officer that would at least be in his twenties to somehow be able to pose as a senior high school student and were very effective in excluding a lot of drugs and making a lot of apprehensions as a result of that effort.

So, it appears that that type of activity is not only going on in the workplace where there is suspected drug activities, but in the schools as well.

I would like to ask you gentlemen one further question. I can make a real distinction between someone who is preemployment tested; that is, they are competing for a job and so whether they are indeed using drugs or not becomes a significant factor in whether they are going to be employed. I can make a significant difference, or at least see a significant difference between that kind of person and someone who is currently employed, where there is no suspicion, no probable cause, if you will, to think that that individual is somehow abusing drugs.

Now, for example, in my office I have no reason to think that any of my employees are abusing or using drugs in any way. It just appears to me that—and I may differ in that situation from my friend from Florida. It seems that I have some problem to without probable cause to ask my employees to undergo drug testing. I would not necessarily be opposed to it for new hires, but it seems to me that those employees do have certain rights that they have as employees.

I would be curious as to all of your different opinions on that if they are in fact different. Mr. Weihenmayer.

Mr. WEIHENMAYER. I share your concern. I do differentiate between the two, and I believe we have a more difficult problem with the current employee, and that's why we have not instituted point 6 of our program. For example, it is possible that some people would argue that someone utilizing drugs is not job impaired.

Now, that doesn't mean, given our kind of industry, that we want to sit around waiting for that person to have a financial obligation that they can't handle and which leads them to steal from us; before we recognize it. So we would like to take action in advance.

You may also have a pilot who can fly and who smokes marijuana all the time, and who can fly and not have an accident, until he finally has one, and then it is too late. I do share your concern, though.

This is how, in a layman's term, it has been explained to me. If I have a private house, my house, and someone comes to my house, I can say, I would like you not to smoke. Now, smoking is not illegal, I just don't want you to smoke. It is my house, and as long as it doesn't violate some law, can't I determine who comes in my house.

If I am a private company, can't I determine who comes in my house to work? Are we violating some law if we frankly select people that don't use drugs? I would like to think in a private organization that we don't have a problem with that, but it is a somewhat cloudy situation still.

Mr. OXLEY. Dr. Schuster, do you have any remarks on that?

Dr. SCHUSTER. I would simply say the utmost concern is that whatever policy evolves, it should be stated clearly in writing by the company, and that suitable provisions be made for the consequences of testing positive. I also would like to emphasize that results should always be confirmed, as Mr. Bensinger has said, with different techniques to make absolutely certain that positive results are truly positive.

Mr. BENSINGER. Congressman Oxley, I think that fitness for duty is a criteria of employment for everyone, and in the absence of a behavioral observation, probable cause or a special reason, an intermittent or random testing program could be implemented by a company, a private employer, with notice and with a sound explanation indicating the rationale for doing such, which is to deter drug use, and to recognize that it is a disease of denial in which the deterrent effect of a possible test will be significant.

I would also spell out the parameters, as Dr. Schuster, as explained of the consequences of a positive test, and in those kinds of cases generally, you would have, rather than an automatic discharge, perhaps even more reasons for an employee assistance program while they are off duty.

I would just add one item I forgot to mention on your other question on undercover investigation. I think when companies undertake them, it is essential that when they talk with the local police and prosecutors they say when the arrests are going to go down, let's have a joint announcement so that the cooperation and the initiative of the company is in the forefront of the news, not eight workers arrested at the GM plant and GM didn't know anything about it, and that the company's initiative, its participation in the undercover investigation and its presence at a press conference would be very important.

Mr. OXLEY. Thank you, gentlemen.

The CHAIRMAN. I thank this panel, and you will be hearing from us to see when we can get together in a more informal setting. Thank you very much. Thank you, Dr. Schuster, and we welcome any ideas that you may have.

The regulatory agencies panel, John H. Riley, Administrator, Federal Railroad Administration; James H. Taylor, Director, Office of Inspection and Enforcement, Nuclear Regulatory Commission; Charles E. Weithoner, Associate Administrator, Human Resource Management, Federal Aviation Administration; Carmen Thorne, manager, medical, testing, and employee assistance, Washington Metropolitan Transit Authority.

By unanimous consent, the entire statements that you have will be entered into the record, and we ask you to restrict your oral testimony to 5 minutes so that the committee will have time to inquire. As most of you know, we are running 1 hour behind time, and we want to make certain that we have time for the next panel.

Mr. Riley.

TESTIMONY OF JOHN H. RILEY, ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION

Mr. RILEY. Thank you, Mr. Chairman, and I appreciate the opportunity to share the experiences that we have had in dealing with what was unquestionably for me the toughest public policy issue I have had to deal with as Administrator, and I have to reflect, having lived with this now for a few years myself, admiration for the careful and methodical way that this committee has gone about studying the same problems.

Now, we frankly have no way to tell you with certainty how far substance abuse has permeated the railroad workplace. Until the issuance of our rule approximately 60 days ago, we had no authority to do postaccident testing, and the railroad industry did not have clear authority to do discretionary testing because of a decision of the Railway Adjustment Board.

We could find out with certainty only when there was a fatality and we were lucky enough to get an autopsy report or where a crew happened to consent to testing. But even with these limitations, we know that over the most recent 10-year period there were at least 48 accidents in which alcohol or drug use was a causative factor. We know that those accidents involved 37 fatalities, 80 nonfatal injuries, and more than $34 million in damage. We also know that of the 136 autopsies performed over the most recent 7-year period, 16 percent reflected significant levels of alcohol or drugs in the bloodstream.

Now, behind these numbers is the potential for a truly catastrophic accident, which we recognize because of the nature of our industry, and you really don't have to look any farther than the Livingston accident in 1982 for a hazardous material train that forced the evacuation of an entire community to see what could happen.

We reached the point last year when alcohol and drug use together represented one of the largest, if not the largest cause of employee fatalities, and that is why we had to act. Over 16 months, we went around the country and held eight field hearings. We did that so we could hear from midlevel corporate management and line workers in the labor unions, people who don't always get their views expressed in Washington by the representatives of either group, and we consulted with NIDA, talked to many of the witnesses here today and developed some conclusions from those hearings, and I want to share them with the committee.

The first is that the railroad industry—our problem of substance abuse is no worse and probably no better than any other basic industry. It is a societal problem. We have to deal with it because we are in society, but we have a different exposure than many other injuries. Unlike the lawyer, unlike the accountant, the railroad en-

gineer has virtually an unlimited capacity to injure or kill fellow employees, passengers, or anyone unfortunate to live close enough to a hazardous material train. And it is that difference in exposure that shaped the context of the rule we issued in February.

That rule is premised on two factors. First, is our belief that the public—and the public has to be viewed as innocent—is absolutely entitled to protection from the consequences of alcohol and drug use in the workplace. Second, it is premised on a recognition that alcohol and drug use are both intensely human problems, often symptoms of other problems, and to be effective, a program—and I use that word advisedly because it is more than a rule—has to go beyond detection and penalties and get into early identification, counseling, has to give an employee a place to go when they have got a problem and some incentive to seek help when they know they have got it.

I want to tell the committee that I am firmly of the opinion that a rule and a voluntary program are necessary partners. Each does something the other can't do. A rule can detect and deter, in the case of a nondependent user, and it can get a problem employee out of the workplace, but a rule cannot create a peer environment that is negative to drug use. A rule cannot create a place for an employee to go, and because of this, while we spent 16 months preparing our rule, we worked with the Union Pacific and other carriers and labor to put together a national voluntary program that emphasized those things that a voluntary program does well, called Operation Red Block.

A majority of the Nation's railroads now use it. We educated over 2,000 midlevel management and labor officials last year. We intend to do about the same this year. I think we now do have a comprehensive program in the railroad industry, and I think it is having some effect. While these figures probably overstate the effect, we average nearly five fatal accidents a year, or five accidents a year in which alcohol and drugs were clearly implicated in the past. We had none last year. We have not had a single one since the issuance of the rule.

Now put an asterisk next to that, because in some cases investigation is still going on. There is luck involved there. We haven't solved the problem, but I do believe we have begun to change attitudes and changing attitudes is the key to solving the problem. What does our rule say? Six provisions. Let me very briefly summarize them for you.

We forbid the consumption of alcohol or drugs in the workplace. We forbid employees to report to work impaired. Second, we require the railroads to make inquiry in every accident as to the presence of alcohol or drugs and report the data to us. Third, we have a program of mandatory postaccident testing in about 150 of the most serious accidents premised on the recognition that we must know causation if we are going to craft effective policies, and we will reevaluate that number every year to determine whether we have gone too far or not far enough.

Now, we could have stopped here because those were the NTSB recommendations. But I don't believe those three provisions get to the heart of the problem. In our industry the heart of the problem is twofold. The fact that the railroad industry did not have a clear

right to test, and thus had no way to determine with certainty when their rules had been violated, and when you don't have that right to determine with certainty when a rule has been violated, management becomes hesitant to act even where there is a clear problem in the workplace, because it becomes one man's word against another. It goes to a grievance proceeding, and these things tend to be compromised out at the end of the year. That hesitancy to act undermined our program.

Second, there was no meaningful incentive for employees with problems to step forward and seek help prior the time that they became involved in an accident. The only sanction is firing, and an employee is not going to step forward and seek help, nor are employees going to refer one another. We had to address those, so we added three other provisions to the rule.

First, mandatory preemployment drug screening for the railroad industry. We have a slightly older age profile than most other basic industries, and I think our drug problem is less severe. We hope to keep it that way, and preemployment drug screening is now in effect on all railroads. Second, we granted the industry reasonable cause testing authority, and we define reasonable cause very carefully in the rule, and they can now, in fact, test for reasonable cause.

It is a threefold definition. One are the types of things that a reasonable person upon observation would correlate to a violation. The second is a variety of accidents that are keyed to human performance, and, third, violation of safety rules, even when they don't result in an accident when those rules are keyed to human performance. Finally, we incorporated a provision we call bypass in the rule, and I view it as preventive maintenance.

What it says is that an employee who comes forward voluntarily and says, "I've got a problem," can bypass discipline, and after treatment can get back to his job without loss of seniority, and the purpose there is to give an employee the opportunity to come forward and an incentive to come forward and to break what some have called the conspiracy of silence that I don't think is a conspiracy. It is human nature.

If the only sanction is going to be firing, you are rarely going to have a fellow employee no matter how concerned he is about his life turn in another employee. But if that employee, on a referral, is covered by a bypass rule, the incentive is at least to some degree restored. It is a onetime right. It can't be elected while the employee is on duty or impaired, so it can't be used to beat discipline. Testing and bypass interplay; they work together. It would be very little incentive for a person to elect bypass today other than a development in their personal life because up until the time our rule went into play, it was fairly clear that you weren't going to get caught in the railroad environment.

Today I think railroad employees are recognizing that if they violate the rule, they are going to get caught. I think the rule, in summary, Mr. Chairman, and the voluntary program together, together, is going to save lives in both a qualitative and and quantitative sense. More people will live, but the real goal of this thing is to get people into the bypass program so you cannot only keep the em-

ployee alive, but improve the quality of his life by giving him a chance to get back into the workplace as a productive person.

I appreciate the opportunity to share some of our experience with the committee this morning.

[The prepared statement of Mr. Riley appears on p. 118.]

The CHAIRMAN. Mr. Taylor from the Nuclear Regulatory Commission.

TESTIMONY OF JAMES M. TAYLOR, DIRECTOR, OFFICE OF INSPECTION AND ENFORCEMENT, NUCLEAR REGULATORY COMMISSION

Mr. TAYLOR. Mr. Chairman and members of the committee, I am pleased to represent the Nuclear Regulatory Commission at this hearing. The NRC has recognized drug abuse to be a societal, medical, and most importantly, a potential safety problem at the utilities regulated by our agency, and given the pervasiveness of the problem that you heard about this morning, we duly recognize that it must exist and does exist to some extent in the nuclear industry.

In fact, back in 1982, the NRC began and published a proposed rulemaking to address the matter of drug abuse by nuclear power plant personnel. This initiative which we call the fitness for duty rule was to require that NRC licensees operating commercial nuclear powerplants establish and implement procedures to give us reasonable assurance and the public reasonable assurance that persons with unescorted access to nuclear reactor safety systems not be under the influence of drugs or alcohol or otherwise unfit for duty.

In 1984, in conjunction with the Commission's final deliberations on this rulemaking, the nuclear industry, as an alternative to NRC mandating a formal rule, proposed a program of industry self-regulation which could be endorsed by the Commission via a policy statement on the subject of fitness for duty for a nuclear plant personnel. This policy initiative on the part of industry was proposed by an industry group which represents every utility called the Nuclear Utility Management and Resources Committee. [NUMARC].

This group proposed that the industry develop a comprehensive set of standards to ensure that nuclear powerplant personnel are in fact fit for duty. In addition, the industry proposed that the Institute of Nuclear Power Operations INPO would be the vehicle by which the industry would collectively conduct periodic evaluations at nuclear powerplants to ensure that various programs covering fitness for duty were being carried out.

INPO is an Atlanta-based industry organization formed in 1981 to promote excellence in nuclear power operations. In recognition of these industry initiatives, a majority of the Commission decided to defer final rulemaking on the subject of fitness for duty pending further development by the industry of its own program, and a program to be overviewed by INPO.

In August 1985, the nuclear industry working with the Edison Electric Institute EEI published a revision to earlier guidance for companies to establish effective drug and alcohol policies and programs, and I have a copy here with me. This was published in August 1985. This document was shared with the NRC staff and

frankly covers many of the areas that you have heard discussed this morning.

First of all, it encourages a strong company policy regarding prevention of drugs in the environment. It encourages behavioral observation and training for supervisors. It urges coordinations with unions and law enforcement officials, chemical testing as necessary, and just as important, Employee Assistance Programs where people turn themselves in for substance abuse.

INPO in the meantime developed criteria by which they would evaluate what the industry is doing. We have worked with the Commission on a policy statement. That policy statement is expected to be submitted to the Commission very shortly for final approval. The policy statement affirms the Commission's position that persons with access to nuclear safety systems at operating nuclear power plants shall not be under the influence of any substance, legal or illegal, which adversely affects their ability to perform their duty.

It establishes the Commission's objectives of a drug-free environment at operating nuclear powerplants. The commission's decision to defer implementation of this formal rule in recognition of what the industry has been doing, and in recognition of the work done under EEI, is on the basis of performance in the nuclear industry. The Commission intends, when it publishes its final policy statement, which we expect shortly, that over an 18-month period, and this is very clearly understood and stated, that the Commission will evaluate the effectiveness of this industry-wide program. In fact we expect to overview, from the NRC staff, the evaluations on a periodic basis conducted by INPO, and we also expect, using a small group of trained staff, to conduct direct inspections at operating nuclear power plants on a random sample basis.

Within the NRC staff, as a Government agency, the staff executive director is in the process of developing a policy for NRC employees, especially directed to NRC employees who are stationed in nuclear powerplants—those are resident inspectors—or those who frequently visit licensed facilities and who may have access to safety systems.

In summary, Mr. Chairman, the NRC and the Commission is encouraged at this time that the nuclear industry has and is taking initiatives to deal with the problem of drug abuse at nuclear powerplants. The goal of the industry and the Commission is to establish a drug-free environment in this important workplace.

Mr. Chairman, that is a summary of my testimony.

[The prepared statement of Mr. Taylor appears on p. 126.]

The CHAIRMAN. Thank you very much. Mr. Weithonor, the Associate Administrator for the Human Resource Management, the FAA.

TESTIMONY OF CHARLES E. WEITHONER, ASSOCIATE ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION

Mr. WEITHONER. Thank you, Mr. Chairman, for the opportunity to appear before the subcommittee.

In the light of the critical safety responsibilities which are placed on the FAA, we concluded last year that we needed to consider the

actions we should start to insure that the use of illicit drugs by an FAA employee did not jeopardize the safety of the traveling public. Although we have no reason to believe that illegal drug use is widespread within the agency, and in fact we are convinced it is not, we believe we have a special obligation because of our safety role to absolutely prohibit the use of illegal drugs by our safety employees whether such drug use is during their off-duty hours or not. We believe the traveling public shares in that judgment.

Administrator Engen announced an agency policy on substance abuse last August. That comprehensive policy, although strict, is essentially remedial in nature. It was formulated in a way that seeks to balance employee rights with the safety needs of the air transportation system. One key element of our policy is that when there is credible evidence that any FAA employee is involved in growing, manufacturing, or dealing in illicit drugs, that employee will be separated by the FAA.

We also separate any employee who has direct aviation safety responsibilities or duties which could affect the safety of people or property if that individual, while on duty, uses, possesses or purchases drugs or is under the influence of drugs. All employees have been put on notice concerning these stringent measures.

In cases where there is credible evidence of off-duty substance abuse by an employee, that employee will be relieved immediately of all aviation safety-related duties and temporarily assigned other responsibilities. The employee will then be offered an opportunity to enter into an appropriate drug use abatement program or alcohol abuse treatment program. Refusal to enter into such a program will result in separation.

Once an employee has enrolled in an appropriate program, return to safety duties will be contingent upon FAA medical clearance. After successful completion of the rehabilitation program, the employee will be subject to random screening tests. Any recurrence of illegal drug use or alcohol abuse will result in immediate removal of the employee by the FAA.

In addition to the basic policy against the use of any illicit drugs by FAA safety personnel, the Administrator directed that a procedure be established within the FAA to screen for substance abuse during the annual medical examinations which agency safety employees are required to undergo. The agency's medical staff is in the process of evaluating the qualifications of several laboratories which have competed for a contract to perform such drug screening in behalf of the FAA, and we hope to have that program in place this fall.

In terms of our regulation of employees outside the FAA, we have not at this time prescribed any drug-testing program, although that issue is one which we must continue to assess. It should be noted, however, that there are more than 1 million airmen regulated by the FAA. Clearly, testing that entire population of even a significant portion of that population would be burdensome to administer as well as very costly.

We do, however, have regulations in place which preclude any crewmember of an aircraft from serving as a crewmember while using any drug, whether illicit or not, which affects that crewmember's capabilities in any way contrary to safety. We also have medi-

cal regulations concerning pilots which preclude the issuance of a medical certificate which is necessary to serve as a pilot, to any individual if that individual has a medical history or clinical diagnosis of drug dependence.

There are complementary regulatory provisions concerning alcohol as well. In fact, we have had a significant degree of success with the comprehensive rehabilitation program we instituted in the mid-1970's for recovering alcoholic airline pilots. Under that program more than 600 airline pilots have returned to flight duties under very carefully controlled conditions. We have experienced a success rate of slightly better than 91 percent, with success being defined as no relapses over a 2-year period following the return of medical certification.

In closing, Mr. Chairman, I should note that there has never been an accident involving a U.S. airline which has been attributable to alcohol or drug use. This speaks well, I believe, both for the concern for safety found in all segments of the aviation community and for the FAA's regulatory approach governing the use of drugs and alcohol in the aviation environment.

Nevertheless, as a provider of safety services and a key regulatory agency, we in the FAA must keep pace with changes in society and take action designed to prevent safety problems from occurring. As noted, we have taken several key steps within the agency in terms of the recent drug policy that applies to our own employees. We continue to be concerned about the potential for such problems in industry as well, and if we identify areas needing improvement, we will not hesitate to take such additional measures in the future as may be determined necessary to protect the flying public.

That completes my statement.

[The prepared statement of Mr. Weithoner appears on p. 132.]

The CHAIRMAN. Thank you. From the Washington Metropolitan Transit Authority, Ms. Carmen Thorne.

TESTIMONY OF CARMEN L. THORNE, MANAGER, MEDICAL TESTING AND EMPLOYEE ASSISTANCE, WASHINGTON METROPOLITAN TRANSIT AUTHORITY

Ms. THORNE. Thank you, Mr. Chairman. As you know, the Washington Metropolitan Area Transit Authority's primary mission is to provide safe, efficient, and reliable transportation to the public. We employ over 7,000 individuals to carry out this mission. Due to the rapid rise in alcohol and drug abuse throughout the Nation, the authority has recognized a need to develop a policy to address this problem among its work force. We have established a policy and program which meets the authority's safety requirements while providing employees with an opportunity for rehabilitation.

The authority's negotiated substance-abuse policy and employee assistance program enabled us to provide safe, efficient, and reliable transportation to the public, while safeguarding employee rights. To accomplish two such diverse objectives was indeed a challenge.

I would like to give you a brief chronology of events which led the authority to establish a formal substance-abuse policy and employee assistance program.

In 1982, the Offices of Rail, Bus, and Facilities Maintenance instituted mandatory postincident medical examination policies which required employees to submit to a medical examination following specified work-related incidents and/or accidents.

In December 1982, local 689 of the Amalgamated Transit Union filed a class-action grievance on behalf of the authority's employees challenging our unilateral establishment of the postincident medical examinations, which included blood and urine tests for alcohol and/or drugs.

In September 1983, an arbitrator issued an award denying the class-action grievance and upholding WMATA's authority to implement its mandatory postincident medical examinations primarily because the parties' collective-bargaining agreement gave the authority the right to require medical examinations at any time. The arbitrator did find, however, that local 689 could continue to challenge the policy in individual cases on grounds such as misidentification of an employee's specimen, unreasonableness in the application of the policy to a particular employee, inconsistent application, and/or the questionable reliability of the tests for drugs.

Between the latter part of 1982 and 1984, approximately 142 employees were terminated following postincident medical examinations which indicated the presence of alcohol and/or drugs. Grievances were filed in virtually every termination case, and arbitration was invoked in approximately 57 cases.

Arbitrators issued a variety of awards in these cases. Some upheld the discharges, but many granted the grievances and overturned the discharges.

In the wake of these arbitration decisions, efforts were undertaken to develop an employee assistance program to work in conjunction with the authority's disciplinary rules and postincident medical policies.

In April 1984, the authority and local 689 began formal negotiations regarding the types of discipline to be imposed following positive findings for alcohol and/or drugs in the postincident medical examinations. These negotiations contemplated expanding the EAP and using it as an alternative to discipline.

From April through July 1984, the authority and local 689 in an exhaustive review of the entire alcohol and drug-abuse problem. This included, among other things, surveying 27 different transit authorities and their handling of the problem; meeting with medical, legal, and social experts; and, with recovering substance abusers.

Additionally, the authority worked closely with its operating divisions to develop a program tailored to the authority's particular needs. On November 29, 1984, the authority and local 689 signed a negotiated substance abuse policy and employee assistance program. Local 922 of the International Brotherhood of Teamsters, which also represents some of our bus employees signed the policy on April 2, 1985.

The main features of the program are highlighted in a copy of our policy which is attached. We have two categories of employees: the category 1, which is the volunteer; the category 2, which is the person that has been caught as a result of an incident or an accident.

In November 1985, the authority was sued by 18 employees who challenged their terminations as a result of positive postincident medical examinations for the presence of drugs on the basis that their terminations deprived them of their 4th and 14th amendment rights and their right to privacy. In addition, they alleged negligent terminations, violations of the Rehabilitation Act of 1973, and various civil rights violations.

In January 1986, the U.S. District Court for the District of Columbia dismissed the lawsuit and held that the authority's administration for its postincident medical tests, as well as its policy decision to terminate those employees who tested positive for the presence of alcohol and/or drugs, were governmental functions and thus the authority was immune to civil litigation. Moreover, the court found that the risk of serious injury is apparent, given the speed and closeness within which the buses and trains operate in our congested metropolitan area, so even the slightest decrease in alertness and reflexability due to the influence of alcohol and/or drugs increases the danger of accidents.

With this policy and program, we wanted to send out the message that WMATA must have a drug-free work environment. Employees with chemical-dependency problems are encouraged to voluntarily use our EAP referral services to seek treatment. Employees who are caught using or selling drugs on duty are fired without recourse. Employees who are found with drugs in their system are given an opportunity to rehabilitate themselves in order to save their jobs.

In conclusion, we feel that our program has provided a viable solution to the diverse objectives we were attempting to satisfy. We believe that we are at the forefront of our industry in our approach to handling this problem; but we are still working to restructure, redefine, and refine our policy. We are committed to developing a strong EAP. We are confident that we can increase the level of awareness of this problem and we will continue to work toward establishing a drug-free work environment. Thank you.

[The prepared statement of Ms. Thorne appears on p. 138.]

The CHAIRMAN. Thank you, Ms. Thorne.

Mr. Guarini.

Mr. GUARINI. Thank you, Mr. Chairman. This panel is comprised of regulatory agencies. We had just witnessed a terrible nuclear meltdown in the Ukraine, and there is still a great deal of lack of information concerning what actually happened there. We have been informed that it is by human error. Now, I would like to ask you whether or not you feel such an area of Nuclear Regulatory Commission that, Mr. Taylor, you are involved, whether you think there should be periodic examination of all employees, or whether there should be just random examination as you testified.

Mr. TAYLOR. Actually each licensed utility is addressing this issue of how to conduct chemical testing, and I have some figures with me which say what the industry is doing, and perhaps that will show you. Some of them have taken very aggressive action to institute testing programs, as well as monitoring programs.

Mr. GUARINI. Well, rather than just go into statistics, we are talking about now something that affects the public in a very strong measure. As a matter of policy, let's talk about policy in-

stead of statistics. Do you advocate the periodic testing of all people who are involved with any sensitive jobs and handling the nuclear regulatory problem that we have?

Mr. TAYLOR. The Commission's policy is that there should be a means of testing. Many licensed utilities are doing preemployment and for-cause-type testing.

Mr. GUARINI. What is your preemployment policy? Everybody who seeks employment is given a test?

Mr. TAYLOR. This is again an industry decision. Most of the industry has imposed preemployment testing.

Mr. GUARINI. You say opposed to it?

Mr. TAYLOR. Imposed it. Many of the industry, up to 90 some percent, have instituted testing for cause.

Mr. GUARINI. Now, you are talking about all the nuclear industry plants we have.

Mr. TAYLOR. Operating nuclear powerplants.

Mr. GUARINI. There are 90 some percent test for cause.

Mr. TAYLOR. Roughly over 90 percent are reporting they are testing for cause.

Mr. GUARINI. In other words, 3 percent don't test for cause.

Mr. TAYLOR. There is a percentage that is not testing yet.

Mr. GUARINI. Well, doesn't that seem to you to be a very dangerous situation to exist out there where you know that a person is under the influence of drugs and dealing with nuclear energy, and at the same time not even test them if there is cause?

Mr. TAYLOR. I think that you have heard this morning testimony that testing is only one of the elements of a good drug-abuse program.

Mr. GUARINI. But you are telling me here that there could be cause in 3 percent—it only takes one nuclear plant to blow up to endanger all of our population.

Mr. TAYLOR. I am giving you results of information that I have access to right now. This program is just being instituted. It may be that the rest of these utilities will test. In fact, all of the library utilities have endorsed the EEI guidelines and agreed to meeting that industry standard before April of this year.

Mr. GUARINI. I know, but your agency oversees all of these nuclear plants. Now, don't you have a policy for all these plants? This drug problem is not just with us. This drug problem has been with us since the seventies on a huge, national scale.

Mr. TAYLOR. The Commission has not yet issued its final policy statement on drug testing. The policy does refer to testing, but the type of testing expected has not yet been finally decided by the Commission. That is, to say whether it ought to be periodic, random, for cause, or preemployment.

Mr. GUARINI. So what you are saying is that in regard to nuclear energy you have not defined a national policy as how you handle people that have a drug problem, or whether or not there is any testing when you know there is a cause on at least 3 percent of your nuclear plants in America.

Mr. TAYLOR. I am saying that I do not have reports that those plants have testing for cause.

Mr. GUARINI. Do you think America can go to bed feeling safe with that kind of a national loose policy?

Mr. TAYLOR. Let me explain that all of the utilities do have basic fitness for duty programs. They do have observation programs. In the control room at a nuclear powerplant, you don't have one individual solely controlling the operations of a nuclear powerplant.

Mr. GUARINI. Here is where I am concerned, Mr. Taylor, if I may. You allow industries to set their own principles and their own standards. Apparently, you, as a national regulatory agency, don't have an umbrella overall policy for everyone. What you are saying to me is that you allow the individual nuclear energy plants to have their own in-house policy; is that correct?

Mr. TAYLOR. The industry has proceeded to develop its own policy. The commission has stopped short of issuing specific rulemaking to evaluate how well the industry's program is working. The operators in nuclear powerplants are licensed individuals. They are licensed by the Commission.

Mr. GUARINI. But you have no national standard as a matter of the Nuclear Regulatory Commission, of your office; is that correct? You allow each of them to take care of their problem in accordance to their own experience base, and there is no national criteria standard that you have set yet. In spite of the fact that we belong in a national crisis with this drug problem.

Mr. TAYLOR. That's right. The Commission had proceeded to a rulemaking position when they opted for the industry initiative as described in these guidelines.

Mr. GUARINI. I am shocked.

What about the railroad, sir? You have testified you have a program. Do you, in sensitive jobs where the public interest is a concern, have inspection for cause or do you just do random inspections? How is the public protected by the railroad, other than the general policy? And do you agree with the President's report that all Federal employees should be inspected?

Mr. RILEY. In our industry we have reasonable cause testing on every railroad, and the reasonable cause testing is the key to the three criteria I outlined. We had to decide the random testing issue, and I can only claim expertise in the peculiarities and particularities of my industry. We came to the conclusion that in the railroad industry, all or virtually all of the violators, and probably all, would trip the reasonable cause levers, and would be caught by reasonable-cause testing or pushed into the Bypass Program.

To contend that testing randomly gets you into the other universe of people who never trip the reasonable cause levers. We became convinced that there are few, if any, potential violators in that area, and that expanding our reasonable cause testing program to full random testing would yield us very few if any detections, but complicate the legal problems that we have.

Mr. GUARINI. What is it, the collective bargaining with the unions that creates a great deal of the problems where you have employees already working?

Mr. RILEY. Well, I think the difficulty we have here with our rule is because it went farther than any other. It has become the test case. We have been in court on it about 7 months now. We have won three of the four battles. We had a stay against it for a while.

Our industry had a particular problem because you are very close to what the problem was. The National Railroad Adjustment

Board entered a ruling a number of years ago, which threw in a very serious question, the ability of management to do any testing. What that did was it deterred on line managers from acting even where they suspected there was a serious problem. It became one man's word against another. It got thrown into grievance procedures and compromised out in the kind of broad trading that is done at the end of the year.

One of the things that we wanted to do with our rule, frankly, was overrule the Adjustment Board's decision to clarify that situation and allow some testing to begin.

Mr. GUARINI. But within the FRA, the Federal Railroad Administration, you have a set policy that is in place that applies to all railroads. You don't let the individual railroads set forth their own criteria, do you?

Mr. RILEY. Our rule is a minimum rule that applies to all railroads. They are free to adopt a more stringent rule if they choose to do so. They are not free to adopt a less stringent rule.

Mr. GUARINI. And is that true of the Federal Aviation Administration?

Mr. WEITHONER. The Federal Aviation Administration requires a comprehensive medical examination every 6 months on the part of airline pilots.

Mr. GUARINI. Is that part of the contract with the employers?

Mr. WEITHONER. It is as a result of an FAA regulation.

Mr. GUARINI. It is a regulation of your board.

Mr. WEITHONER. Yes, sir. We do not require specifically drug testing as a part of that, but if there is any indication of drug dependence or other problems, then there is certificate action taken; that is, the pilot's certificate is suspended or revoked.

Mr. GUARINI. Do you agree with the President's Commission that all Federal employees should be tested for drug abuse?

Mr. WEITHONER. Personally, I do not, no, sir. Within the FAA our policy is to apply drug testing to those who have hands on direct safety responsibility.

Mr. GUARINI. Mr. Taylor, do you agree with the President's Commission report?

Mr. TAYLOR. I agree personally—I do not think it should apply to all, but to those with special jobs and special access type things.

Mr. GUARINI. Mr. Riley, do you agree with the President's Commission report?

Mr. RILEY. I think I share the views of the other members on the panel, at least from what I know of the situation. I want to qualify it with this statement. While I think that you would have the right to require such testing, and I would comply with it, it would not be my choice. I would differentiate between the levels of responsibility.

Remember that ours is a safety agency. We can only regulate for safety. We do not have the authority to go beyond that.

Mr. GUARINI. See, the question with safety is whether or not you wait for the problem to occur and then apply an answer, or do you have preventative answers, as Mr. Clay Shaw's bill had indicated that all public employees be tested. So the question is——

Mr. SHAW. If the gentleman would yield, my bill does not say that.

Mr. GUARINI. Well, I understood that you did.

Mr. SHAW. With top secret clearance.

Mr. GUARINI. Just top secret only.

Mr. SHAW. Yes, sir. I did not address the question of all Federal employees.

Mr. GUARINI. You had two bills, then, did you not?

Mr. SHAW. The other would be an amendment to the House rules to allow the House funds to be used for drug testing in a Member's office should a Member choose to do so. But I have not filed anything requiring——

Mr. GUARINI. OK, thank you for the correction.

The question is whether we allow the problem to happen and then do something about it after some injury has been done, or whether or not we do something about it in the first instance, especially when we are talking about nuclear reactors or Federal aviation or Federal railroad where we know that we have a big problem dealing with the safety of the public.

It seems as though there is a balance between constitutional liberties and at the same time protecting the public interest on the other side of the equation.

I think we will have to adjourn for about 15 minutes. There is a vote on now. We will be back later.

[Recess.]

Mr. SHAW. If we could reconvene at this time, if we can get the present panel, there will be just a couple more questions. I have just a couple of questions, and then we will go to the last panel.

Mr. Guarini posed to the panel the question of supporting the testing of all Federal employees. I would like to go back and ask a question which is a derivative of that question to each one of the panelists. All of you have a knowledge of drugs and their effect on the employee and his performance and efficiency, as well as the safety factor, which seems to be going through all the panels that we have.

I would like to ask each one of the panelists if they feel that from their knowledge that drugs can effect on a person's mentality and his wealth to the extent that the Federal Government should require testing of all Federal employees who have top secret clearance. Mr. Riley, if I could start with you.

Mr. RILEY. Well, while I am not generally in agreement with the recommendation for testing all Federal employees, I would distinguish the national security area. I think the national security area is different, and in my own judgment I think random testing can be justified there and is justified there.

Mr. SHAW. Yes.

Mr. TAYLOR. Having held that type of clearance, I agree wholeheartedly.

Mr. WEITHONER. Our policy does not call for that in the FAA. I think it is worth looking at. We are not a heavily security oriented agency, and we have a very small number of people who need or have top secret clearance, but we do have some.

Mr. SHAW. At the Metro, I don't think anybody has a top secret clearance, but what I am trying to do is draw on your expertise and knowledge as to the effect that drugs do have on the minds, bodies and lives of employees, and based upon your knowledge, do

you feel that for national security reasons that Federal employees who have top secret clearance, whether they should be tested.

Ms. THORNE. Yes, I would support pretty much what the panel has already said.

Mr. SHAW. Thank you.

Mr. GUARINI. Is that periodic testing, may I inquire?

Mr. SHAW. Yes, on some type of a random regular basis for the top secret clearance. That is the way I posed the question. If any of the panelists understood it any other way, I would clarify it.

Mr. GUARINI. Irregardless of cause.

Mr. SHAW. Certainly for cause. When you get into the situation of random testing or compulsory testing, each agency has to decide how frequently it would be administered. The question was raised with one of the panelists a while ago as to what do you do with existing employees, and that is a tough issue. Before we instituted testing in my office, I had proposed that same question to myself. What I am going to do if I have two or three holdouts who just say, "Look, I am not going to do it. It wasn't a condition of employment. I feel it is an invasion of my rights, and I am just not going to do it." How would I have handled that.

I am very thankful that I didn't have to answer that question, but I have reflected upon it. I think what I would probably do is to tell my employees that as of a certain date in the future, whether it be 6 months from now or a year from now, that is going to be the policy of the office, and it is going to be a condition of continued employment, and that is what is going to be expected of you.

I think it would be morally and just flatly wrong, I think, to come in and say here is the new policy and everybody line up. I don't think anybody is suggesting that anything be handled in that cavalier manner because it is a serious situation that we are dealing with and some people do have some real problems and concerns about it, and it is something that you shouldn't just come in and drop on people like a bomb. Even those that are not involved with drugs will feel like they have been singled out and they will have some problems.

Mr. GUARINI. Mr. Rowland.

Mr. ROWLAND. Thank you, Mr. Chairman.

First, let me apologize for being late, but unfortunately I had a subcommittee hearing on a markup this morning. I did miss the first panel, but I am glad I am here for the second panel.

Mr. Riley, and I think some others, in their discussion were making reference to reasonable cause testing. Would any of you comment as to what you think would be the major criteria for making those determinations and everyone else please also comment.

Mr. RILEY. We have three criteria outlined, and I think you have got to outline what is reasonable cause very specifically, because it is going to differ from environment to environment. In the railroad environment you have efficiency measurements that are pretty clearly definable, so it is little easier here than it would be elsewhere, but we define it three ways. First, the type of observations—I'm not using the technical language. I will submit that to the committee, but the broad brush, the types of observations that

would lead a reasonable person to conclude there is a violation in process—alcohol on the breath, the normal observations.

Second, a range of accidents that are reportable accidents that involve human decrement causation. Third, violation of certain enumerated safety rules which can only be violated through human performance decrement. A train runs an absolute stop signal. That is the kind of thing that triggers reasonable cause testing in the railroad industry. That's how we define it.

Incidentally, let me add that on the drug side we do require—the observation of symptoms, if you will, on the drug side is a bit more complex than it is on the alcohol side, and the test is somewhat more intrusive. We require the official triggering that test to have completed the 1-day training course—an absolute minimum of 3 hours—in the recognition of drug symptoms, which is now widely given in the railroad industry. We believe we will have our industry essentially trained as we get out to the end of this year. We felt that that required a little bit more expertise.

Mr. ROWLAND. Any other comments?

Mr. TAYLOR. Regarding the EEI developed guidelines to implement the policy statement which the Commission is developing, neither the Commission nor the nuclear industry have yet taken a final position with regard to testing. I was questioned on that subject before. Basically the EEI guide says that testing for cause ought to be determined from behavioral observation, from problems in performance, or other evidence thereby leaving a broad sense of the basis for a company to determine when chemical testing should be done for cause.

Mr. WEITHONER. In the FAA, ours are quite close to what Mr. Taylor said. The other indications would be things like an arrest or an accusation from a credible witness or more than one witness.

Mr. ROWLAND. So basically what we are dealing with would be basically observations, small accidents that hopefully would not be larger accidents and general observation and tips from other employees.

Mr. Taylor, let me just follow up, as industry guidelines are drawn together, what do you see the specific role of the NRC being in enforcement?

Mr. TAYLOR. NRC retains authority to take enforcement action whenever safety is threatened or inappropriate actions are taken in a nuclear powerplant. We have very strong enforcement capability. That enforcement capability extends primarily to the licensed utility. That enforcement capability also extends over licensed operators, and in each control room there are at least three licensed operators: the reactor operator, the senior reactor operator and shift supervisor. So there are very strong enforcement sanctions when behavior, aberrant or deliberate, or anything causes a safety concern.

The safety concern can be starting the wrong pump, moving the wrong switch. If that error can be identified to a problem with substance abuse, we have direct enforcement authority. The Commission, as I said, has not yet finalized its policy of what it expects from the industry. We were talking before about what the industry is doing and some of the testing and other things that are going on. We do have authority to act whenever safety is in question.

I might add we also have resident inspectors at every operating nuclear powerplant. They are not there 24 hours a day, but they are either there or available and one of their jobs is to see how well the crews are doing.

Mr. ROWLAND. Do you anticipate they will be involved in the observation and followup with regard to enforcement?

Mr. TAYLOR. Yes, in enforcement, yes. If there is any identified safety issue, they become our first conduit of the information very frequently.

Mr. ROWLAND. Do you also anticipate setting up guidelines or penalties based on problems that may occur?

Mr. TAYLOR. I think, again, our penalties are normally based on the safety significance, and, for example, if a company has a safety system, usually they are dual trains. That is a protective feature. One side is immobilized. That reaches what we call a severity level 3 in enforcement. That begins the suit. Penalties begin at $50,000.

If an individual licensed operator is culpable, we don't fine him but his license can be suspended.

Mr. ROWLAND. Thank you very much.

Mr. Riley, if you could touch base later with some of the specifics, I think we would all be interested in the criteria you use.

Mr. RILEY. I would be glad to do that, and in addition, we have about an 175-page field manual, which is not designed to be memorized by anyone, but is designed to be a reference book for people in the field who have to deal with specific issues. If we haven't already provided it, I will be glad to see that the committee receives it.

Mr. ROWLAND. Thank you very much. Thank you, Mr. Chairman.

Mr. GUARINI. I want to thank the panel for its assessment. It has been very helpful, and we very much appreciate it. I just want to ask one last question to Mr. Taylor.

How many nuclear plants do we have in the country today, and how many are coming on line?

Mr. TAYLOR. We have 55 utilities, roughly 100 operating nuclear powerplants and somewhere in the area of 15 or 20 in later stages of instruction and what we call pre-operation testing.

Mr. GUARINI. Now, the Nuclear Regulatory Commission has someone on site at each and every plant, do they not, as a matter of policy?

Mr. TAYLOR. Yes, the resident is usually on site every day. He lives close by.

Mr. GUARINI. Nonetheless, you do allow each particular plant and company to have their own regulations concerning drugs.

Mr. TAYLOR. As the Commission is currently going, it expects to issue its policy statement that sets down what it expects the companies to do. Therefore, we will not have a regulation which is directly related to taking action on the basis of drug abuse, but where the drug abuse ties to any safety implications, we have clear-cut enforcement and direct authority to take action.

Mr. GUARINI. Yes, but you don't use it if there is no national policy or criteria. As I understand your testimony, in 3 percent of the plants, which would be perhaps three plants today that are in operation, that you leave it to the local plants to do what they think is necessary to provide safety for the people of our country.

Mr. TAYLOR. I'm glad you gave me the opportunity to clarify that because I should point out the Commission has not yet completed its work on the policy. They may yet impose drug testing on everybody.

Mr. GUARINI. I am wondering why they are so slow, because you know the problem is no new problem, and it certainly is——

Mr. TAYLOR. The Commission was poised to take action on a strong rule a year or more ago when the industry volunteered to develop the policy and standards. Since this is a difficult area, the Commission accepted that offer.

Mr. GUARINI. Do you have problems with the unions in this regard?

Mr. TAYLOR. There are union problems. There are lawsuits against utilities. The utilities are taking a lot of action on the subject, but the Commission has thus far not decided to say you have got to have pre-employment, for cause, random, periodic, or any specific type testing. The numbers I was trying to give you were based on an informal survey, which we worked with INPO on, to try to find out where do people stand.

If you asked me about a specific plant, like Vogtle, I can tell you some things about some very specific plants.

Mr. GUARINI. See our problem is acting after the fact. Then it is much too late.

Mr. TAYLOR. I point out that this agency is dedicated to move so we won't have to do that. That is what we are trying to do, but as you know, these types of mandates do give rise to a lot of privacy issues, and some of the companies are already fighting them.

Mr. GUARINI. Well, it seems just from observation that the advance that was made in this field on our fight against drugs is much further in railroad and aviation than it is in nuclear energy; that they have already got something in place that seems as though they have made a greater policy effort, and it is just unfortunate that the most serious of accidents that could ever be created, knowing what we had happen in Ukraine just last week with the melt down, is in your particular field.

We can't afford to have one accident that contaminates our water; that destroys our crops and that maims our people.

Mr. TAYLOR. I think we are coming up close behind the other agencies, and I should point out that seldom does one individual solely put a nuclear powerplant into jeopardy. There are multiple operators in the room. It takes a whole series of actions to get into the condition where you get that type of casualty.

Mr. GUARINI. Well, let me ask you a very simple question. Is there a drug problem in the nuclear plants of our country?

Mr. TAYLOR. Yes. We would have to acknowledge that there is, as any segment, as a typical industry, there are drug problems, and we do get reports of problems. We do not get very many reports of operator problems.

Mr. GUARINI. When you know that there are drug problems, do you take any aggressive action, or is it that you wait until a situation manifests itself before there is action?

Mr. TAYLOR. We overview what the utility does. If it in any way affects the operations, we are right there.

Mr. GUARINI. See, there is the problem. You overview, and overview means that you allow it to happen first and then you do something about it. The airlines and the railroads aren't doing that, and that is a fault.

Mr. TAYLOR. The companies themselves hold the basic responsibility——

Mr. GUARINI. That's fine, but the people are the ones who suffer, not the stockholders of the company, not the directors or management, but the millions of people that may be involved around New York City or Pittsburgh or Los Angeles if there ever is a melt down, God forbid. All right, thank you, gentleman. I appreciate it.

Mr. ROWLAND. Mr. Chairman, would you yield for just a quick moment?

Mr. GUARINI. Yes.

Mr. ROWLAND. I just wanted to follow up on that same point. Do you have any authority over those employees or the known problems that you may see with people taking drugs? The capacity you outlined was overview over the company and/or the employees. Do you have any authority to be involved?

Mr. TAYLOR. If they are licensed operators, which are the most vital people in the plant, and they are engaged in any safety related activity, and, for example, if they were using drugs off site and turned themselves in for rehabilitation, we might—and the company has a rehabilitation program, we may say, fine, he can't be on the watch bill until the appropriate medical authorities say he is fit to perform those duties—and that his return to duty must be agreed to by the company. That is the action usually taken.

But if he were to get into a control room and take an incorrect action and it were to be demonstrated that he were under the influence, then we have full regulatory authority to take action.

Mr. GUARINI. And by that time it could be too late. That's my point.

Mr. TAYLOR. He may have tripped a pump or done something, but there is no question that we have that type of authority.

Mr. GUARINI. Well, could, by human error, we have a reenactment of something that happened in Chernobyl as a result of human error?

Mr. TAYLOR. There is a great deal of discussion going on in this Congress about that accident, and our people are trying to describe the differences between what happened in Chernobyl and what could happen in the U.S. commercial nuclear powerplant. I wouldn't want to take the time to try to develop that.

Mr. GUARINI. No, but the very fact that drugs or alcohol could create a human error factor that could be a national tragedy if there isn't a national policy by the nuclear agency that is regulating or by the aviation or by even the railroads if proper isn't taken by the Government. I am just submitting that your agency is very very late to get into the game of protecting our people as far as having standards for drug abuse.

Mr. TAYLOR. The next time I see you, I hope that will be corrected.

Mr. GUARINI. Thank you very much, sir. I appreciate it.

Mr. GUARINI. I would like to call the next panel, Robert Angarola, attorney; Paul Samuels, Legal Action Center, New York; Dr.

Douglas E. Rollins, director of the Center of Human Toxicology, University of Utah; James Mahoney, director of the Employee Assistance Program, Philadelphia Council, AFL-CIO; and Rear Adm. Paul Mulloy, U.S. Navy, retired.

Gentlemen, we welcome you. You consist of the drug testing labor panel, and you have views that may differ from some of the testimony that we have taken earlier in the day, and I thank you for being patient. We expected to arrive at this panel's testimony around 12 o'clock, and we are about 1 hour 20 minutes behind. So I thank you very much for your patience.

Mr. Robert Angarola, would you please proceed.

TESTIMONY OF ROBERT ANGAROLA, ATTORNEY

Mr. ANGAROLA. Thank you very much, Mr. Chairman. Please don't apologize. I think it has been an extraordinarily interesting and useful day. I appreciate the opportunity to testify before you. I am an attorney in private practice right now, working with several companies that have instituted drug testing programs. Before that I was general counsel of the White House Office of Drug Abuse Policy. In fact, I am sorry to see that the chairman is not here, because the first time I was involved in the urinalysis issue was 14 years ago when the chairman, on behalf of some of his constituents, called my office, which was the White House Special Action Office for Drug Abuse Prevention to see if they could institute a drug testing program in an intermediate school in Harlem.

The aim of that program was to identify children who were using heroin at a very early age and at a very early stage of their addiction. The aim of that program was not to expel students or stigmatize them in any way. The aim was to get them help as quickly as possible, get them treatment as quickly possible, and perhaps avoid the problems of the full-scale heroin addiction.

I see parallels between that situation 14 years ago and what is happening in industry today. Typically, and when I say typically, I would say 99 percent of the time, employers who are instituting drug testing programs do not want to fire employees. They are trying to ensure that their workplace is healthier, is safer, and that their productivity is at as high a level as possible.

When an employer considering a testing program calls me, typically the first question they ask, as a lawyer, is, "Is it legal?" I always say you are starting at the wrong point. Where you must start is, one, answer the question "Why you want to test your employees or your perspective employees?" Are you running a bus company? Are you running a nuclear power facility? Are you running a grocery store? The answers to those questions are different in each of those cases.

But if you can answer that question, I think you have a second question to answer before you ask the legal question, and that is "What do you do with the results?" Have you determined when a positive test is spotted how you are going to handle that employee? Are you going to fire them on the spot? Are you going to offer them treatment? Are you going to remove them from a sensitive job and put them in another job while they are undergoing treatment?

If you have answered those two questions, then the legal questions shake out a lot more clearly. That should lead you, as an employer, to the drafting of a very particular, detailed written company policy which tells people, tells your employees and your perspective employees what urine testing means. The policy has to be clearly communicated and understood by applicants and employees. It has to be uniformly applied. It has to be consistently enforced, and it has to be put in the context of a health and safety issue.

I contend that if companies have done this, particularly in the private sector, they are in a much better position to avoid a legal challenge and certainly in a much better position to defend that challenge.

I submitted my testimony for the record, and I have submitted a much lengthier paper which goes into some of the court cases that have been handed down over the past year or two, which I think will more clearly explain where courts and arbitrators are going. I would, however, like to just summarize those papers, in light of the time constraints. The key element in every instance is the reasonableness of the drug testing program, and again you are looking to help people. You are not looking necessarily to fire people. Discipline is, of course, a possibility, but in the employment content in private industry and in government, the main question is: Is the program reasonable? If it is reasonable, it is legal.

The other issue that seems to be bubbling up more now, and it is being used as a basis for legal challenges in this area, is the question of accuracy and reliability of the test. Now I am not a technician, and I am happy to see that there are technical people here. But the few courts that have looked at this issue have determined that the tests are constitutionally reliable. Interpretation of results are based on scientific principles that are duplicable. They are not subjective as with polygraph exams.

I think it is interesting to look at an article that most of us, in Washington anyway, have seen this week, which was in the Washington Post on Monday which was questioning the use of urine testing on the nuclear powerplant facility down in Georgia. The article itself said that a very clear chain of custody procedures were followed; that the urine sample was in fact the person's who gave it; that the test was conducted on the urine of the person who gave that sample. There was a good laboratory involved; that positive tests were confirmed not by one, but by two separate confirmations using different equipment

They said the chances of error were 1 in 10,000. That error could be a positive, a false positive, or indeed a false negative. In addition, they took half the sample and kept that, so if the test showed positive, and you disagreed with it, you could go back and check that sample. Yet still there was question about the accuracy and reliability of this, at least there was an implication of inaccuracy in the article.

Then think about what happens with it if it was positive. Now, let's not talk about that particular instance, but in 99 percent of the cases, that person is identified as a drug abuser. He or she is confronted with that information and encouraged to get treatment so they can continue working. Now maybe I am not something, but

I did see the statistics in the article that said before the testing program was instituted by 5.4 accidents happened per 200,000 man-hours and after the program was set up less than 0.5 accidents per 200,000 hours. We are talking about people now. We are talking about five less accidents happening.

Now, how does that translate in terms of safety: death or injuries to others? To me it seems fairly clear. I want to compare this accuracy and reliability of urine testing with breathalizer testing, where when you are stopped, you blow into the machine. It is conducted by a trained—well, certainly not a very well-trained or expertly trained—not an expert, let's put it that way—person, a policeman. The bell goes off.

If it is 0.1 percent in most States you can be criminally liable for DWI. On the flip side, if it is less than 0.1 percent, in some States, you may not get charged at all, probably you won't. Now, that has been challenged in the courts, and it has gotten up to the Supreme Court in a 1984 case. The Supreme Court said the accuracy and reliability of that equipment was sufficient on constitutional grounds to go forward with a criminal case against the driver. My concern again is not as a technician, but as a lawyer. I am concerned that the accuracy and reliability issue is being used by some groups as a smoke screen to stop testing. I have seen in several States pending legislation that would ban the use of urine testing in that jurisdiction. San Francisco has passed an ordinance which bans the use of drug testing in the workplace. What I am saying is that we are looking at a health and safety problem on one side, and we are looking at a political problem on the other.

The testimony that has been presented today clearly indicates the extent and the dangers associated with drug use both in industry and elsewhere. I thank you for asking me to testify and congratulate you and your staff for looking into this area, which I think is one we will be dealing with for years to come.

[The prepared statement of Mr. Angarola appears on p. 151.]

Mr. GUARINI. Thank you very much, Mr. Angarola.

Mr. Samuels, the Legal Action Center.

STATEMENT OF PAUL SAMUELS, LEGAL ACTION CENTER, NEW YORK

Mr. SAMUELS. I would like to thank you for the opportunity to testify and also to congratulate the work of Chairman Rangel and the select committee for the excellent work you have done. I don't know how many people out there are aware of it, but there are many people leading drug-abuse free and productive lives because of the select committee's work, and you are to be congratulated for this most important accomplishment. We certainly hope you continue it.

Mr. GUARINI. Thank you.

Mr. SAMUELS. The Legal Action Center is probably the only public interest law firm in the country whose primary mission is to reduce drug abuse and assist in the rehabilitation of those who suffer from it. For this reason, we have what may be a unique perspective on the problems of drug abuse in the workplace and urine testing specifically.

Let me state at the outset before I get into the issues involved with urine testing that we are delighted and encouraged by the growing awareness among employers and others in our society as exemplified by this hearing, of the magnitude and destruction, both human and financial caused by drug abuse. Greater attention to this problem and more resources directed toward its eradication can only benefit all of us.

As you have heard repeatedly before, there is no single or simple solution to the problem of drug abuse. I think also when we move into the area of drug testing, we are balancing some important considerations, all of which everyone here, I think, acknowledges as important. Employers are entitled to a work force that is capable of performing in a reasonable manner, and the public has a right to be protected from dangerous activities.

Employers are clearly entitled to refuse to hire drug abusers and addicts who are unable to perform the jobs they applied for. Employers are entitled to discipline and if necessary, terminate employees who are unable to perform the work they were hired to do. At the same time, I think we are all agreed that employees have rights, as well. Persons fully capable of performing jobs without constituting a threat to anyone else should not be forever barred from employment because they once had a drug abuse problem 1 or 5 or 20 years ago, and yet we still see that happen. Nor should a functioning and productive employee who develops a substance abuse problem be treated any differently from any employee who is stricken with any other illness.

He or she should be given an opportunity to obtain treatment and allowed to continue to work or to return to work when able to perform the duties of the position in a safe and reasonable manner. We believe these are fair and workable standards with which to approach substance abuse in the workplace. Indeed they are embodied in existing legislation on both the Federal and the State level.

We also feel that any use of urine testing for drugs by employers should, and to be legal, must be consistent with these principles. When examining the current state of the law regarding employer use of urine analysis, I agree wholeheartedly with Mr. Angarola that there are two separate issues that need to be looked at. One is, when is it legal for employers to require urine tests, and the other and equally important is, what use may employers make legally of those test results.

Let me start with the first question of when it is legal to test. Most of the litigation concerning the legality of requiring testing is centered on whether urine testing for drugs by public employers violates employees' constitutional rights. Obviously, the constitution does not reach private companies. Courts have ruled by and large—virtually all the courts have ruled that urine testing by public agencies is constitutional if the employer has probable cause or reasonable suspicion to believe that the employee tested is abusing drugs. Testing without probable cause or reasonable suspicion has raised constitutional issues which we think are serious.

We also have serious questions about the efficacy and the usefulness of random testing as opposed to testing based on reasonable suspicion. As Mr. Riley testified, we believe that the Federal Rail-

way Administration's conclusion that a properly administered reasonable suspicion test should and usually will catch virtually anybody with a problem, and I will get more to that later.

I think we also need to look at the fact that we are balancing important considerations here. We strongly believe that employers have a duty, not just have the right, but have a duty to address the problem of drug abuse in the workplace. At the same time, there are privacy concerns. Just as we would have serious concerns about strip searching any employee because there are concerns at a particular workplace that there is theft going on, we have similar concerns about urine testing requiring anyone to give a urine sample in the view of someone else if there is no reasonable suspicion or no articulated information or evidence upon which to base the suspicion to take that test.

One of the concerns that we have about this issue is that most of the attention that we have seen paid to it has focused on this first question of when is it a legal test. But we have seen very little detail, very little attention paid by the media or, unfortunately, many employers on that second crucial question, which is what is going to be done with test results? What happens if a test result is positive?

In fact, there are a number of concerns about what is going to be done with a test result. I think other people have mentioned it here, but it bears repeating for a moment that there are concerns about the accuracy of test results. There have been a number of arbitration decisions and a few court cases which have overturned employer discipline on the basis of inaccurate testing.

Nobody claims that any test is infallible. Even a small error rate becomes significant when large numbers of samples are tested. Indeed, most urinalysis experts and makers of the tests themselves and most of the people, if not everyone we have heard today, recommend that any positive result be confirmed by a second test. Ordinarily it is recommended that the gas chromatography mass spectrometry test, the most accurate testing method available, be used as the confirmatory test.

Unfortunately, in our experience there are many employers who are not doing confirmatory testing, especially not using the GCMS test, which is more expensive, and that is ordinarily the reason that employers, we find, are not using confirmatory testing, but obviously that creates a great deal of question as to whether that test result was accurate.

Another set of problems has to do not with the laboratory, but with the type of procedures that are used to develop the test. There are a chain of custody problems. A urine specimen may be mislabeled, mishandled, contaminated on the way to or at the drug testing laboratory itself or deliberately switched or replaced by someone who knows the true sample will reveal drug abuse. Recent studies of drug screening laboratories by the Centers for Disease Control found some disturbingly high rates of inaccuracy.

A number of arbitrators and some courts, as I mentioned before, have overturned decisions based on this. One litigation that we were involved in with the New York City Police Department, an important agency, obviously, which was not doing double testing, was not confirming its testing results, and was not, in our judg-

ment, using careful procedures. As a result of a settlement of that litigation, the police department in New York City did revise its procedures. The New York City Personnel Department issued a guideline, a ruling, that all city agencies should be adopting these types of procedures.

Really one of the things that we are dealing with is that no matter how accurate a test result is—a testing procedure is, I mean, we still have the principle of garbage in garbage out. If it is not maintained—if the chain of custody is not maintained, if an employer is not careful to make sure that that sample was not mislabeled, not contaminated, the fact that a test, itself, may be virtually infallible won't be much help.

Even if a positive urine test is accurate, there are serious questions as to whether an employer can legally refuse to hire or fire solely on the basis of that one test. Federal and State laws only permit an employer to take action against an employee with a drug abuse problem if that problem is job-related. Urine tests unaccompanied by other evidence, such as intoxication on the job, unsatisfactory work performance, the other types of factors that were identified by the panel before, may not be enough to meet that standard of proof.

Urine tests reveal, obviously, only if a person ingested a drug at some prior time. They do not reveal whether the individual was intoxicated or impaired on the job or at the time the test was given. Just to conclude, we believe that the best way to eliminate drug abuse in the workplace is to establish a good employee assistance program. Employers should train supervisors to identify and refer troubled employees and encourage employees to go on their own. Obviously, there should be appropriate diagnosis, referral treatment and aftercare.

Employers should retain those employees who overcome drug abuse. They need not continue to employ those substance abusing employees unable to perform the job. Provided that an employer implements necessary safeguards to insure that the results will be accurate, we also believe that urine testing can be a useful and appropriate tool in the employer's campaign against drug abuse if it is used as part of confidential employee assistance program to help diagnose and treat drug abusing employees.

I strongly support the comments that Commissioner Ueberroth made at the opening of this hearing that in order to be affective and useful we must be using employee assistance programs. We must be using confidentiality when we are testing and if we test.

I think that we are all agreed that if there is going to be urine testing, there has to be careful and accurate procedures and tests; that it has to be confidential. It ought to be aimed at rehabilitation in the context of an employee assistance program. The last concern that I wanted to leave you with is, you have heard a lot of testimony from a lot of people who have looked at these issues carefully and have come out with very sensible, workable programs in many instances. But we need to keep in mind that there are a great number of employers out there who have not done that.

As I mentioned before, they don't use confirmatory testing. They are not careful about procedures. They don't tie disciplinary decisions to job performance problems. I think that in your delibera-

tions you need to keep in mind that any guidelines that come out have to deal with that whole range of employers.

We look forward to working with the select committee on these important issues, and we would be happy to provide whatever assistance we can whenever we can. Thank you.

[The prepared statement of Mr. Samuels appears on p. 190.]

Mr. GUARINI. Thank you, Mr. Samuels.

Dr. Rollins, director, Center for Human Toxicology, University of Utah.

TESTIMONY OF DOUGLAS E. ROLLINS, M.D. PH.D., DIRECTOR, CENTER FOR HUMAN TOXICOLOGY, UNIVERSITY OF UTAH

Dr. ROLLINS. Thank you, and I would like to thank the members of the committee for the invitation to participate in these hearings and express my opinion on the laboratories doing the testing for drugs of abuse.

Given the level of concern that I have heard so far today concerning the legal and humanitarian issues of urine testing for drugs of abuse, it is imperative that these tests are performed by the most accurate procedures available. Indeed many have implied today that the actual testing of the urine specimen is the weak link in the entire process. This does not have to be the case. We have the technology to perform accurate testing. It does little good, however, for a company to be concerned about the health and civil rights of their employees, and then contract their drug testing with a laboratory that may produce false positive or false negative results.

A false positive is a report of a drug in the urine specimen when actually no drug exists. This could result in the person losing their job or damage their credibility with their employer. A false negative is a report of no drug in the urine when in fact a drug is present. In this case the company is under the false assumption that they have an effective drug detection program when in fact they do not.

The current situation regarding drug testing laboratories, as I see it, is as follows. First, there are no requirements for laboratory certification except by the Department of Defense, and there are only two civilian laboratories that are now DOD certified. No. 2, while most laboratories are capable of performing immunoassay screening tests, many are unable to confirm the positive results by specific, more sophisticated tests. No. 3, quality control procedures are not required. No. 4, as the need for more testing increases, the number of labs performing the tests also increases, and the lure of making lots of money in the face of competition may cause a compromise of lab practice and lab quality.

It is essential that these test results be accurate and sufficiently well-supported by quality control data to withstand scrutiny by experts in court. The basic components of sound laboratory analysis of urine for drugs of abuse are: No. 1, all samples must be handled as forensic specimens with appropriate chain of custody. No. 2, screening should be performed by an immunoassay procedure either the EMIT test, a radioimmunoassay test or a third test that is coming on line, TDX.

No. 3, all positives must be confirmed by a second specific method, preferably gas chromatography mass spectrometry. No. 4, well-documented internal and external blind quality control programs are essential. No. 5, a certification process that includes scrutiny of these quality control procedures, equipment and analytical procedures, knowledge of forensic toxicology and technical personnel.

In summary, there need not be a weak link in occupational drug abuse testing programs. Organizations must resist the seduction of simple, cheap, imprecise drug testing because the results may have an impact on the work force as great as the abuse of drugs. The technology is available to assure a credible, high quality and fair drug testing program. Thank you.

[The prepared statement of Dr. Rollins appears on p. 199.]

The CHAIRMAN. Thank you very much, Dr. Rollins.

Mr. James Mahoney, director of the Employee Assistance Program, AFL-CIO. We welcome you, sir.

TESTIMONY OF JAMES MAHONEY, DIRECTOR, EMPLOYEE ASSISTANCE PROGRAM, PHILADELPHIA COUNCIL, AFL-CIO

Mr. MAHONEY. I would like to thank the committee for having me represent our group here. The only credentials I bring is one of a rank and filer, elected union official, and somebody who is active in economic and civic responsibilities in our community.

I am going to just summarize my presentation to you.

Mr. GUARINI. Please.

Mr. MAHONEY. Our country is engaged in a war the likes of which has never been encountered. It is not fought with rockets, guns, or soldiers or terrorists. It is distraught with street dealers and the foreign forces that import drugs into our area.

Because of this concern, we decide how do we engage this enemy, and we did a great deal of research and came up with some pretty definite opinions. The search took a long time, and that was research conducted by the Philadelphia AFL-CIO council which represents approximately 250,000 people.

Our experience said that we must initiate a program, an assistance program. But before I go into that, I would like to give an opinion and probably a definite opinion, on what we feel about drug testing, urinalysis and so forth. We feel that in desperate times people come up with desperate solutions, and sometimes these desperate solutions only sharpen the problem and cause more difficulty than they tend to relieve.

We feel that the testing program that has been proposed is doomed and the strategy is just one that harasses and humiliates those who are entering the work force. Random urinalysis and screening ends up with false positives and false negatives. False negatives are where people learn how to cheat the tests. Every test that has ever been created has people who know how to get around it.

In fact, in looking through a magazine called High Times, which is popular with the people who are involved in this area tells them how to beat the test by dropping little bits of ammonia into it. And I can give you 100 other ways that workers have told me that if

they wanted to beat the test, they could beat the test. But that is just a wrong situation in its own right.

The false positives are of an even greater concern. And what happens if we have a false positive? Do we now have human beings testing a case? Who administers the situation? We don't feel that the present form of testing will produce correct results, and the history will bear this out. I don't want to belabor it at any great length, but we feel that that approach is absolutely a flawed and doomed and simplistic approach. It sounds good, but in the practicality it doesn't work out.

I hope that the search without due cause—you know, unless I am mistaken, we still have the Bill of Rights. There ought to be a cause to search a person. There ought to be a cause to go to that. I think if you have ever read any of Herman Melville's books, you read something called Billy Budd. You found the situation where Billy Budd reached out and hit Claggett. Now the captain had the terrible situation of to do away with the handsome sailor, and it almost caused a revolution on the ship, and it might have caused the whole revolution in the English Navy, if you read it and all of the Battle of Trifoger would have been the nail that shoed the horse situation.

What happens when you have a work force and at random selection you pick a handsome sailor. Supposed the handsome sailor is the little saintly old Mary Murphy who nobody has ever seen. She is marched off the floor behind a screen and made to urinate in front of someone else. I am afraid we are trying to solve the problem or drown the problem in a sea of urine. It doesn't work out in reality.

But that is enough with my negativeness, but I had to say that because I have heard all of this concentration on this situation. Because of this and because of the realization of this, we felt we must, being an assistance program, and we couldn't do it by ourselves. We felt it had to be a consortium of people. That was, yes, the AFL-CIO; the Greater Philadelphia First Corp., the most elite business association of the area; the chamber of commerce and the Blue Cross and Blue Shield.

You know, both among union officials and amongst employers, when you start talking about drug, alcohol, and stress, they get a look on their face that says not that pain in the you know what again. Nobody really feels that it is something that they really want to deal with. The people at the policy level have to decide that they are interested in helping these people, and not being punitive. So we tried to logically come up with a program that would deal with it from beginning to end, and I gave these (the assistance program brochures) to you, and I won't go through it.

But it deals with outreach and education. It deals with onsite training at the job site of not only trying to teach the employee but to teach the supervisors how to recognize it. It shows in a fraternal way that people can come in and receive treatment. I could go on not only to just that, but to the subject of aftercare. Everybody talks about aftercare, but that is a forgotten art, because what happens most of the time is that people who are treating them in some of the institutions, by the time they have drained them of their benefits, there is no money to be made in aftercare, so they throw

them back in. So I am a bartender—and we do represent bartenders—they come out of care, and the next day they are back in the cookie factory. This happens not only there, but it happens in the same way.

In the first year, to show you the type of reception that we got, in one year we did over 68 training programs onsite. Over 8,000 people called up. The exact number was 8,327. We did 2,978 hours of counseling. That's offsite counseling. And, yes, we had to put in 620 people either into detoxification or rehab programs. I could go on and talk about assistance programs, but you know probably a great deal more than I do, but it is predictable that if people offered this, some will come in and look for help and self-commit, if it is on a fraternal basis and they don't think they are giving themselves a black mark or a pink slip at their job. And, yes, there are people who are so down that they won't come in at all, and those people have to be found. There has to be a trained person at the worksite who will recognize them and demand that they come in for mandatory referrals.

In closing, I would to tell a little story out of Aesop's fables. The Wind and the Sun were having a little argument about who was the strongest. The Wind said, "I am the strongest. Oh, here comes a man up the street with a cloak. Let's see who can get it off him first." The Wind huffed and puffed with all his bitterness and cold and heartless way, and the man just huddled closer into his cloak, and when he failed, the Sun tried. What the Sun did was shine his warm face on him and the man peeled off his cloak.

I'm afraid some of the approaches, the simplistic approaches we are trying to take here are those that are huffing and puffing and are only going to shrink the problem further down below the surface.

In closing, an invasion of privacy and false accusations, demeaning humiliation is not good policy. Ultimately, the urine screening as proposed by the President, will only produce more of what it set out to resolve. I could go on.

You know, everybody has talked about the job. Our program is not offered just to people who are employed. We decided that if you are going to do this in the city, and you had a social responsibility or just an economic brain in your head, you had to offer it to the community as a whole, because there are just as many spouses at home or children who are affected and affecting that person on the jobsite as the person himself. And if you just try to attack it with a rinky-dinky underfunded employee assistance program to cover your own you-know-what, it doesn't work out in the end.

I don't want this to sound like a social technician or a gummy sociologist, I am talking as a hard-headed, practical business type. Our study we did Blue Cross—and I want to leave this with you. If you want more copies, I'll get them to you. These are just done to try to take an intelligent approach to it. It showed us that those who are affected by drugs and alcohol use the health delivery system 11 times more than those not affected.

In the study of 43 unions in a very efficient manner, we found out that those who do not have the problem used the health delivery system 537.4 days. Those that had the problem used it 5,949.4 days. And you say that is only an affected person? Our study this

year showed us that families that have a drug or alcohol problem use the health delivery system 3½ times more. We understand that health care is a billion dollar problem a day in this country. This is not just the area of finding how to find somebody on the job. It is an economic situation.

This country is in a sea change, a sea change—I'm sitting next to an admiral, so I guess I have got a right to say that. In the 1870's and the 1890's we went from an agrarian economy to a mechanical society. Today we are going from a mechanical to an electronic, not service, but to do things in a different manner. In order for us to face those problems, the adversary relationship between business and labor has to be over with if we are going to have a strong economy.

If we again push ourselves down into labor's spies—and that is what the workers are going to say; if I put somebody in the workplace to look for those who are on drugs, how do I know he is just looking for that? Where is it at? Do you want to put the spies back in the shop without the resources to help the person? Now, I am not in favor of someone who has a problem just to be put in a very crucial spot.

I can tell you that business agents come to me every day and say, "Jimmy, get a program started in my local, because if I have to send someone out to that jobsite, I want to know that they are all right." And they, on their own, have started programs at the local level to try to find members before they would be sent out to a jobsite, because a situation should be, what? Proactive and reactive, and everything I pretty much heard here today is reacting to finding the person after he is what he is, and not trying to find him before.

I'll end with one set of figures. With all the finding that you are going to do, the searching you are going to do, and all the work that we are doing, only 5 percent of the people with the problem are ever uncovered; 95 percent go undetected or untreated because there is not sufficient funds and sufficient effort to do the early education and the early intervention work before people are seriously in problems. We only find them when they are staggering on the job, when they are spaced out, when they have cut themselves or done something before.

When we went out to try to find funds to do this, I will tell you every place we went we were sent for sky hooks. I don't know where the money is going in this area, but when we went out—and I feel our program is as good as any program around, we didn't find a soul or a program or an agency that had a nickel to help us institute it. They all claimed that there has been a cutback, so there isn't anything.

Well, there is some problem that if you are going to have this type of program, if we are going to improve and you are going to have them on the type of basis and the percentages that are necessary, someone has to look at this situation. Thank you.

[The prepared statement of AFL-CIO appears on p. 203.]

Mr. GUARINI. Thank you, Mr. Mahoney. Admiral Mulloy.

TESTIMONY OF REAR ADM. PAUL MULLOY, U.S. NAVY, RETIRED

Admiral MULLOY. Good afternoon. I am honored to be in these chambers and to be able to participate in these important proceedings. I was asked on Friday, so I did a quick—rather Monday—to be here today. I hope I may be able to contribute in a beneficial way.

I am Admiral Paul J. Mulloy, U.S. Navy, Retired. That means I am retained, not retired; I'm ready. Under the Secretary of the Navy Lehman, Admiral Haywood and Secretary Herrington, I had the privilege of heading the Navy's war on drugs and other people programs for 3 years before I retired in 1984. Since then I have served as a private consultant in several fields, and this year I have resumed a more direct role again against drug abuse. I am a director of a newly formed business named Quadro Associates, Incorporated, whose mission is to help organizations achieve a drug free and secure workplace.

I have also assisted Government agencies, including currently the Drug Enforcement Agency, with their drug deterrent program. I believe that when properly applied, urinalysis testing is an important tool in deterring drug abuse. In the Navy, I watched it contribute to reducing drug abuse from 48 percent to less than 10 percent as part of a very comprehensive, multi-faceted people program, not unlike what Mr. Mahoney is saying.

I think it is significant that when that went on, that all other performance indicators, including retention, which in the military is so important, rose during that time. In fact, our young people, and I think the Navy's average age is about 19.6, turned against the drugs that they themselves did. It worked. With enlightened leadership and peer responsibility, we did get rid of it without causing real problems.

Designed sensitively with people in mind, the urinalysis program should be used not alone, but within a full range of programs such as extensive street smart education and the helping hand programs that must go with them. The policy for use should be firm, should be fair, should be reasonably and clearly communicated.

The objective should be to get rid of the abuse more than the abuser in combatting this complex, plague-like threat to our people and our system of values. Narcotics posed such a threat to the Navy and national security that we declared war on drugs. It worked. You declare, the President declare and conduct total war against this scourge and especially those criminal parasites behind it, and in that process do it with a humane enlightened way of caring for our people so we don't violate the trust that was asked here.

Do that. I am confident we can. And I will help. Thank you.

Mr. GUARINI. Thank you very much. What you really say is that we need a national resolve that this must be one of our top priorities on the President's agenda in order to be successful in attacking the problem.

Admiral MULLOY. Yes, and his drug policy strategy in 1984 was an excellent blueprint. The resolve has to be done with a PR effort. I agree with Mr. Ueberroth on that. You have got to get the people's attention. The kids are being eaten up by this.

Mr. GUARINI. It is your sense being involved in a program, that there is a national strategy that is lacking today.

Admiral MULLOY. No, there is a strategy in writing. I think it is the enactment of it, the carrying out of it. It is the full force of all of us involved. This has nothing to do with party or politics.

Mr. GUARINI. No, it is a bipartisan effort, as you will notice from this committee.

Admiral MULLOY. Yes, there is, and this committee—and I was privileged to attend it before—thank God you are here.

Mr. GUARINI. Thank you. With a $17 billion education budget of which only $3 million is for education in drugs is a pitiful sum.

Admiral MULLOY. I don't understand that. In Navy one of the absolute corollaries to go on a wage of war was a massive education information training program with people like the narco priest from New York putting on video tapes and telling the kids, we had our people subscribe to High Times. Here is what those idiots are telling you. Here is what our great scientists, doctors and clergy are telling you as the facts we published both side by side and said: you decide. They did. Those are the same kids we have got now. They are beautiful, just lead them and they will do what's right.

Mr. GUARINI. Admiral, we had a serious problem within our military. I remember when I visited Admiral Crowe when he was head of NATO. He said there was an extreme problem over there. By drug testing of all the officers right down to the lowest enlisted man we were able to wipe it out. That took place after we had a national incident, I remember, with the U.S.S. *Enterprise* where there was an accident on the flight deck and which they found drugs in the system of the pilot.

I wonder whether or not you could say or make a comment as to whether or not the testing in the military was significant in our war against drugs.

Admiral MULLOY. Yes, may I, Mr. Chairman——

Mr. GUARINI. Please. I know you have some knowledge about that.

Admiral MULLOY. The pilot involved was a reserve that was taking antihistamine drugs unknown to any of the Navy physicians, and his doctor had prescribed it. The error there was one of hey, guys, you don't fly when you have taken that stuff. The kids on the deck, yes, was drugs. Thanks to the hearings it really exploded. In fact, I had had 6 gorgeous years at sea and three major commands. I was ordered into Washington, and my first job within 2 weeks was to appear in front of this hearing.

The net result under Secretary Lehman and Secretary Herrington and Admiral Haywood and others, you know, was that the war on drugs went on. The first thing that was applied was call it a war, black/white, no gray, and start testing. We ended up, annually, testing 1.3 million specimens, 9.8 million tests.

Now, we did that in an explosive way of going about it, but in that process, and I called the people the other day, on all that we had no technical false positives and I agree with Dr. Rollins. If you do it correctly, you set in place ahead of time, you communicate what you are doing, and you do it in corollary with other vigorous programs, it will work. And you shouldn't get the false positives.

By the way, with a double blind system in the process we were running 6,000 double blinds a year—that's technical language. Dr. Rollins can tell you about it—zero false positives were the results.

Mr. GUARINI. Would you say it was testing that was the successful took that helped you wipe——

Admiral MULLOY. I thought it was essential.

Mr. GUARINI. Essential.

Admiral MULLOY. Essential, because you gave the people the idea you weren't kidding, but at the same time I will anecdotally tell you that on a quarter deck of a ship with a detection dog with a cold in his nose and a kit that doesn't work, 70 percent of the stuff won't come aboard because our sailors are smart.

Mr. GUARINI. Well, what about, Dr. Rollins, the testimony that we heard that today you can defeat the test by taking certain kinds of other drugs that a neutralize and give you a blind test. Is that true? Is it reliable or——

Dr. ROLLINS. The testing is reliable, yes. It is possible to confuse, if you will, the screening test. If a highly reliable sophisticated gas chromatography mass spectrometry test is employed as confirmation, it is virtually impossible.

Mr. GUARINI. You are not concerned about the fac that you could defeat the purpose of the test by taking some other kind of a nostrum?

Dr. ROLLINS. Again, you could confuse the screening part of the test, the initial test, and if that is all an organization or if that is all the Navy was using, it would not be reliable. It is only a screening test, and there must be a second totally separate confirmatory test performed.

Mr. GUARINI. So scientifically, tests are reliable.

Dr. ROLLINS. Yes.

Mr. GUARINI. And cannot be defeated scientifically if they are properly taken.

Dr. ROLLINS. If properly done they cannot be defeated.

Let me correct that. I suppose it is possible that somebody could put water inside of a container instead of urine or something like that.

Mr. GUARINI. Would the test have to be taken in front of another person or the specimen collected in front of someone who would actually be there to observe that it is in fact the urine specimen of that person?

Dr. ROLLINS. I am not sure that I feel qualified to necessarily comment on that, but I think if you want that person's urine, yes, it must be observed.

Mr. GUARINI. Mr. Mahoney.

Mr. MAHONEY. The answer to that is, yes, and I am sure that the Navy—and the Navy has an excellent program, but I think if you ask the Air Force, they will tell you about the mess that they had.

Admiral MULLOY. We had some messes, but there wasn't anybody hurt by it.

Mr. MAHONEY. And that is in the military where you have authority and disciplined control. Now take that out on to a plant site or a job site or an office and try to have somebody who is doing it commercially to make money and start to try to apply it. It may be

able to be applied in very scientific areas, but in the real world, it doesn't happen.

Mr. GUARINI. Well, I guess you could have a person go into a room and lock the door and there is nobody else in the room, and then come out with the vial.

Mr. MAHONEY. No, they have to stand in front of you. They have to take the vial out. They have to hold it, and you crayon——

Mr. GUARINI. Well, you are very dramatically giving a scenario that may not have to be followed.

Mr. MAHONEY. It kills the lily, but that is the way it is done.

Mr. GUARINI. Is that true, Dr. Rollins?

Mr. MAHONEY. Let's not kid around. It is either done that way or it is not done that way.

Admiral MULLOY. Maybe I can help.

Mr. MAHONEY. I don't want to be the expert in this.

Admiral MULLOY. The visual method is what we in the Navy established; that you must have somebody see the specimen delivered because right there is where you could have a problem. When we first started this thing in San Diego, baby urine was being sold $50 a plastic bag. People were learning about all kinds of plastic apparatus.

We insisted that the chain of custody be full proof—you know, Tylenol could learn from us. Then when it got to the lab, it had to be screened by a separate system at a higher cutoff level than the confirmation so that we knew we were letting some guilty people away, but all positives had to be confirmed by GCMS. That is an extensive program, but if you are dealing with people's reputations, you have got to do that.

Mr. GUARINI. Well, you never hurt an innocent person because it is only the positive tests that you are dealing with, so therefore no innocent person would be hurt. The fact is you may not find everybody who is positive.

Admiral MULLOY. That's right. And we said it is not only the public safety here that we are trying to protect, we are also trying to reaffirm the public trust.

Mr. GUARINI. All right thank you.

Let me ask you, Dr. Rollins, who should be responsible for certifying laboratories to do this test, and you said there is a paucity of certified laboratories in our country today. Where should that responsibility lie?

Dr. ROLLINS. Well, I'm not really certain about that. I can tell you the certification processes that are available now. As the College of American Pathologists has the certification process, it doesn't strictly apply to this, and I don't think it really tests the forensic nature of the sample.

Mr. GUARINI. Should the Federal Government be responsible for certifying laboratories?

Dr. ROLLINS. Perhaps the Federal Government or maybe even the State governments. For example, in the State of California, it has already been raised—the issue has been raised today that the State of California has a bill before their governing body concerning State certification of laboratories.

I don't know whether I have an opinion. It certainly could be the Federal Government.

Mr. GUARINI. But there should be certification somewhere.

Are the States adequate in meeting the responsibilities in doing the job?

Dr. ROLLINS. No, they are not right now.

Mr. GUARINI. Thank you. Mr. Clay Shaw.

Mr. SHAW. Mr. Mahoney, you, in your statement on page 3, you said, "Urinalysis as currently being practiced and as it has been proposed by President Reagan, is an ill-fated and foolish plan." I am a little bit confused. I don't know of any plan that has been proposed by President Reagan.

Mr. MAHONEY. I read—now you are here in Washington—in the papers that there was a Presidential commission that you have had here that proposed urinalysis for drug testing.

Mr. SHAW. What that was is an independent study and recommendation by the President's Commission on Organized Crime.

Mr. MAHONEY. I apologize to him. Whoever's plan it was, I think it is—I may be mistaken.

Mr. SHAW. I just wanted to clarify that for the record.

Mr. Mahoney, being a descendent of Irish stock from the State of Pennsylvania, I am pleased to say that I agree with you on just about everything you said with the exception of the one point. The one point is, of course, the point whereby you disagree with the panelists to your left and to your right.

In your statement you talked about a search without due cause. Now, perhaps we ought to defer this to the lawyers down at the other end of the table. I always thought that that provision in the Constitution was geared more towards the question of criminal law, criminal prosecution, at least that has been where it has been mostly brought about. But I would say, and I would direct this to either one of the attorneys, where it can be—I think you both covered this in your opening statement, but where it can be justified by the employer and where it is not done or any criminal purpose, and where it is done with due care as to confidentiality, is there a problem with illegal search and seizure?

Mr. ANGAROLA. The confusion arises when you consider the Bill of the Rights, particularly the fourth amendment, the prohibition against unreasonable searches. It only relates to governmental actions. Therefore, I am protected from searches by the police or from even the metropolitan transit authority, since it is a municipal body, that prohibition applies to their actions. It does not apply to a private industry or to a private company, for example. So if you ran a grocery store, you as an employee do not have a constitutionally protected right against a unreasonable search by your employer.

Mr. SHAW. Well, there is no way to extract the specimen without the cooperation of the employee. Someone can lose their job, but they can absolutely refuse, even though I am not suggesting that type of a harsh approach to it.

Mr. ANGAROLA. The other side of it is in the Government context where it is clear that the 4th and 14th amendments do apply, at least one court case has held that a governmental employee can be tested if the nature of the work is such that it involves hazardous work around high voltage wires. The court determined that that was a reasonable test, a reasonable search. There was a reasonable

relationship to job safety to allow the urine testing to occur. These are district court cases I am talking about.

A case last year came down in Iowa which did not allow the random testing of correctional officers in a State prison. It did allow preemployment testing and annual physical testing and "for cause" testing, but did not allow for random testing. The court said there was no reasonable suspicion of drug taking by specific correctional officers to justify that test, that search. That is being appealed. The question is, is it reasonable to use testing to prevent drugs from being introduced in the prison system? That is what the court of appeals is going to have to decide. Was it reasonable to test.

Mr. SHAW. Doesn't it appear to you that the court may have been grappling looking for a middle ground with regard to this as to existing employees and future employees and perspective employees?

Mr. ANGAROLA. Yes.

Mr. SHAW. I guess we still have to wait for the final word with regard to that.

In those cases, did the court make a distinction between—it would be quite obvious if the results were turned over to the State's attorney's office for prosecution, then all of us would be very upset—with any legal background—would be very upset by the constitutional infringements there, but have the cases made that distinction?

Mr. ANGAROLA. They have. They have discussed it in the context of the Government as employer rather than the Government as enforcement agency.

Mr. SHAW. Don't you think that is where the distinction might eventually come down, where it would be drawn?

Mr. ANGAROLA. I think that is one of the distinctions that will be made.

Mr. SAMUELS. If I could just comment on that because I might have a slightly different view of where the courts have come on that. From our reading the cases, most of the court decisions that have looked at the constitutional issue have found the Constitution implicated even where the test is being made for employment purposes as opposed to criminal purposes.

Most of the courts are still saying that is a constitutional issue. The fourth amendment does apply, and the standard has to be ordinarily reasonable suspicion or probable cause is the language that the courts have been using.

Now it is true that most of the court decisions that we have seen have outlawed random testing for that reason, saying that there is no reasonable suspicion involved by definition when you are doing random testing, because you are testing employees regardless of reasonable suspicion. So, there is a constitutional issue implicated there that I think needs to be looked at.

Mr. GUARINI. Would the gentleman yield for a minute?

Mr. SHAW. I would be glad to yield.

Mr. GUARINI. On the fifth amendment, the self-incrimination part, that would only be where you are criminally involved not just where your contract is involved as an employee union contract or

just an employee contract. Could you comment on that? Is there a constitutional violation there at all?

Mr. SAMUELS. That's correct. None of the court cases that we have seen have addressed this as a fifth amendment issue. They have talked about the fourth amendment right against unreasonable search and seizure, due process, right to privacy. We haven't seen a court case that has dealt with this in the fifth amendment context.

I think one of the things that needs to be looked at, though, that has been raised in some of the more recent cases that have been filed, is that there is nothing in most of the policies that we have seen, meaning most of the urine testing policies by Government agencies that would prohibit those employers from turning test results over to prosecuting agencies, so there at least is the possibility that somebody could be raising these arguments saying that while it is not being yet, there is nothing that would prevent an employer from turning this over to the prosecution and therefore there are fourth and fifth amendment implications.

Mr. SHAW. Yes, but if they did, then the fifth amendment implication would click in immediately, and any evidence of that nature I believe—and I see you shaking your head affirmatively that you agree—any such evidence would be thrown out as improper.

Mr. ANGAROLA. If I could just put one gloss on that, a test shows only that you have used drugs, and of course, under the Federal Control Substances Act and under State uniform control substances acts, drug use is not a crime. Possession is a crime, and while that may sound like a very foolish distinction, but it exists, and testing you can only show use. You cannot necessarily show possession, so I am not sure——

Mr. SHAW. Unless you drove your car to the test.

Mr. MAHONEY. I hope, Congressman, that in being maybe too verbose about it that maybe I have obfuscated the point. I don't want to be a constitutional lawyer and every time I speak to another lawyer he gives another opinion, and so that is as wide as there are people. Plus, I don't want to confine this just to contractual law that the union would have. There is also a group of laws that is almost accepted that there are some common rights an employee has that aren't under the Constitution or under the union contract that he has. The courts have been saying that people just can't be willfully fired for capricious reasons, even without a union contract or without the Constitution.

I hope that in saying this I didn't infer that we were against testing on all bases. What I was trying to do by being very direct about it, is to say this urine testing is a single answer, an answer that is just trying to simplify the question without the humane way of trying to do something is only going to corrupt the workforce.

All I could say is I wish I was back as the union organizer again, because all of this testing going on in plants would have made my job an easy one. They would have had so much trouble and such an easy job to win the people over because they feel they have been put upon, I would have looked like I was intelligent or smart. The employer was doing the job for me. But it is not just that. We are afraid that good people who could be saved, who we lost in the workforce or afraid that people will learn how to go around it, and

the focus will not be on trying to solve the problem and helping people, but it will be on the punitive end.

Once you get on that vein, you are back light years. In this whole field of drug, alcohol, and stress it has taken years to get people to say that it is not a moral malady; that it is not socially repugnant because you have the situation. It is a disease, and all of a sudden when we seem to start to make some progress, we are back with the cop and the club. That's what the worker feels. Now, you are asking me to come forward and admit it and fraternally try to solve the problem, and next week I find out you have a secret agent in there trying to do it. It almost is counterproductive.

I am going to end by saying that I am not against all forms of testing because that is necessary, as the Admiral has said, and may be effective, but just that as a simplistic answer without the other is doomed to failure.

Mr. SHAW. Well, maybe we are not in total disagreement on that last point. Let me ask you this question, Mr. Mahoney, Do you believe in drug testing for Federal employees with top secret clearance?

Mr. MAHONEY. Since I am not their business agent, I don't want to make policy for them, but I think—as a person who has no jurisdiction in that area—I think that in certain areas where the national interest is at stake, there are reasons why things have to be done. There is always a rule of reason. And all I am asking, if I can be asking for a rule of reason on this side, there has to be a rule of reason on the other side. If it is arbitrary, it is doomed to failure.

Mr. SHAW. I think that that has been the message through all the panelists today, maybe expressed more on the positive than the negative as you approached it, but I do think that everyone believes that—and I think it was best said by Mr. Mulloy. We want to get rid of the abuse rather than the abuser. I think that is all of what we want to do. I think that is what employers want to do. They don't want to lose valuable employees.

Mr. MAHONEY. But being practical, you go to an employee and say, "Let's start an employees assistance program." Let's try to do something, and there is a deaf ear, like you are a man from Mars. All of a sudden they go to a seminar where some Merlin magician, some chemistry act gets on that is going to make a buck, and they say we can rid your plant of all these problems. Whip. Pardon me, ma'am. Right out the window. Next week he has got everybody in there with testing and testing, and the person has never done anything to try to solve this.

Mr. SHAW. Mr. Mahoney, we have heard starting early this morning and ending 2:30 or later this afternoon, one success story after another.

Mr. MAHONEY. I would ask you to do something.

Mr. SHAW. We are saving lives. We are saving property. In the long run, we are saving jobs. We may be upping productivity. We may be making the American worker more productive, and it is a situation when testing does come into the workplace. Now, obviously, there are I am sure we can fill reams of paper in instances where testing has been abusive, and I would never subscribe to that type of testing, but I think it is a valuable tool and I think it should be contained, and when we talk about education, I think,

being an officer of the union, have a responsibility to educate your workers as to what is reasonable drug testing so that they would be encouraged to go along with reasonable drug testing.

As a matter of fact, I think that the union should be very active as to drawing what are acceptable guidelines.

Mr. MAHONEY. Well, you know, I don't want to be argumentative because I have on basis——

Mr. SHAW. We are not arguing.

Mr. MAHONEY [continuing]. No basis of fact to be argumentative. If there is an area where there are self-ordained experts, it is drug and alcoholism. When you ask them to substantiate it with facts and studies and programs, they say, "No, this is what I know about it that is coming down the line."

I question this grand success where people have just institut l a testing program, and the problem that I am trying to state is for everyone that is trying to do it quickly through a testing program without a full employees assistance program. There are many more of those than the people doing it correctly. Now, someone if said to me we are going to have a testing program, we are going to have an employee assistance program right through to aftercare. you have me now that I am listening, that this can make a change, but just the sole testing alone without a comprehensive program is doomed to failure.

Sometimes I think that people go from the particular to the general. They come in here and tell you about a particular success story and expand it to the general. The general case, if you will study it, you will find isn't the fact of life because most people out there haven't even tried to start to do something on the all over ethics. I don't want to be argumentative about it. I have said too much already, but it is simplification that I am trying to deal with.

Mr. SHAW. You are not going to find an argument from me. Your handout says to identify people whose problems impair job performance and to motivate them to seek and receive assistance on confidential basis. Rehabilitate rather than terminate. Curb the costs associated with excessive health care claims and reduce productivity.

Everybody's head will nod affirmatively on that and that is something that all of us want.

Mr. MAHONEY. But I will give you a fact, and this is real fact out of a study that we just did. From 1980 to 1984, and this studying the whole area of Philadelphia and doing it scientifically, not haphazardly like some have done. There was a 46-percent increase in admissions on drug and alcohol.

Here is the point I am trying to get. People going into detoxification. That is to get dried out so you won't catch them—26-percent increase; rehab, 8 percent less. So it means that they are getting frightened. They are going in to get dried out. But if I found that rehab was going up along with detox and the problems of people being admitted, then I would say we were having a success. But when I find out that people are going into detox and not going in for rehabilitation, some parts of us are missing the boat toward really helping people, and I am as guilty, and I hope some of the rest of us are also.

That is not supposition. That was done in a very comprehensive report which, if you want, we get to you and show you the facts and figures of it.

Mr. SHAW. I have just one thing to add to that, and that is I think it is important to remember that the threat of the test is a deterrent as much as anything else. All of us want to deter the use of drugs.

Mr. MAHONEY. If that solves the problem, yes.

Mr. SHAW. Thank you.

Mr. GUARINI. Our good colleague from Connecticut, Mr. Rowland.

Mr. ROWLAND. Thank you, Mr. Chairman. First, I think I speak on behalf of the whole committee when I thank you all for your patience and certainly for your strong viewpoints and your interest in this issue, and we have kept you here quite a long time, and we all greatly appreciate that.

What I would like to do is follow up what the Admiral said with a question that I had. Admiral, you were making reference to some of the urine tests that were done, and you inferred there were millions that were done. The only personal notation that I would make, and I think the thing that we need to keep an eye on or keep in the back of our minds is that indeed the drug problem in the workplace and anywhere else is not necessarily with just young people, and obviously your experience has been with young Navy men and women. I think we need to continue to remember that it is affecting employees of all ages.

One of the biggest problems we have seen on this committee is cocaine use, and indeed it is a type of drug that cross all generations. For me, would you mention again how many tests were done. I think you said 6 million.

Admiral MULLOY. 1.8 million specimens. That's every sailor theoretically from the Chief of Naval Operations on down to a seaman recruit, three times a year. That is what we were trying to achieve, and it was done on that fashion from the chief of operations all the way down, and six tests on each specimen because we wanted to get predominately cocaine and marijuana, but we were also, from a regional point of view of the worldwide Navy, things like hashish over in the Middle East, so we had the laboratories do those tests, but we were mandatory on the prescribed eyewitness, chain of custody very rigorous, all of which were tested by people they didn't even know were around checking on it, and then those rigorous lab procedures.

I totally agree with all these people, including our good friend here, that you don't put something like this in alone. It has got to go in with a whole umbrella of other programs, as Congressman Shaw was also alluding to. So it amounted to 9.8 million tests per year.

Mr. ROWLAND. Let me ask you this, then, Admiral. You have got my curiosity peaked. How many individuals did you find with some type of drug use?

Admiral MULLOY. Out of that? The first time they tested it, that is where this alarming 48 percent came out. There was at one time the DOD verbal survey, fill in the blanks, that said 48.6.

Mr. ROWLAND. The 48 percent is the verbal survey.

Admiral MULLOY. That was the DOD survey. A lot of people in the Navy said, well, that doesn't make any sense at all. So we ran a urinalysis test. Now we are getting rid of the verbal—47.8. So that took care of the elephant theory.

Mr. ROWLAND. Almost half of the tests that were done indicated drug use.

Admiral MULLOY. In the 18- to 25-year-old population that was being tested.

Mr. ROWLAND. How about of the entire population.

Admiral MULLOY. We didn't do the entire one for that type of test.

Mr. ROWLAND. So that was done to approximately a million Navy men and women between the ages of 18 and 25.

Admiral MULLOY. You have got to be careful of that. The name of the survey was triggered by the Burt survey, a DOD survey, which was, I think, 19,000 people total worldwide, all Armed Forces. The Navy did a urinalysis survey—you can get this from the Navy for the record, but I believe it was 1,000 on the Atlantic coast and 1,000 on the Pacific coast, but from statistical extrapolation, you draw a 47.8 percent. And, man, you better pay attention. That's when we said we have got to declare a war.

We are pleased with the results, because it does tell you, as these gentlemen are saying, and the concerns he is expressing, which I am very sensitive to, that if you do it right, with enlightenment and a lot of programs that are really geared to people and reaching out a hand to help them. If they come up and ask for help, they are free. They get a free ride.

Mr. ROWLAND. Do you think the drug test acts as a deterrent?

Admiral MULLOY. Oh, absolutely.

Mr. SHAW. I just have one question. Marijuana, I understand, stays in the system longer than cocaine.

Admiral MULLOY. Yes.

Mr. SHAW. How long a period there are we looking at that you are going to pick up the marijuana for?

Admiral MULLOY. These gentlemen could say. With a heavy user you can get it up to 30 days, in a very heavy user. Of course these tests we are running at about a 48-hour, 72-hour turnaround time, so if the test is taken, the specimen is given 60 milliliters of it, so that you freeze it if it is positive, all of these technologies, which, by the wa are available, and I didn't want to get into that. But they have rigorously been tested for 4 to 5 years. They have withstood the challenge of the courts, and in fact the judges support it because it is fair, reasonable and technologically sound.

The issue of the time constant for marijuana is established. We know that. We are concerned about these rapid drugs that are assimilated into the body and then out again, but that is why the random test is important.

Mr. SHAW. I just didn't want anyone to come away from this hearing with the idea that 47 or 48 percent of the sailors were daily users.

Admiral MULLOY. Was what?

Mr. SHAW. That that percentage was daily isers.

Admiral MULLOY. Oh, no, of course not. The issue was that we even found it.

Mr. SHAW. You were very clear. I just wanted to make sure the record was.

Mr. ROWLAND. I just have one final question for Mr. Angarola. One thing you said really caught my attention. It was something to the effect when you were referring to the drug testing program or any drug testing program, you said if it is reasonable, it is legal. I don't know if that was your exact quote, but you made that inference. I guess the obvious question that I have, and I think we have been kind of grappling with this for the past several hours.

By whose judgment do you think the drug testing can be determined as reasonable? I would appreciate your comments on that.

Mr. ANGAROLA. I think it goes back to what I mentioned with the Iowa Correctional Facility case. In the private industry, it is a reasonable program, and again, I fully concur with Mr. Mahoney and Admiral Mulloy. I am not saying testing alone. I don't think anyone is saying testing alone can solve the problem.

Mr. ROWLAND. No.

Mr. ANGAROLA. But if a private entity sets up a reasonable testing program, it is unlikely to be challenged even, but if it is challenged, I would say there are very few legal bases to overturn the testing.

The second issue, though, is with the governmental situation where you do have the 4th and 14th amendment concern. Maybe I was being a little too cute, I didn't mean to be, but what I meant is if it is reasonable in terms of reasonable under the Constitution——

Mr. ROWLAND. By whose determination?

Mr. ANGAROLA. By a court's determination. I think we have to go on that assumption, and we are, in a sense, at a very early stage to determine what, in each individual instance, is reasonable and what is unreasonable, and I think we just have to wait, for the courts to decide.

Mr. ROWLAND. In other words, at this juncture you believe that if an employer sets up before the person is employed a reasonable set of principles, circumstances, standards, whatever the case may be, and if that employer terms that to be reasonable, in other words, if it is not tested and goes through, that, in your opinion, would be looked at as a reasonable drug testing program.

Mr. ANGAROLA. I think what we are seeing now, even with the Iowa case, you will find that preemployment and for-cause testing is accepted and an annual physical testing is accepted.

Mr. ROWLAND. Accepted by the employers?

Mr. ANGAROLA. Accepted by the court.

Mr. ROWLAND. OK.

Mr. ANGAROLA. And by the employees. I think what is happening is that we are focusing on random testing so much now that it may be, again, another cloud that is confusing the issue more than helping us. The real issue is how do you identify people, and how do you get them some help, and how in the employment context, do you have a healthy and safe workplace, and that is where I am not so sure where the courts are going to come out. Where is that line that says this is unreasonable? We don't know yet.

Mr. ROWLAND. Thank you very much.

Mr. GUARINI. In following up on getting the help, who pays, Mr. Mahoney, Blue Cross, the health programs, do they pay for the medical services that are rendered to someone? Is it treated like a disease? Do they pay for rehabilitation? Should the company have to pay? What is happening out there in the field?

Mr. MAHONEY. I didn't want to get off into that. It is such a hodgepodge out there. You have HMO's that people are covered under that cover outpatient, but not inpatient. You have the Blue Cross that covers inpatient, but not outpatient. It is as wide and as long as everyone that comes through the door.

Mr. GUARINI. So there is a lot of confusion.

Mr. MAHONEY. The confusion is rampant, and it is almost heart-rending when someone comes through and says, "I have been covered for x number of years, and I have all this coverage. I have the best coverage in the world," and he says, "My son is in trouble, help him." And I say, "Mr. Jones, you don't have coverage." He says, "What?" You have it for everything else, but you don't have it for drug and alcohol.

Mr. GUARINI. Well, what about rehabilitation. Do the companies generally pick up the bill for rehabilitation when a worker can't afford it?

Mr. MAHONEY. Here is where a problem really gets into the nitty-gritty, and it is something that we have gone into and taken a look at it at the social service end. We are also looking at it in the cold business end and how it works. I said that we had 635 or 637 people go in. If we don't have people go into treatment in more economic ways than the ways that are presently there, it fails also. When some goes into inpatient or free-standing or acute hospital care, it ranges anyplace from $10,000 to $20,000 a person.

Mr. GUARINI. It is expensive.

Mr. MAHONEY. Very expensive. That's why we are trying at this point to say that acute care hospitals may be necessary for some people that have a very serious debilitating physical problem along with it. Free standing, which is cheaper, is available for those who just need detoxification rehabilitation. And, yes, there are people who need to be in something that we are starting now. It is almost an evening program, and it only costs about $2,000, the same type of treatment, the same type of education, the same type of workup, and we are going to do it on the outpatient basis either during the day, if somebody wants, or in the evening.

It has two benefits. One because of cost and because then people will start to try to write benefits that would cover it. See, if I have to cover $20,000, I don't want to cover it, but if I have to cover something that costs $2,000, I may put it into my coverage. I'm not being wordy, but it is so complex that it is almost a shame. It is a disgrace, because we have people out there who are body-snatchers. And most people in the drug and alcohol program are no more interested in rehabilitation than the world.

They are interested in bodies to get into their hospitals to fill the beds to make a couple million bucks, and that is what it comes down to. They do all of this psalm singing stuff about what they are doing for people, and I realize that their clinical review is horrendous. The clinic review that they think they have, it is a wink

of the eye. It is whether there is a cold bed and I have got a warm body and that costs a lot.

This goes deeper than that. You have to be able to economically get people treatment at a cost they can afford, and it is our job—we think we have made a success out of this program as far as getting out and trying to educate our people. Where we are failing, and that is the area that you are talking about, is how to get a constant benefit that is affordable for employers or union funds to buy so that they will encourage people.

I have had business agents say,

> Mahoney, you are a character. You talk holes in my head to get interested in this program, and now my fund is busted. You did me no favor. Find a way to get the help for my people so we can afford it.

And we are out in this area trying to pioneer this day's program.

Mr. GUARINI. Let me ask you, is this becoming a subject of collective bargaining in the union contracts? Has it happened yet?

Mr. MAHONEY. Health care is the biggest subject of collective bargaining. The cost of health care today is probably the single most largest cost—not just directly. Years ago, everybody worried about direct wages.

Mr. GUARINI. No, I am talking about drugs and rehabilitation of drugs.

Mr. MAHONEY. Yes, it is becoming a subject, but what is happening is people are saying where is the coverage, and it is almost a shame, and I am not trying to advocate one health plan over another, but when somebody offers a hodgepodge of health plans like HMO's from one to another, and they don't explain that there is a large area that you have—like I have six kids. If I would have a plan without that coverage with percentages, I should have my head examined because I have got to be a lucky man to get through this without stubbing my toe along the way somewhere.

It is a very serious discussion. The problem is the amount of knowledge on the subject, and the approach to it is one that is very weak. I think as Congressmen, if you could look into ways to practically try to fund intelligent approaches to this. All kinds of money was thrown in methadone clinics and all kinds of things like that. Very little was ever—it is so minuscule, so small, that if just a little bit was put toward an organized effort, we might come up with some answers.

I am not trying to be wordy, but your question is like a 4-hour explanation.

Mr. GUARINI. I understand that.

Mr. MAHONEY. For every person that comes in, it is a different answer.

Mr. GUARINI. But the fact is that it is a nightmare and there is confusion out there.

Mr. MAHONEY. It is a nightmare and it is confusion, and all that we have tried to do is to get we in the labor movement, the business community, health insurers, and the United Way, to form a consortium to almost give away these services. And when we look to the established programs that you have been funding that are supposed to be all God's work out there—I am being repetitive—when we went to them for help, all I got was left-handed screwdriv-

ers and sky hooks. They had no way that we fit, no way that we were necessary. "We don't need you. We don't want you. We don't want to ever see you, and we can't afford you, so get lost. But here is where you go. Go look over here." So we ran over there and we found that was a blind alley. Then we come back and say, "Oh, you shouldn't go here, you should go there." So after 6 months of being sent on fool's errands—and just doing it intentionally because we didn't want to say we were just too ignorant about it, we found our own ways to start to put it together, but it didn't come out of the established Government programs that are assigned to do this.

Mr. GUARINI. You have been a great panel. The select committee thanks each and every one of you.

Mr. MAHONEY. Sorry to be too wordy.

Mr. GUARINI. It was excellent. Thank you. The hearing is adjourned.

[Whereupon, at 2:45 p.m., the committee was adjourned subject to the call of the Chair.]

PREPARED STATEMENTS

U. S. HOUSE OF REPRESENTATIVES

OPENING REMARKS
OF
HON. WALTER E. FAUNTROY
(D., D.C.)

BEFORE THE

SELECT COMMITTEE ON NARCOTICS ABUSE & CONTROL

FOR THE
HEARING
ON
"DRUG ABUSE IN THE WORKPLACE"

MAY 7, 1986

HEARING ROOM
B-318

9:00 A.M.

MR. CHAIRMAN, I AM PLEASED TO BE ABLE TO PARTICIPATE IN THESE HEARINGS THIS MORNING EXAMINING THE CRUCIAL PROBLEM OF DRUG ABUSE IN THE WORKPLACE.

I WANT TO EXPRESS MY APPRECIATION TO YOU FOR CALLING THESE EXTREMELY IMPORTANT AND TIMELY HEARINGS.

IN MY REMARKS, I WANT TO BRIEFLY ADDRESS TWO ISSUES THAT CONCERN ME VERY DEEPLY. THE FIRST RELATES TO THE USE OF URINE TESTING TO DETECT DRUG ABUSE. THE RAPID INCREASE IN THE NUMBER OF FIRMS CONDUCTING PRE-EMPLOYMENT DRUG SCREENS AND TESTS OF CURRENT EMPLOYEES HAS CREATED AN ENORMOUS DEMAND FOR LABORATORIES TO PROCESS THESE TESTS. AT THE CURRENT TIME, THIS INDUSTRY IS TOTALLY UNREGULATED. A STUDY IN THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION IN APRIL 1985 SHOWED THAT ERROR RATES IN MANY LABORATORIES WERE 50 - 100 PERCENT.

I BELIEVE THAT PROCEDURES MUST BE DEVELOPED TO CERTIFY, ON A REGULAR BASIS, THE PROFICIENCY OF LABORATORIES ENGAGED IN DRUG TESTING. PREFERABLY, THIS SHOULD INVOLVE A DOUBLE, BLIND TYPE OF TEST ADMINISTERED BY AN INDEPENDENT BODY SUCH AS THE CENTER FOR DISEASE CONTROL. I ALSO BELIEVE THAT ANY TIME AN INITIAL URINE SCREEN YIELDS A POSITIVE RESULT, A CONFIRMATORY TEST, USING A DIFFERENT TECHNOLOGY, SHOULD BE REQUIRED. THE LACK OF ADEQUATE QUALITY CONTROLS ON LABORATORIES DOING DRUG TESTS AND THE FAILURE TO CONFIRM A POSITIVE DRUG SCREEN

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CANNOT BE TOLERATED WHERE A PERSON'S CAREER AND OPPORTUNITY FOR EMPLOYMENT IS AT STAKE. THOSE BEING TESTED NEED TO BE ASSURED THAT TESTS WILL BE CONDUCTED ONLY ACCORDING TO THE HIGHEST STANDARDS OF CARE AND QUALITY.

SECOND, I BELIEVE EVERY BUSINESS SHOULD HAVE IN PLACE AN AGGRESSIVE DRUG EDUCATION PROGRAM FOR EMPLOYEES, AIMED AT PREVENTING DRUG ABUSE. WHERE EMPLOYEES ARE UNIONIZED, I WOULD ENCOURAGE SUCH AN EFFORT TO BE A JOINT MANAGEMENT-UNION PROJECT SO THE MESSAGE TO WORKERS IS UNEQUIVOCALLY CLEAR. EMPLOYEE ASSISTANCE PROGRAMS AND OTHER EFFORTS TO HELP WORKERS WITH DRUG AND ALCOHOL PROBLEMS ARE COMMENDABLE, AND I FULLY SUPPORT THESE EFFORTS. MORE ATTENTION, HOWEVER, SHOULD BE DIRECTED TOWARD PREVENTING THESE PROBLEMS BEFORE THEY OCCUR. THE COST SAVINGS WOULD BE SUBSTANTIAL. JUST AS EMPLOYERS GO TO GREAT LENGTHS TO REDUCE ACCIDENTS IN THE WORKPLACE, THROUGH INTENSIVE SAFETY CAMPAIGNS, SO SHOULD THEY ENCOURAGE THEIR EMPLOYEES TO REMAIN DRUG FREE THROUGH COMPREHENSIVE DRUG ABUSE EDUCATION AND PREVENTION PROGRAMS.

MR. CHAIRMAN, ONCE AGAIN I CONGRATULATE YOU FOR HOLDING THESE COMPREHENSIVE HEARINGS TO EXAMINE THE PROBLEM OF DRUG ABUSE IN THE WORKPLACE. I AM SURE THESE HEARINGS WILL PROVIDE THE OPPORTUNITY TO EXAMINE THE IDEAS I HAVE RAISED, AS WELL AS MANY OTHER IMPORTANT ISSUES.

* * * *

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Alcohol, Drug Abuse, and
Mental Health Administration
Rockville MD 20857

FOR RELEASE ONLY UPON DELIVERY

STATEMENT OF

CHARLES R. SCHUSTER, PH.D.

DIRECTOR

NATIONAL INSTITUTE ON DRUG ABUSE

BEFORE THE

SELECT COMMITTEE ON NARCOTICS

ABUSE AND CONTROL

U.S. HOUSE OF REPRESENTATIVES

ON

DRUG ABUSE IN THE WORKPLACE

MAY 7, 1986

Mr. Chairman and members of the Committee: Thank you for inviting me here today to testify on the overall problem of drug abuse in the workplace as well as the issue of drug testing in the workplace. I appreciate your focusing national attention on a subject of such importance to our efforts in combating drug abuse among our citizens.

Drug testing or screening has surfaced as a current issue because the procedure is becoming widely used by employers who recognize the serious health and safety problems posed by drug abuse among their workers and are detemined to take some action. Substance abuse is a very common health hazard in the American workplace today. In addition, although it is difficult to obtain precise figures from business and industry on the cost of alcohol and other drug abuse, we know that substance abuse related to accidents, loss of productivity, loss of trained personnel, theft, treatment, insurance claims, and security has made a significant enough negative financial impact to force many employers to address the issue.

Data from our National Household Survey and our High School Senior Survey reflect the magnitude of the drug abuse problem in the United States today. The latest household survey data indicate that a variety of drugs are currently being widely used (current use is defined as use in the last 30 days). Twenty million Americans are currently using marijuana/hashish; 4 million Americans are currently using cocaine; more than 2 million Americans are currently using other stimulants nonmedically; more than 1 million Americans are using sedatives without a prescription; and 100 million Americans are currently using alcohol.

Among America's young adults (ages 18-25), which is the segment of the population generally thought to use drugs most extensively, 65 percent have experience with some illicit substance: 64 percent have tried marijuana; roughly 20 percent used marijuana daily for at least 1 month during [illegible] adolescence; 28 percent have tried cocaine, and 95 percent have used alcohol. This is the population now entering the workforce. Clearly, statistics are cause for serious concern.

For several reasons, it is difficult to obtain data on drug use from surveys conducted in the workplace. Businesses are reluctant to share with the public any data they might have collected for fear that they might reflect poorly on the quality of their work products and consequently affect sales, while industries such as transportation fear that releasing such surveys could result in a lack of public confidence in their employees. Finally, employees are reluctant to report drug use to their employers or at their place of work for fear of threats to their job security.

We do have data, however, from several NIDA-sponsored studies which have examined the relationship between drug use and work-related variables. These recently completed studies have shown that current marijuana users have high rates of job turnover, especially when they are currently drinking and using other drugs. For example, the time between job entry and termination for workers with current drug use was 10 months shorter for men and 16 months shorter for women than for non-drug users. Preliminary data from one study, which looked at young men aged 19-27, indicate that rates of young adult drug use in general and of being high on the job differed by occupation. Marijuana use in the past year ranged from 30 percent among farm laborers and foremen to 49 percent among service workers such as food

and beverage and cleaning and building maintenance employees. Past year use of cocaine ranged from 10 percent among farm laborers and foremen to 17 percent among craftsmen and among workers in personal services such as cosmotologists and hotel workers. Rates of being high on the job during the past year for alcohol, marijuana, and cocaine were determined for men employed in the past year. Overall, 5 percent of the men reported being high on the job on alcohol, 8 percent on marijuana, and 2 percent on cocaine. Salesworkers (8 percent) were more likely than any other occupational group to report being high on alcohol while on the job. One to 3 percent of the salesworkers reported being high on cocaine while on the job. Rates of being high on marijuana while on the job were greatest for craftsmen, operatives (construction and manufacturing machine operators), and personal service workers.

Rates of marijuana use by young adult men in the past year ranged from 30 percent for mining to 55 percent for personal services industries. Rates of being high on marijuana on the job were greatest in the following industries: manufacturing durable goods (10 percent); personal services (11 percent); construction (13 percent); and entertainment/recreation (17 percent). Rates of cocaine use in the past year were high in construction (19 percent), transportation (24 percent), personal services (27 percent), and entertainment/recreation (27 percent). It should be noted that rates for workers of all ages in an industry or occupation may be higher or lower than those presented here depending on the proportion of their work force which include young adults.

Although employed men were as likely as the unemployed to have ever used marijuana and cocaine, employed men were less likely to report current use of marijuana than those unemployed (25 percent vs. 35 percent). However, employed men were only slightly less likely to report current use of cocaine (6 percent vs. 7 percent). In addition, men with high rates of job turnover (three or more periods of unemployment in the past year) were also more likely to report current use of marijuana and cocaine.

A national NIDA survey of adults aged 18 and older examined the relationship between drug use and absenteeism from work. More current marijuana users missed one or more days of work in the past month because of illness or injury than did nonusers (22 percent vs. 14 percent); this was also true for cocaine users (21 percent vs. 16 percent). The more striking difference in drug use groups, however, was in the number of days "cut" or skipped from work: 17 percent of the current marijuana users skipped vs. 6 percent of the nonusers and 17 percent of the cocaine users vs. 7 percent of the nonusers.

In summary, data from these studies clearly indicate that marijuana and cocaine use are associated with great job instability and increased job absenteeism. The effects of drug use are not restricted to off-job time; there are, however, substantial differences among occupations and industries in the proportion of young adult workers reporting being high on the job.

Because of the high rate of drug use in our society and its presence in the workplace, as reflected in the data I have just cited, the general public are beginning to join us in recognizing the critical need for effective ways of reducing the demand for drugs. As we search together for a solution, we.

face several complicating problems. One is the insidious contagious nature of drug abuse as an illness. The person who seems to be doing well and enjoying drug use is the individual most apt to influence others to use drugs. A second factor which we must take into account is that relatively mild job site use has a tendency to escalate to more severe forms of use. This is why early intervention is so important. Another key fact is that if drug use in the workplace is ignored, a message of acceptance is implied which may itself lead to increased use.

As you know, some workplaces are more visible to the public than others because of safety (the transportation industry), national security (DOD), or media exposure (the sports world). It was widely publicized recently that the Federal Railroad Administration implemented tough new alcohol and drug use regulations. In the baseball community, Commissioner Uberroth has publically taken a hard line against drug use in baseball. The reality is however, that drugs affect work in all segments of our national economy.

In the past, private industry has been somewhat reluctant to discuss drug programs or policies, as well as data on drug use by their employees. Many companies may have felt that having a drug policy and/or discussing drug issues was an open admission that their businesses had a problem and would result in a loss of public confidence. Clearly, this attitude is changing. Within the last year a major transition has taken place in the business world. Progressive companies have begun to adopt the position that <u>society</u> has a drug abuse problem. It is becoming evident that drug abuse is not unique to a particular business, but rather a phenomenon of society-at-large, and since you must draw your workforce from society, you must develop policies and programs to deal with this problem.

NIDA's Research Technology program has been instrumental in the evolvement of technological advances in clinical diagnostic techniques. These advances have made possible assays suitable for the detection of drugs in body fluids, and these new technologies have made drug testing a valuable demand reduction tool. Since the Department of Defense (DOD) and other Federal agencies have implemented testing in an effort to detect and reduce the incidence of drug use by members of the armed forces and agency staff, it appears the demand for drugs has significantly decreased among these groups. In addition, we have learned from private industry that drug testing has been an effective tool in reducing drug use wnen it has been incorporated into their overall substance abuse policies.

Since its inception, NIDA has taken a lead in assisting business and industry with drug abuse education, prevention programs, early detection, and treatment efforts in the workplace. Several initiatives are under way that will further the Institute's collaboration with industry and labor. In an effort to be of assistance and respond to the numerous complex questions associated with employee drug screening, NIDA has developed an informational question and answer booklet which has been well received by labor and industry and is being widely distributed. We believe the integration of drug screening into programs of treatment, prevention, and drug education will prove to be a highly effective way to manage substance abuse problems in industry. I do not believe that drug testing by itself is the solution to controlling the problem of drug abuse, but it can be an extremely useful tool within the context of an overall program or policy that stresses treatment, prevention, and education.

Another way in which we have tried to be helpful to business and industry leaders was by convening a conference to share information and develop consensus on the best policies, procedures and strategies for reducing drug abuse in the workforce. As a result of this meeting, NIDA expects to produce a consensus document within the next 60 days which will give further guidance to business and industry on these important issues.

The conference, which was held in early March, brought to light a number of concerns surrounding drug testing which I would like to address at this time. The critical issue is one of individual rights versus the rights of the public. There is a need to balance an individual's reasonable expectation of privacy and confidentiality with the principles of public safety, efficient performance, and optimal productivity. Job situations where there is a substantial risk to the public safety will surely justify greater permissible intrusions than would be acceptable where risks to the employee or community are perceived as minimal. Although an employee has reasonable rights to privacy and confidentiality, an employer has the right to demand a drug-free workplace.

Another concern is with the accuracy of the testing, specifically the reliability of urinalysis methods. NIDA advises that the accuracy and reliability of these methods must be assessed in the context of the total laboratory system. The need to use assay systems which are based on state-of-the-art methods and rigorously controlled procedures is inherent in situations where the consequences of a positive result to the individual are great. A positive result of a urine screen cannot be used to prove intoxication or impaired performance, but it does provide evidence of prior drug use. If the laboratory uses well-trained and certified personnel who

follow acceptable procedures, then the accuracy of the results should be very high. Laboratories should maintain good quality control procedures, follow manufacturer's protocols, and perform a confirmation assay on all positives by a more specific chemical method than that used for the initial screening. There are quality assurance procedures presently required of clinical chemistry labs that urinalysis laboratories can follow and which could be required by industrial clients prior to contracting with the laboratories for services.

With the growing use of urinalysis, some type of guidelines for proper use are essential, imposed either by the urinalysis industry itself or by State or Federal regulation. For example, a first step in this direction is now under discussion in the California State Assembly, which has pending the Substance Abuse Testing Act of 1986. This bill requires that all toxicology laboratories testing employees and job applicants in California be licensed by the State. Also, NIDA plans to issue a research monograph in the Fall on Guidelines to Technical Aspects of Urinalysis. This document will consist of chapters written by experts in the field, addressing the many technical issues associated with urinalysis.

Although we have made progress in addressing the problem of drugs in the workplace, we need more information in certain areas in order to continue advancing in this arena. For example:

- We need evaluation studies to better assess the impact of drug abuse on business as well as to determine the efficacy of employee drug testing programs. Therefore, we are working with some of the Nation's largest businesses to design and carry out such studies.

- We need better data on the use and abuse of alcohol and drugs among employees in different occupational groups and work roles. We are considering developing a survey to examine the use of alcohol, marijuana, cocaine, and other drugs at the workplace. Data would be gather on the respondents' own use, their knowledge of others using drugs on the job, and the effects on safety and performance of drug use by the respondent and his/her coworkers. We also will soon be analyzing the new household survey which will include information on drug use in business and industry with regard to health consequences and the rate of job absenteeism.

- We need to understand the impact of the work environment itself on the drinking or drug taking behavior of employees. To determine this we need to examine data currently being collected as well as focus more epidemiology research for this purpose.

- We need to further assist private industry by providing support and technical assistance for the development of certification procedures and quality assurance guidelines for urinalysis laboratories.

In summary, the workplace provides an excellent forum for dealing with drug abuse through education, prevention, early intervention, and referral for treatment. If deemed necessary by an employer, drug testing should be considered as one component of a work substance abuse policy. We are trying

to encourage the development of workforce policies that will be powerful and effective enough to make an impact on this country's drug-taking behavior and contribute significantly to our overall demand reduction strategy.

This concludes my formal statement. I will be happy to answer any questions you may have.

Submission to
Select Committee on Narcotics Abuse and Control

by

E.A. Weihenmayer, III
Vice President - Human Resources
Kidder, Peabody & Co. Incorporated
Chairman, Wall St. Personnel Management Association

Congressional Hearing
May 7, 1986

Enclosures

1. Testimony
2. Drug Prevention Programs of Leading Wall St. Firms
3. Kidder, Peabody's Drug Policy
4. Kidder, Peabody's Q&A to Managers on its Drug Policy
5. Kidder, Peabody's Policy Acknowledgement Form
6. Kidder, Peabody's Urinalysis Tests

Kidder, Peabody & Co.
Incorporated

Congressional Hearing
Select Committee on Narcotics Abuse and Control
May 7, 1986

Thank you for the opportunity to share with your committee my thoughts on the growing drug problem in American industry. I am Ed Weihenmayer, Vice-President - Human Resources of Kidder, Peabody, one of the country's oldest and largest investment banking and brokerage firms, with over 6,500 employees. We are headquartered in NYC. I am also Chairman of the Wall St. Personnel Management Association, which umbrellas 40 of the largest firms in the securities industry. Together, these firms represent more than 150,000 employees.

There is a growing industry focus on company initiatives which protect the financial assets of the American investor. Kidder, Peabody, for example, services 225,000 individual accounts - men, women, parents, children, widows, widowers, retirees; many IRA's, many modest accounts, and obviously some large accounts too. This trust placed in us is an awesome responsibility. We carefully train our brokers to operate in a manner which upholds this trust; we teach our managers to monitor account activity effectively; we carry insurance on all accounts in case the system breaks down; we bond all employees...and we try to be extra thorough in hiring our employees. We conduct extensive reference checks, and fingerprint all employees in accordance with NYSE regulations.

Lately, bombarded as you have been with data on the national drug epidemic, we have grown increasingly concerned over the use of drugs by our employees. Any such use jeopordizes the protection, the security, and the trust I mentioned earlier. I'm tempted to share with you some of the war stories of drug use and infiltration in our industry - but you've already heard some of these or others like them. Not surprisingly, I regret to say, Kidder had its share of drug-related thefts and account manipulations over the past year. While details are available, you should at least know that one of these resulted in a multi-million dollar loss. I am pleased to report that through insurance coverage and Kidder's own $1,000,000+ out-of-pocket contribution, no customers lost money, but the risk is always there. So is our concern over employee drug use.

Kidder, Peabody has a 5-point drug prevention program. First, we have a written and distributed policy which prohibits employees from having illegal drugs in their systems while on the job. Please note that the policy does not address when the drugs are used, where they are taken, or whether the employee is job impaired...only that the employee has illegal drugs in his or her system. Most will

agree that Kidder and our customers are better off in a drug free environment. We feel we have a right, a business right and, yes, a legal right, and certainly a responsibility to our customers, to strive for a drug free environment.

Second, every employee joining us signs an acknowledgement of our drug policy, as part of the enrollment procedure. Third, every new employee at HQ is given a drug screen using a urinalysis - either on a pre-employment basis or on the first day of work. To date, we have tested 526 applicants and found 38 cases of drug use. Kidder, incidentally, is never advised of a positive drug test result until the initial screen has gone through a second - and I'm told 100% scientifically accurate - confirmation test. The low number of applicants testing positive is no doubt influenced by their upfront knowledge of the drug screen. Some applicants simply drop their candidacy - that's OK. Others may frankly regulate their use, since each drug stays in one's system for a predictable number of days after ingestion. Consequently, avoiding detection is not that difficult. Still, we feel the test is an effective deterent and sets the tone of our drug program. We have had no employee incidents develop from these 526 screens.

You may be surprised that we have actually hired some people who tested positive. They claimed their use was social and infrequent; they pledged to discontinued use; they signed the policy acknowledgement; and they agreed to be tested on an unannounced basis over the first six months of their hiring. Their supervisors were obviously involved in these hiring decisions. To date, all those retested have passed the followup urinalysis. Incidentally, all employees hired on this basis have been very cooperative in this process.

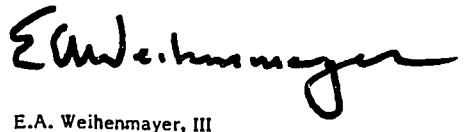
The fourth component of our program involves specific training of supervisors and managers in drug-related matters. You would be startled over how uninformed many managers are about the drug scene.

Lastly, we have an Employee Assistance Program which aids employees who have drug problems to get the help they need. This program is administered by an outside organization of professional psychologists and psychiatrists, basically at company expense. If an employee seeks help from that organization directly, it is handled on a strictly confidential basis. The company also refers employees who seem to have drug or other personal problems which are interfering with their job performance. Even these company referrals are afforded certain confidentialities.

You have probably noted that our current program does not include drug screening of existing employees, except on a for-cause basis. We recognize that this is a

weak link in our effort to achieve a drug-free environment, but we have simply chosen to let the legal environment clarify itself somewhat before we decide whether to periodically screen our employees. While we believe drug screening in a private firm is permissible from a legal standpoint, it still raises invasion-of-privacy questions from an ethical and employee relations standpoint. So, while Kidder has made no decision yet on testing existing employees, when it does, it will have to weigh these concerns against the dangers which employee drug usage imposes on the firm and on our 225,000 customers. For some reason, most of us are comfortable testing airline pilots, bus drivers, and nuclear power plant operators for drug use, because physical safety is involved. I view drug testing used to ensure the financial safety of America's investors as a very reasoned and comparable precaution. I would encourage clarifying legislation in that regard.

Gentlemen, thank you for giving me the opportunity to speak with you about this growing drug problem and one company's response to it.



E.A. Weihenmayer, III
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DRUG PREVENTION PROGRAM SUMMARY - LEADING WALL STREET FIRMS

Firm	Written Policy	Policy Distributed/ Acknowledged	Urinalysis	Supervisory/ Managerial Training	Employee Assistance Program
Kidder, Peabody	Yes	Distributed to all employees/new employees sign acknowledgement in enrollment process	Yes, for all new hires in NYC. No testing for existing employees except for cause.	Yes	Yes, with outside organization.
Goldman, Sachs	Yes	Policy stated in Employee Handbook given to all employees	Yes, for all new hires in NYC. No testing for existing employees.	Yes	Yes, with outside organizations.
Merrill Lynch	Yes	Distributed to all employees	No	Yes	Yes, with outside organizations.
Smith Barney	Will be distributed in August	Will be added to new hire package in August	Still under review. Will possibly be the same as Kidder's.	Yes	Yes, with outside organizations.
Drexel, Burnham, Lambert	Yes	Not distributed or signed by employees	No, drug use is addressed via polygraph.	No	Yes, with outside organizations.

Kidder, Peabody & Co.
Incorporated

December 11, 1985

TO: All Employees
RE: Drug Use Policy

The illegal use of drugs in this country is on the rise, both socially and in the workplace. Like most firms in our industry, Kidder, Peabody has a continuing objective to provide the highest quality service to our many clients and to safeguard their assets. Kidder, therefore, is taking three initial steps that will benefit our employees, our clients and the firm itself.

1. Kidder has had a long-standing policy regarding the illegal use of drugs, and we want to ensure that this policy is properly communicated to—and understood by—all employees. The policy is:

   "Possessing, using, purchasing, distributing, selling, or having controlled substances in your system without medical authorization during the work day, on the firm's premises or while conducting company business, is inconsistent with the firm's business interests and will be grounds for disciplinary action, up to and including immediate termination."

   The firm reserves the right to take appropriate steps to investigate compliance with this policy.

2. Kidder is making available an Employee Assistance Program that employees may utilize on a strictly confidential basis. Counselors from the Program specialize in the treatment of drug problems. (We will provide more information on this Employee Assistance Program in the December Inside Kidder.)

3. We will also be introducing a drug screening program in New York for applicants. It will be handled directly by Human Resources as part of the employment process.

We trust you will understand and support these policy initiatives.

Ed Weihenmayer

E.A. Weihenmayer

Kidder, Peabody & Co.
Incorporated

December 5, 1985

TO: Department Managers, Regional Managers and Resident Officers
RE: Illegal Drug Use in the Workplace

Illegal drug use is on the rise, both socially and in the workplace. It's no secret that this problem exists on Wall Street as well as in Corporate America.

Like most firms in our industry, Kidder, Peabody has a continuing objective to provide the highest quality service to our clients and to safeguard their assets. The Management Committee has asked Human Resources to take the initiative with a number of leading firms in our business to stimulate an industry effort focusing on the drug problem. In this regard, we believe it is important for us to take the following initial steps which are intended to benefit our employees, our clients and the firm itself.

1. Next week, all employees will receive a copy of the firm's policy regarding the illegal use of drugs.
2. The December issue of Inside Kidder will discuss Kidder's policy and the Employee Assistance Program provided by the firm as a resource for employees to help themselves. We will regularly communicate Kidder's policy to managers and employees.
3. Beginning early in 1986, a drug screening program for job applicants in New York--at all levels--will be coordinated by Human Resources. All individuals interviewing for employment at Kidder should be advised of the firm's policy and this practice at an early stage in the screening process.
4. Training in drug awareness and policy implementation for New York managers/supervisors will begin early in 1986.

We look forward to your support. To aid your understanding of the illegal drug issue, please review the attached material and refer to it when necessary.

E.A. Weihenmayer

Illegal Drug Use: An Overview for Managers

What is Kidder's policy regarding drug use?

Possessing, using, purchasing, distributing, selling, or having controlled substances in your system without medical authorization during the work day, on the firm's premises or while conducting company business, is inconsistent with the firm's business interests and will be grounds for disciplinary action, up to and including immediate termination.

Who are the illegal drug users?

A 1983 Wall Street Journal article about cocaine use in the financial services industry stated, "Some of the brokers, dealers, traders, lawyers and executives snorting it--most of them young males with high-pressure jobs and incomes to match--are making costly mistakes in business judgment."

A doctor at a New York hospital offers one explanation for the high incidence of use: "The baby boom generation of post World War II has shifted from marijuana to cocaine. Many of them got comfortable with the idea of so-called recreational drugs in the '60's and '70's and they are smack dab in the middle of life, dealing with problems they never thought they would have to deal with."

In a recent three-month period, the national hotline for cocaine users and victims responded to 10,000 callers. Hotline founder Dr. Mark S. Gold stated, "Cocaine is no longer the drug of the very rich, of rock and TV stars, of million-dollar-a-year athletes. It is increasingly the drug of choice of middle-class America, of men and women who, by most yardsticks used to measure success, are successful."

Whether or not these quotes adequately describe the scope of the problem, there is no denying its existence.

What are the dangers of illegal drug use?

- Performance may suffer, because an employee whose judgment is impaired frequently makes costly mistakes, particularly in jobs that require quick decisions. Performance may also suffer when time and attention are channeled away from job functions and into acquiring and using drugs.
- An employee who uses drugs extensively may have to spend a great deal of money every week to support his or her habit. The temptation to steal or to commit fraud to pay for drugs is always there.
- With each disclosure of actual or suspected employee drug use, public trust in the industry and inevitably in our firm diminishes.

What are the warning signs of drug use?

- Unusually irritable and agitated behavior.
- Wide mood swings.
- Unpredictability.
- Indecision and fatigue alternating with overconfidence and increased energy.
- Errors in judgment.
- Excessive and unexplained absences and latenesses.
- Last-minute requests for vacation days.
- Heightened suspicion of others.

Of course, any one or more of these signs could be the result of problems other than drug use. Firm policy requires that prudent judgment be exercised in every case of suspected drug use before any action is taken.

What is the appropriate focus for combating illegal drug use?

Of course, criminal aspects of illegal drug use are of great concern, but the immediate focus of the firm's program is the quality of the employee's performance.

One of a manager's prime functions is evaluating and improving employee performance. Once you tell an employee to improve performance, it is the employee's responsibility to respond. Ideally, counseling by the manager will remedy a performance problem. If the problem is drug related, Kidder encourages the employee to seek outside help.

Does Kidder plan to screen current employees for illegal drug use?

Employees should anticipate drug screenings in the future and take action now to terminate any illegal drug use.

Is drug testing an invasion of privacy?

Invasion of privacy in a legal sense refers to invasion by the government only. A private firm can conduct a screen as long as it is not specifically prohibited by law from doing so. Some employees may consider drug screening an invasion of privacy from the standpoint of their own personal values, and this is understandable. However, while Kidder is sensitive to the importance of such individual value

judgments, it also must strive to operate in a drug-free environment and regards drug screening as an appropriate means to that end.

How can you, as managers, help control the problem?

You can help by continually evaluating your employees. Be sure to document performance problems, recommendations, advice or warnings. This is important to countering any legal challenges to whatever action the firm may ultimately take.

Once you realize that an employee's performance is not up to par and that the problem is a personal one rather than lack of capability, discuss your performance evaluation with the employee. Your objective at this stage is to help the employee improve performance. One option, where it seems indicated, is to advise any New York employee of the availability of the (outside) Employee Assistance Program which is described below. Do not accuse an employee of drug abuse; you may be wrong and even if right, the accusation may be counter-productive. Please call George Carson or Ed Weihenmayer for guidance.

How does the Employee Assistance Plan (EAP) work?

George or Ed will coordinate all referrals of employees by managers to Robert Rothenberg of Harris Rothenberg Associates, 80 Wall Street, 422-8847. Alternatively, employees may contact the EAP directly on a personal and strictly confidential basis. (Kidder will not be provided with employee names or details of treatment.) Harris Rothenberg Associates specializes in treating drug and alcohol-related problems. One of its counselors will make an assessment of appropriate steps for each employee to take to resolve the problem. It is then the employee's responsibility to follow through on treatment.

Kidder will pay for the initial diagnosis and determination of appropriate treatment. Any subsequent treatment will be at the employee's expense, defrayed by applicable insurance coverage.

Kidder, Peabody & Co.
Incorporated

Drug Policy

The illegal use of drugs in this country is on the rise, both socially and in the workplace. Like most firms in our industry, Kidder, Peabody has a continuing objective to provide the highest quality service to our many clients and to safeguard their assets. Kidder has, therefore, taken certain steps that are intended to benefit the firm, our employees and our clients.

The first step is to ensure that all employees clearly understand the company's policy regarding illegal drug use:

> **"Possessing, using, purchasing, distributing, selling, or having controlled substances in your system without medical authorization during the work day, on the firm's premises or while conducting company business, is inconsistent with the firm's business interests and will be grounds for disciplinary action, up to and including immediate termination."**

The firm reserves the right to take appropriate steps to investigate compliance with this policy.

The second step entails a mandatory drug screen for new hires in New York. This will be handled directly by Human Resources on a confidential basis as part of the employment process.

Please acknowledge your understanding of Kidder, Peabody's policy and your acceptance of these conditions of employment by signing below.

_____
Name (print)

_____ _____
Date Signature

Kidder, Peabody & Co.
Incorporated

Drug Screen
Urinalysis Procedure

First test: ABUSCREEN PROFILE, test by Roche Biomedical Laboratories used in the Olympics. ($18)

Confirmation test: For all positive results of ABUSCREEN, we automatically have the specimen rescreen by gas chromotography/mass spectrometry. ($75)

TESTIMONY OF
JOHN H. RILEY
FEDERAL RAILROAD ADMINISTRATOR
BEFORE THE
SELECT COMMITTEE ON
NARCOTICS ABUSE AND CONTROL

HOUSE OF REPRESENTATIVES
MAY 7, 1986

Mr. Chairman. I appreciate the opportunity to come before this Committee on the issue of drug use in the railroad workplace, and to share FRA's experience on what was unquestionably the toughest policy issue to come before the agency in my tenure.

Frankly, Mr. Chairman, there is no accurate way to measure the extent to which substance abuse has invaded the railroad workplace. Before the rule became effective last week, FRA lacked any means to obtain post-accident toxicological tests. With rare exceptions, we could confirm the presence of alcohol or drugs only when ...

- An autopsy revealed it after a fatal accident, or

- A crew elected to submit voluntarily to testing.

Even with these limitations, we know that in the ten-year period between 1975 and 1984, alcohol or drug use played a causal role in, or materially affected the severity of, at least 48 accidents. Those accidents resulted in 37 fatalities, 80 nonfatal injuries, $20.4 million in railroad property damage, and $14 million in environmental clean-up costs. A 1978 survey on alcohol abuse conducted as part of a joint labor-management program concluded that 13 percent of railroad operating employees had consumed alcohol on the job; and an equal number had reported to work at least "a little drunk" during the study year. The existence of a problem is clear. And it is equally clear that alcohol and drug use is linked to accident severity.

Alcohol was established as a causal factor in 15 percent of all fatalities in train accidents over a recent three-year period (excluding rail-highway grade crossing accidents). Autopsies available from a recent seven-year period reveal that 16 percent of the 136 employee fatalities tested positive for significant levels of alcohol or drugs.

Inherent in these statistics is the potential for a truly catastrophic accident involving passengers or hazardous materials. One need look no farther than the alcohol-related derailment that occurred in Livingston, Louisiana on September 28, 1982, resulting in a hazardous material release that forced the evacuation of 2,700 persons.

Alcohol and drug related accidents have become one of the largest single causes of employee fatalities in the railroad industry, and that, Mr. Chairman, is a key reason why we had to act.

In 1983, and again in 1984, FRA held field hearings in each region of the country, to insure that mid-level management and rank and file employees -- who lack the opportunity to come to Washington -- could make their views heard. We heard from numerous experts, including some of the witnesses before your Committee today, and we consulted on a regular basis with the National Institute on Drug Abuse. I also attempted to form a consensus between management and labor on a rule incorporating both testing and bypass, something that proved impossible to accomplish. When we issued a final rule on July 31, 1985, we did so on the basis of a good understanding of the safety needs of the industry, the views of all affected parties, and the utility of the various competing techniques for control of the problem. It is some of these fundamental conclusions that I want to share with this Committee today.

I became convinced that the problem of substance abuse in the railroad industry is no worse -- and probably no better -- than in any other basic industry. It's a societal problem. I've seen it in my law firm, and in my own family. The difference, however, is in the degree of public exposure that results when substance abuse is brought to the railroad workplace.

A lawyer with a drinking problem may commit malpractice; a machinist using drugs could lose a finger. But a person operating a train under the influence of alcohol or drugs has a frightening ability

to threaten the lives of fellow employees, passengers, and any member of the public unfortunate to live near the site of a major accident. It's that difference in the degree of public exposure that makes effective action so critical in our industry.

The rule which took effect last week is premised on two concepts:

First, recognition that the public has an absolute right to be protected from the consequences of alcohol and drug use in the workplace.

Second, the equally important recognition that the problem of substance abuse is a uniquely human problem, one which is often a symptom of other difficulties. To be effective, a program must go beyond detection and penalties to provide incentives for self-help, peer support, and opportunities for rehabilitation.

Consistent with this second premise, it is essential to recognize that a strong rule and an effective voluntary program are complementary -- not mutually exclusive. A rule can detect, it can insure that a problem employee is removed from service. In the case of a nondependent user it may even deter. But a rule cannot rehabilitate, it cannot ensure early identification, and it cannot create a peer environment conducive to mutual support. Only a voluntary program can accomplish these objectives.

That's why, more than two years ago, the Federal Railroad Administration invited labor and management representatives to join the agency in establishing a national voluntary progam patterned on the

highly successful "Operation Red Block" initiated by labor and management on the Union Pacific. The national program is now in place on a majority of the nation's major carriers, and it has made a difference. Training sessions have reached more than 2,000 mid-level management and union officials, and we hope to double that number in the year ahead.

Implementation of the new rule, in conjunction with the voluntary program, gives the railroad industry a truly comprehensive approach to substance abuse in the railroad workplace. The rule itself has six provisions, and they can be briefly summarized as follows:

First, the rule prohibits railroad employees covered by the Hours of Service Act from possessing, using, or being under the influence of alcohol or controlled substances while on duty. The rule also includes a "per se" prohibition on working with a blood alcohol concentration of .04 percent or more.

Second, the rule requires that the railroads make specific inquiry into alcohol and drug involvement in all train accidents and report any relevant information discovered. This rule, together with complementary changes to our reporting guide, will ensure that this important dimension of human performance is better reflected in the accident data.

Third, the rule requires post-accident toxicological testing after approximately 150 to 200 events each year. These events are identified by category: major train accidents, impact accidents, and employee fatalities. Post-accident testing will permit us, for the first time,

to identify with reasonable precision the role of alcohol and drugs in those occurrences that involve the greatest threat to the safety of the public and railroad employees.

These three elements of the rule correspond to recommendations issued by the National Transportation Safety Board in 1983. We believe that these provisions are important. However, had we stopped there I believe that the rule would not have been effective, because it would not have addressed two primary problems in the railroad environment. First, the railroad industry did not have the clear right to test. If you cannot test, you very often cannot determine with certainty whether an employee has violated Rule G. At best, it comes down to one person's word against another. The disciplinary action ends up in arbitration, often with insufficient evidence to judge the truth of the matter -- or the case is compromised out with other grievances. This makes supervisors hesitant to act in situations where it must be one person's word against another's, even if the supervisor is able to identify signs of impairment. That inability to determine violations with certainty has undermined the effectiveness of the railroads' Rule G.

The second fundamental failing in the system was the lack of any meaningful incentives for employees with problems to step forward voluntarily to seek help. If the only response to a Rule G violation is dismissal, employees will not bring peer pressure against those with alcohol and drug problems. If we had failed to create meaningful incentives for the employee to come forward on their own, or for fellow employees to apply peer concern, then the rule would have been purely reactive. We would not have been able to reach people until they caused an accident.

Had we concluded the rulemaking without addressing these problems, we would have had a rule in which it would have been necessary to revisit again in one or two years. Further, we would have been faced with a steady influx of active substance abusers into the railroad workforce as older employees retire -- making these problems all the more critical. So we put three additional provisions in the rule.

The fourth element of the rule requires mandatory pre-employment drug screens. Some railroads have enjoyed a generally lower incidence of drug abuse in their employee ranks because of the older average age of railroad employees. This provision will help to ensure that the problem does not worsen as younger generations enter the railroad workforce.

The fifth element of the rule authorizes the railroads to require breath and urine tests for reasonable cause. This provision defines three situations in which testing may be required. The first is "reasonable suspicion." This refers to observations that the supervisor must be able to articulate, such as slurred speech or lack of coordination. The second basis for testing is the direct involvement of the employee in a reportable accident or injury, where the supervisor reasonably suspects that the employee's actions contributed to that accident or injury. The third basis for testing is violation of one of several enumerated operating rules that are crucial to safety. These are the kind of circumstances that clearly indicate a performance problem and call into question the fitness of the employee.

The final element of the rule is what we call the "bypass provision." It covers two situations. First, the employee steps forward and asks for help with a substance abuse problem. Second, the employee is in violation of Rule G on the job and a co-worker identifies that employee to a supervisor. In both cases the railroad is required to provide an opportunity for the employee to get help, rather than terminating that person's employment. This is a proactive provision. It gets the troubled employee out of the system and into treatment before that employee does personal harm or harms someone else. It ensures that the troubled employee will be treated fairly and will be returned to service when he/she no longer presents a threat to safety.

Note that the testing and bypass provisions will work together. The threat of detection will encourage troubled employees to seek help before they are caught. Co-workers will also be more likely to use the bypass provision to reduce their own exposure.

Mr. Chairman, our final rule contains many provisions designed to safeguard the rights of employees and to promote their respect for the integrity of this program. Although time will not permit me to describe them this morning, they are an important part of the rule and are analyzed in detail in the preamble.

The alcohol and drug problem is a real one, and the rule is a fair and effective response. I am absolutely convinced that railroad employees will live, and improve the quality of their lives, because of it.

STATEMENT OF
JAMES M. TAYLOR, DIRECTOR
OFFICE OF INSPECTION AND ENFORCEMENT
U.S. NUCLEAR REGULATORY COMMISSION

BEFORE THE

SELECT COMMITTEE
ON NARCOTICS ABUSE AND CONTROL

ON THE SUBJECT OF
DRUG ABUSE IN THE WORKPLACE

MAY 7, 1986

Mr. Chairman and Members of the Select Committee, my name is James M. Taylor. I am the Director of the Nuclear Regulatory Commission's Office of Inspection and Enforcement. I am pleased to represent the NRC at this hearing.

The Nuclear Regulatory Commission recognizes drug abuse to be a social, medical and potential safety problem affecting most segments of our society. Given the pervasiveness of the problem, it must be recognized that it exists to some extent in the nuclear industry. Accordingly, in August 1982, the NRC published a proposed rulemaking to address the matter of drug use by nuclear power plant personnel. This initiative, known as the "Fitness for Duty" rule, was to require that NRC licensees operating commercial nuclear power plants establish and implement procedures to provide reasonable assurance that all persons with unescorted access to safety systems at nuclear power plants not be under the influence of drugs or alcohol or otherwise unfit for duty. Persons would be considered unfit for duty if their ability to conduct safe operations was affected in any way by substances such as drugs or alcohol, or by the effects of other factors, such as fatigue, stress or illness.

In 1984, in conjunction with the Commission's deliberation on the final rulemaking, the nuclear industry proposed, as an alternative to NRC rulemaking, a program of industry self-regulation which could be endorsed by a Commission policy statement on the subject of fitness for duty of nuclear power plant personnel. The industry initiative was sponsored by the Nuclear Utility

Management and Resources Committee (NUMARC), an organization of senior electric utility officials formed in early 1984 to review management issues in nuclear plant operations and develop industry wide resolutions. NUMARC proposed that industry develop a comprehensive set of standards for fitness for duty programs which would be adopted by all utilities operating nuclear power plants.

In addition, the industry initiative included provisions for the Institute of Nuclear Power Operations (INPO) to conduct periodic evaluations of the extent to which the industry standards are met at individual nuclear power plant sites. INPO is an Atlanta based industry organization formed in 1981 to promote excellence in nuclear power operations. A major segment of their program includes team evaluations at nuclear power plant sites and corporate offices to review and evaluate utility safety performance against standards of excellence developed by INPO.

In recognition of the industry initiative, a majority of the Commission decided to defer final rulemaking on fitness for duty pending further development of the industry program by NUMARC and development of an appropriate supporting policy statement by the NRC staff. In August 1985, the Edison Electric Institute (EEI) published a revision to their 1983 guidance for establishing effective drug and alcohol policies and programs. This document, entitled "EEI Guide to Effective Drug and Alcohol/Fitness For Duty Policy Development", describes the key program elements and features which should be considered by each utility in structuring their individual programs. This document, which is viewed as a standard for the nuclear power industry,

provides guidance on such subjects as the development of company policy regarding drug involvement, behavioral observation training for supervisors, coordination with unions and law enforcement officials, chemical testing of body fluids, and employee assistance programs. Also, during 1985, INPO developed performance objectives and criteria for use by their evaluation teams in assessing fitness for duty programs at utility corporate offices and at operating nuclear stations.

A draft Commission Policy Statement on Fitness for Duty of Nuclear Power Plant Personnel has been prepared by the NRC staff and provided to the NUMARC Executive Group. The draft Policy Statement will soon be submitted to the Commission for final approval. The Policy Statement affirms Commission policy that persons with access to nuclear safety systems at sites shall not be under the influence of any substance, legal or illegal, which adversely affects their ability to perform their duties in any way related to safety. The Policy Statement establishes Commission policy that the sale, use, or possession of illegal drugs by nuclear power plant personnel is unacceptable. The Commission expects that such activities, if conducted onsite, will result in the immediate revocation of access to the plant and discharge from nuclear power plant activities. Further, the Commission expects that any off-site sale, possession, or use of illegal drugs will result in immediate revocation of access to the plant and mandatory rehabilitation prior to reinstatement of access.

A Commission decision to continue to defer implementation of rulemaking in this area would be in recognition of industry efforts to date and the intent of the industry to utilize the EEI Guidelines in developing effective fitness for duty programs. The Commission intends to reassess the need for further NRC action based on the success of these programs over the ensuing 18 month period following approval of the Policy Statement. During this time, NRC plans to evaluate industry's effectiveness through the review of INPO evaluation reports, periodic accompaniment on INPO evaluations, and through selected direct inspections conducted by the NRC staff.

NRC is also addressing this matter insofar as a policy is appropriate for NRC employees, especially NRC employees who are stationed at or frequently visit licensee facilities. Our deliberations on this issue are not yet complete.

In summary, Mr. Chairman, the NRC is encouraged that the nuclear industry has taken the initiative to collectively deal with the problem of drug abuse at nuclear power plants. The goal of both industry and the Commission is to establish a drug-free working environment such that the continued safe operation of nuclear power plants is not adversely affected by the mental and physical fitness of those who operate and maintain these facilities. While the Commission has not yet made a final determination on continuing deferral of rulemaking, it is the Commission's general intent that prescriptive rulemaking be withheld in those cases where NRC licensees have demonstrated progress in addressing nuclear safety matters through initiative and self regulation. The

issue of drug abuse in the workplace seems an appropriate area to give our licensees an opportunity to demonstrate that they can effectively address the problem without further regulation.

Mr. Chairman, this completes my testimony.

STATEMENT OF CHARLES E. WEITHONER, ASSOCIATE ADMINISTRATOR FOR HUMAN RESOURCE MANAGEMENT, FEDERAL AVIATION ADMINISTRATION, BEFORE THE HOUSE SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL, CONCERNING THE USE OF ILLICIT DRUGS IN THE WORKPLACE. MAY 7, 1986.

Mr. Chairman and Members of the Subcommittee:

I welcome the opportunity to appear before the Subcommittee today to discuss with you the approach the FAA has taken in dealing with the issue of illicit drug use by agency employees. This is an important topic which has posed difficult choices for many employers in all segments of our society, and I expect that it will continue to do so at least into the foreseeable future.

We in aviation like to think that we are different than people engaged in many other occupations. And in a number of respects we are, because of the very strong safety ethic which is ingrained in people from the first day they start a career in aviation. At the same time, though, we must be realistic and realize that the aviation community mirrors in a number of respects--both good and bad--society as a whole.

In light of the critical safety responsibilities which are placed on the FAA, we concluded last year that we needed to take a hard look at what actions we should initiate to assure that the use of illicit drugs by an FAA employee did not jeopardize the safety of

the travelling public. Given the size of the agency's workforce, we assumed that some agency employees used illicit drugs off duty, although we have not seen indications of any use during duty hours. In fact, over a period of time, a limited number of incidents--fortunately infrequent in nature--have come to light in which we have found agency employees with safety-related duties that have used illicit drugs in their off-duty hours. Although we have no reason to believe that illegal drug use is widespread within the agency--and, in fact, we are convinced it is not--we believe that we have a special obligation because of our safety role to absolutely prohibit the use of illegal drugs by our safety employees whether such drug use is during their off-duty hours or not. We are convinced that the travelling public shares in that judgment.

Consequently, to effectuate our determined need for a drug-free safety workforce, Administrator Engen announced an agency policy on substance abuse last August. That comprehensive policy, although strict, is essentially remedial in nature. It was formulated in a way that seeks to balance employee rights with the safety needs of the air transportation system. I would like to take a few moments now to describe our policy for the Subcommittee.

One key element of our policy is that, when there is credible evidence that any employee is involved in growing, manufacturing,

or dealing in illicit drugs, that employee will be separated by the FAA. We will also separate any employee who has direct aviation safety responsibilities or duties which could affect the safety of people or property if that individual, while on duty, uses, possesses or purchases drugs or is under the influence of drugs. All employees have been put on notice concerning these stringent measures.

In cases where there is credible evidence of off-duty substance abuse by an employee, that employee will be relieved immediately of all aviation safety-related duties and temporarily assigned other responsibilities. The employee will then be offered an opportunity to enter into an appropriate drug use abatement program or alcohol abuse treatment program. Refusal to enter into such a program will result in separation of the employee.

Once an employee has enrolled in an appropriate program, return to safety duties will be contingent upon FAA medical clearance. After successful completion of the rehabilitation program, the employee will be subject to random screening tests. Any recurrence of illegal drug use or alcohol abuse will result in immediate removal of the employee by the FAA.

In addition to the basic policy against the use of any illicit drugs by FAA safety personnel, the Administrator directed that a procedure be established within the FAA to screen for substance

abuse during the annual medical examinations which agency safety employees are required to undergo. The agency's medical staff is in the process of evaluating the qualifications of several laboratories which have competed to perform such drug screening in behalf of the FAA, and we hope to have this program in place this Fall.

In sum then, for agency safety employees we have adopted an approach that calls for a drug-free lifestyle. We have sought to regulate this policy in a way that balances individual rights with the need to promote both safety and public confidence in the safety of the air transportation system. We believe this approach will serve the travelling public well, and will reevaluate, as appropriate, the need for refinements in this program.

In terms of our regulation of employees outside the FAA, we have not at this time prescribed any drug testing program, although that issue is one which we must continue to assess. It should be noted, however, that there are more than one million airmen regulated by the FAA. Clearly, testing that entire population or even a significant portion of that population would be extremely burdensome to administer as well as very costly.

We do, however, have regulations in place which preclude any crewmember of an aircraft from serving as a crewmember while using

any drug (whether illicit or not) which affects that crewmember's capabilities in any way contrary to safety. We, also, have medical regulations concerning pilots which preclude the issuance of a medical certificate, necessary to serve as a pilot, to an individual if that individual has a medical history or clinical diagnosis of drug dependence.

There are complementary regulatory provisions concerning alcohol as well. In fact, we have had a significant degree of success with the comprehensive rehabilitation program we instituted in the mid-1970's for recovering alcoholic airline pilots. Under that program more than 600 airline pilots have returned to flight duties under very carefully controlled conditions. We have experienced a success rate of slightly better than 91%, with success being defined as no relapses over a 2-year period following the return of medical certification.

In closing, Mr. Chairman, I should note that our presence today should not be viewed as an indication that drug use is a major problem within the FAA safety workforce or in the industry population. There is absolutely no evidence to suggest that is the case. In fact, there has never been an accident involving a United States airline which has been attributable to alcohol or drug use. This speaks well, I believe, both for the concern for safety found in all segments of the aviation community and for the

FAA's regulatory approach governing the use of drugs and alcohol in the aviation environment. Nevertheless, as a provider of safety services and a key regulatory agency, we in the FAA must keep pace with changes in society and take action designed to prevent safety problems from occurring. As noted, we have taken several key steps within the agency in terms of the recent drug policy that applies to our own employees. We continue to be concerned about the potential for such problems in industry as well, and, if we identify areas needing improvement, we will not hesitate to take such additional measures in the future as may be determined necessary to protect the flying public.

That completes my prepared statement, Mr. Chairman. I would be pleased to respond to questions you may have at this time.

TESTIMONY BEFORE THE HOUSE SELECT COMMITTEE
ON NARCOTICS ABUSE AND CONTROL

CARMEN L. THORNE, Ph.D
Manager, Medical, Psychometrics and EAP
May 7, 1986

As you know, the Washington Metropolitan Area Transit Authority's (WMATA) primary mission is to provide safe, efficient and reliable transportation to the public. We employ over 7,000 individuals to carry out this mission. Due to the rapid rise in alcohol and drug abuse throughout the Nation, the Authority has recognized a need to develop a policy to address this problem among its workforce. We have established a policy and program which meets the Authority's safety requirements while providing employees with an opportunity for rehabilitation.

The Authority's negotiated Substance Abuse Policy and Employee Assistance Program enabled us to provide safe, efficient and reliable transportation to the public, while safeguarding employee rights. To accomplish two such diverse objectives was indeed a challenge.

I would like to give you a brief chronology of events which led the Authority to establish a formal Substance Abuse Policy and Employee Assistance Program (EAP).

In 1982, the Offices of Rail, Bus and Facilities Maintenance instituted mandatory post-incident medical examination policies which required employees to submit to a medical examination following specified work related incidents and/or accidents.

In December 1982, Local 689 of the Amalgamated Transit Union filed a class action grievance on behalf of the Authority's employees challenging WMATA's unilateral establishment of the post-incident medical examinations, which included blood and urine tests for alcohol and/or drugs.

In September 1983, an arbitrator issued an award denying the class action grievance and upholding WMATA's authority to implement its mandatory post-incident medical examinations primarily because the parties' collective bargaining agreement gave the Authority the right to require medical examinations at any time. The arbitrator did find, however, that Local 689 could continue to challenge the policy in individual cases on grounds such as misidentification of an employee's specimen, unreasonableness in the application of the policy to a particular employee, inconsistent application, and/or the questionable reliability of the tests for drugs.

Between the latter part of 1982 and September 1984, approximately 142 employees were terminated following post-incident medical examinations which indicated the presence of alcohol and/or drugs. Grievances were filed in virtually every termination case, and arbitration was invoked in approximately 57 cases.

Arbitrators issued a variety of awards in these cases. Some upheld the discharges, but many granted the grievances and overturned the discharges finding:

1) that the EMIT test for marijuana was unreliable;
2) that discharge was the equivalent of capital punishment and employees should be given an opportunity to rehabilitate themselves;

3) that problems with the chain of custody precluded accurate identification of an employee's specimen; and,

4) although the tests revealed the presence of alcohol and/or drugs, there was no evidence that the employee was actually intoxicated or under the influence of intoxicants while working.

In the wake of these arbitration decisions, efforts were undertaken to develop an EAP to work in conjunction with the Authority's disciplinary rules and post-incident medical policies.

In April 1984, the Authority and Local 689 began formal negotiations regarding the types of discipline to be imposed following positive findings for alcohol and/or drugs in the post-incident medical examinations. These negotiations contemplated expanding the EAP and using it as an alternative to discipline.

From April through July 1984, the Authority and Local 689 engaged in an exhaustive review of the entire alcohol and drug abuse problem. This included, among other things, surveying 27 different transit authorities and their handling of the problem; meeting with medical, legal and social experts; and, with recovering substance abusers.

Additionally, the Authority worked closely with its operating divisions to develop a program tailored to the Authority's particular needs.

On November 29, 1984, the Authority and Local 689 signed a negotiated Substance Abuse Policy and Employee Assistance Program. Local 922 of the International Brotherhood of Teamsters which also represents some of our Bus employees signed the Policy on April 2, 1985.

In January 1985, the Authority formally implemented its Substance Abuse Policy and Employee Assistance Program.

The main features of our program include:

1. The Employee Assistance Program provides for two categories of employees:

   Category I employees are volunteers; and,

   Category II employees are those who have been caught with alcohol and/or drugs in their system as a result of a post-incident medical examination.

2. Volunteers are encouraged to avail themselves of the EAP by giving them priority to non-safety sensitive jobs while in rehabilitation; they continue to accumulate seniority and other benefits; and, they can use EAP as often as necessary.

3. Our Policy stipulates the minimum levels of substances which, when detected, give rise to a presumption of intoxication, thereby eliminating the Authority's need to prove impairment.

4. Our Policy creates a Joint Labor-Management Committee which oversees the Policy and Program and is responsible for its success.

In November 1985, the Authority was sued by 18 employees who challenged their terminations as a result of positive post-incident medical examinations for the presence of drugs on the basis that their terminations deprived them of their Fourth and Fourteenth Amendment rights and their right to privacy. In addition, they alleged negligent terminations, violations of the Rehabilitation Act of 1973, and various civil rights violations.

In January 1986, the United States District Court for the District of Columbia dismissed the lawsuit and held that the Authority's administration of its post-incident medical tests, as well as its policy decision to terminate those employees who tested positive for the presence of alcohol and/or drugs, were governmental functions and thus the Authority was immune to civil litigation. Moreover, the Court found that the risk of serious injury is apparent, given the speed and closeness within which the buses and trains operate in our congested metropolitan area, so even the slightest decrease in alertness and reflex ability due to the influence of alochol and/or drugs increases the danger of accidents.

With this Policy and Program, we wanted to send out the message that WMATA must have a drug free work environment. Employees with chemical dependency problems are encouraged to voluntarily use our EAP referral services to seek treatment. Employees who are caught using or selling drugs on duty are fired without recourse. Employees who are found with drugs in their system are given an opportunity to rehabilitate themselves in order to save their jobs.

In conclusion, we feel that our program has provided a viable solution to the diverse objectives we were attempting to satisfy. We believe that we are at the forefront of our industry in our approach to handling this problem; but we are still working to restructure, redefine and refine our policy. We are committed to developing a strong EAP. We are confident that we can increase the level of awareness of this problem and we will continue to work towards establishing a drug free work environment.

Attached is a copy of the Policy. Thank You.

Washington Metropolitan Area Transit Authority

MEMORANDUM

SUBJECT: Substance Abuse Policy and Employee Assistance Program

DATE: January 8, 1985

FROM: ADMN - J. Potts

IN REPLY REFER TO:

TO: Officers, Office Directors and Local 689, ATU, Represented Employees

The abuse of alcohol and other drugs is a major health problem in today's society. The effect on an employee's job performance is costly to the employee, their family and to the employer.

At WMATA, we have become aware that some of our employees suffer from alcohol and other drug abuse. As a public employer, our primary mission is to provide safe, reliable and efficient transportation. Therefore, the Authority and Local 689, ATU, have negotiated a Substance Abuse Policy and Employee Assistance Program (EAP) in an effort to assist employees seeking rehabilitation.

The major purpose of our EAP is to refer employees to the appropriate medical and/or rehabilitation treatment and counseling to help them resolve their substance abuse problems, with the goal of returning them to their full productive job capacity.

The Substance Abuse Policy defines minimum levels of substances which, when detected, presume impairment. It then establishes uniform disciplinary rules for all substance abuse offenses. Copies of the Substance Abuse Policy and EAP are attached for distribution to affected employees and, in some instances, have already been posted at numerous locations. Briefings by the Office of LABR and Personnel and Training are being scheduled in order to more fully explain the new Policy and the elements of the Employee Assistance Program. You may contact Carmen Thorne at 637-1074 not later than January 18, 1985 to make arrangements for briefings.

The key elements of the Employee Assistance Program are as follows:

1. Medical Diagnosis - A full medical evaluation will be made at the outset of the treatment assistance process.

2. Job Performance - Although employees will be strongly encouraged to seek EAP services on their own, many employees will be referred by their supervisors based on documented evidence of declining or unsatisfactory job performances or as a result of an incident/accident.

(2)

3. Confidentiality - Voluntary participation in the EAP will be held in a strictly confidential manner and be treated as medical information.

4. Employee Responsibility - Each employee needs to make a commitment to seek help at the earliest possible stage and commit to accept this help and to establish and maintain satisfactory job performances or return that performance to a satisfactory performance or higher level following rehabilitation.

5. Referrals - EAP referrals are unique and require different combinations of resources to maximize chances for a successful outcome. Supervisors, medical and nursing personnel, family members, union representatives, treatment counselors and EAP personnel all have an important contribution to make. The objective of the EAP is to coordinate and integrate these factors in a way best designed to meet the needs of each referral.

We encourage each employee to become familiar with the substance abuse policy and the services available through the EAP. Further information on the Program may be obtained by contacting Jim Hall, EAP Counselor, at 636-3416. Pamphlets about EAP will be distributed as soon as they are available.

Attachments -
Substance Abuse Policy
Employee Assistance Program

CC: GMGR - J. Miller
LABR - G. Babic
Officers
HMRS - R. Silas
Managers
M. O'Donnell, M.D.
J. Hall
I. Clayton
J. Ellis
C. Thorne

SUBSTANCE ABUSE POLICY AND EMPLOYEE ASSISTANCE PROGRAM

Elements of the Employee Assistance Program (EAP):

1. Eligibility

   — There will be two categories of employees who will be eligible for assistance under this Program.

   — Category I employees are those with alcohol or drug related problems who voluntarily request assistance.

   — The Authority will not limit the number of times a Category I EAP participant may avail himself of the Program; however, an employee may be disqualified after multiple EAP referrals when the Joint Labor-Management Committee determines, upon appropriate medical advice that rehabilitation is not likely to be successful.

   — Category II employees are those who are subject to termination for off-duty use pursuant to Disciplinary Rule 3, and who request participation to preserve employment.

   — Category II employees will not be permitted to participate in the EAP more than once in any three year period in order to preserve employment. However, after successful completion of the EAP, a Category II employee may subsequently become a Category I participant and voluntarily seek assistance more than once within the three year period.

2. Rehabilitation Procedures and Standards

   — Actual Program procedures and standards will be determined by competent EAP Program experts.

   — Program assistance will be out-sourced to established institutions and/or organizations chosen by Authority and Union officials. Administration of the Program will be by Authority employees with oversight by a specially appointed Joint Labor-Management Committee.

   — There must be a minimum Program duration for Category II participants as follows:

Alcohol	-	30 days
Marijuana	-	90 days
Other Drugs	-	180 days

— Under appropriate circumstances, in cases where the employee was disciplined under Disciplinary Rule 6 for any drug presence for which the employee had a legitimate, but unreported prescription, the Medical Director may establish a minimum EAP duration of 30 days.

— These minimum program duration periods may be extended in individual cases by the Joint Labor-Management Committee upon advice of the Authority's Medical Department or by the Program agency.

3. Conditional Employment While in EAP

— Generally, Program participants will be eligible for "conditional employment" in non-safety sensitive jobs, subject to job availability and clearance by EAP Medical staff.

— Category I participants will continue their regular rate of pay during any period of conditional employment and will continue to accumulate classification seniority.

— Category II participants will be paid according to the wage rate of the job performed. Their seniority will be frozen effective the date of infraction, but it will be recaptured without interruption effective the date of satisfactory completion of the EAP.

— Designated non-safety sensitive positions shall be exempt from the Labor Agreement provisions on posting and filling vacancies, bidding and bumping at any time when there are EAP participants eligible for such positions.

— Selection for available non-safety sensitive position vacancies will be determined by date of hire seniority, except the Category I participants are entitled to priority over Category II participants.

— Category II participants who are disciplined for use of drugs other than alcohol, marijuana or legitimate but unreported prescription drugs, are ineligible for conditional employment during EAP.

4. Reinstatement Post-EAP

— Category I employees are entitled to reinstatement to their former job classifications upon successful completion of the EAP. If there is no vacancy, such employees will be permitted to "bump" immediately into the former job on the basis of seniority.

— Category II employees will be eligible for reinstatement after successful completion of the EAP. Reinstatement will be made to the former job classification on the basis of seniority.

5. Backpay and Benefits

— There will be no entitlement to backpay for any Program participants.

— Category I participants will be entitled to use sick leave, vacation and leave of absence without pay for periods of EAP participation. They will also be entitled to continue participation in the Transit Employee Health and Welfare Fund Plan, and they will continue to accrue benefits (such as leave accumulation, seniority and retirement) in accordance with the Labor Agreement, even when the employee does not qualify for conditional employment or where conditional employment is unavailable.

— Category II participations not conditionally employed will be entitled to continue participation in the Transit Employee Health and Welfare Fund Plan, provided they pay their own premium share and they shall continue to accrue Retirement Benefits provided they satisfactorily complete the EAP. Such employees can claim pay for accumulated vacation at the time of their release from pay status, but they shall not be entitled to receive pay for sick leave or any other benefits.

— Category I and II employees who receive conditional employment will participate in all benefits under the Labor Agreement for the duration of such work.

Disciplinary Rules:

1. Use, Sale or Possession on Duty of Any Intoxicant (Drug or Alcohol)

— Immediate Termination

2. Off-Duty Sale, Distribution or Possession with Intention to Distribute Illegal Drugs or Manufacture of Illicit Drugs Resulting in a Criminal Conviction

— Immediate Termination

3. Use Off-Duty of Any Intoxicant with Detectable Presence in the Body as Indicated by a Post-Incident Medical Examination

A. For a presence of substances in the body system which is at or above the stipulated minimum levels, while on duty —

First Offense

— Immediate release from pay status with a return to regular pay status only after satisfactory completion of EAP.

— Employee released from pay status will have ten (10) working days from notification of disciplinary action to enroll in the EAP. If that employee fails to enroll during that period, the employee will be terminated.

— Six month random testing period after reinstatement.

Second Offense

— Second offense of any detectable level within a three year period, with the exception of alcohol in which a level of .04 or more will be regarded as the minimum detectable level, will result in termination.

B. For a presence of substances in the body system which is below the stipulated minimum levels, while on duty —

First Offense

— 10 day suspension from duty.

— Detailed briefing on the EAP and the importance of participation and the certainty of discipline for future offenses.

— Six month random testing period.

Second Offense Within a Three Year Period

— Release from pay status with EAP option.

Third Offense Within Three Years From the Second Offense

— Termination.

4. Stipulated Minimum Levels

— Alcohol	- .05% in blood.
— Marijuana	- 5 ng/mL THC in blood or 10 ng/mL THC in blood plasma
— Any Other Drug	- Detectable level in urine or blood as confirmed by acceptable confirmation test.

5. Testing

— Post Incident Medical Test Policy.

— Urine and blood samples.

- EMIT urine screen for marijuana and other drugs; if EMIT urine screen test positive — then blood is analyzed for THC levels as above.

— Blood test for alcohol.

6. Physician Prescribed Intoxicants

Employees required to use prescription drugs authorized by a licensed physician are responsible for being aware of any effect such drug may have on the performance of their duties and to report the use of such substances to their supervisor prior to reporting for work. When an employee does not comply with this requirement, a physician's prescription will not be an acceptable excuse for the use or possession of an intoxicant and the employee will be subject to discipline as set forth above.

7. Definition of Intoxicant

The term intoxicant includes, but is not limited to, ethanol (alcohol), amphetamines, barbiturates and other hypnotics, cocaine, narcotics (opiates such as heroin, morphine and codeine; methodone), PCP and other hallucinogens, marijuana and any other cannabinoid (e.g., hashish). The term intoxicant also includes any other substance that alters one's senses or could affect one's ability to function in his or her job.

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LEGAL ISSUES OF A DRUG-FREE ENVIRONMENT: TESTING FOR SUBSTANCE ABUSE IN THE WORKPLACE

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I. DRUG TESTING IN INDUSTRY AND GOVERNMENT

In 1982, less than five percent of the Fortune 500 companies were testing employees for drug abuse. Today, about twenty-five percent of those firms are conducting these tests in one form or another, and many more are expected to follow this year. Among the companies that are reported to be using urinalysis to screen all job applicants for drug use are IBM, Exxon, Du Pont, Lockheed, Federal Express, Shearson Lehman, Hoffmann-La Roche, the New York Times, United Airlines and Trans World Airlines. Companies reported to be screening not only applicants but also certain current employees include Rockwell, Southern Pacific and Georgia Power.1/

Private industry is not alone in using this technique to reduce drug abuse in the workplace. Drug screening of government employees also continues to increase. The military has been using urinalysis to test for drugs for many years. The services

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have been joined by such federal agencies as the United States Postal Service and the Federal Railroad Administration. In the near future the Drug Enforcement Administration will start random drug testing. Local fire fighters and police officers are also being screened. Operators of buses, trains and subways are being tested. Prison facilities all over the country are screening correctional officers as well as inmates.

The primary reasons companies and government agencies are taking action to reduce drug abuse in the workplace are to improve the health of their workers, protect the safety of the public and other employees, and preserve and improve the quality of their products or services.2/ In virtually every case, the large companies that have set up testing programs allow their employees to seek treatment for their drug problems and almost always pay for those services. These employers recognize that their workers are their most important assets. They also realize that drug testing alone is not sufficient to deal with the problem and that workers must have access to employee assistance programs and other services that can keep them on the job and help ensure a healthier and more productive workforce.

Yet there are frequent reports in the media of a worker claiming that drug screening is a violation of his or her right to privacy. This paper will discuss the kinds of legal challenges being brought against employers using urine testing for substance abuse and the factors that motivate employees to bring

those challenges. It will also suggest ways for a private employer to defend legal challenges brought as a result of their drug testing programs or, better yet, to avoid them altogether. While most of the cases discussed concern urine testing, the issues they address extend beyond the tests themselves into all aspects of an employee substance abuse program. Any company with a drug abuse prevention program -- and that should be every company -- needs to follow the principles that these cases stand for in dealing with employees having drug and alcchol problems.

II. CONFLICT BETWEEN SOCIAL ATTITUDES AND THE LAW

Statistics show that drug screening is becoming a fact of employment. And employers using the tests in a reasonable manner are generally overcoming the legal challenges being brought against them. But why are workers challenging these testing programs?

The controversy surrounding drug screening results in large measure from a clash between changing social attitudes and law. The public is uneasy about drug screening. People are concerned that the testing will somehow be used against them, not only to affect their employment but perhaps also for law enforcement purposes. They are also concerned that, in a broader sense, it may be a starting point for increasing intrusions into their private lives. The positive effects of early detection and treatment of drug problems are clouded by fears of the negative consequences of being identified as a drug abuser.

These concerns have led to lawsuits challenging the right of employers to screen for drugs and has even resulted in a San Francisco city ordinance which virtually prohibits random drug testing of any public or private employee.3/ Similar and, in some cases more restrictive, legislation is being considered in other jurisdictions.4/ For example, a branch of the American Civil Liberties Union has recently drafted model legislation which, for all intents and purposes, would ban the use of drug testing in the workplace. This proposed legislation, which has been introduced in Maryland, would also restrict testing of applicants for employment.5/ This legislation attempts to protect workers "rights." It ignores the documented improvements in health and safety that result from drug testing programs.6/

Many workers themselves are aware of the serious problem of employee drug abuse. The more informed recognize that employers have limited alternatives to urine testing and that in most situations it is the most effective technique for detecting and preventing drug abuse. Nevertheless, a sizeable segment of the public does not want to accept the use of the tests in an employment context. People often argue that the tests are an unwarranted intrusion into their private lives, that they are "unconstitutional."

Are these people correct? The courts have usually said no. Judicial opinions tend to side with the employer on constitutionality issues. This is because the parties claiming that

drug screening encroaches upon the boundaries of rights to privacy, fairness or due process are reflecting more their social attitudes than an understanding of the law as courts have interpreted it.

Why do people have this perception? Use of marijuana and, increasingly, cocaine is widespread in this country. Several states have decriminalized possession of small amounts of marijuana for personal use. Users at one extreme believe that these legislative acts justify protecting such drug taking as a personal decision approaching a civil right. They are convinced that employer interference in this decision infringes upon their liberty and their right to privacy. A larger number of Americans are less tolerant of drug use but cannot justify the analysis of an individual's urine, breath or blood, or searches of his person or possessions by fellow humans or trained dogs, to identify the problem of drug use in the workplace. Drug use is somehow their own business and nobody else's. Everyone can identify with this feeling to some degree -- but can employers accept it as valid?

The courts, while generally upholding drug testing, are developing an emerging set of rules as to when testing is appropriate and how such testing should be conducted in order to protect the rights of employees. The following is a discussion of the applicable legal principles and common sense rules that can help in developing a successful drug testing program. It must be noted that the law is evolving rapidly in this area and

that state and local statutes can affect what employers may or may not do. Companies should consult with legal counsel (as well as other concerned individuals) before instituting a substance abuse program that may involve drug screening.

III. THE LEGAL ISSUES

The clash between changing social attitudes and the law as it affects employee drug testing has led to several legal attacks on the tests. These challenges have centered in five areas: the right to privacy, the right to be free from unreasonable searches, the right to due process, negligence law and labor law. In addition, workers have claimed that testing is a violation of federal or state rehabilitation acts which protect handicapped individuals.

A. Right to Privacy

There are two common notions of "right to privacy." One encompasses each individual's personal belief concerning those aspects of his life that are private and that should not be subjected, involuntarily, to intrusion by others. Social attitudes are reflected in the lines we draw around our private lives; when we think these lines are crossed, there will be an outcry. "It's not my boss' business what I do on Saturday night!"

But the constitutional "right to privacy" -- the right to privacy that is legally enforceable -- protects far fewer activities.

There is no specific provision in the federal Constitution guaranteeing a right to privacy. The United States Supreme Court has held, however, that such a right is implied by reading several constitutional provisions together.7/ This constitutional right to privacy has been held to protect individual decisions on matters such as marriage, family and childbearing. While the use of marijuana, cocaine and other abusable drugs has unfortunately become commonplace -- and even socially accepted in some circles -- it has never been held to come within that zone of activities protected by the constitutional right to privacy.8/ Moreover, this constitutional right to privacy protects people only against governmental intrusion.9/ Individuals acting as private citizens and private employers are not bound by these constitutional restraints.10/

B. Freedom from Unreasonable Searches

The words "right to privacy" often appear in media reports of challenges to employee drug screening but, in fact, most court claims of invasion of privacy have been based on the fourth amendment prohibition against unreasonable searches and seizures by government authorities. Plaintiffs are asserting that urine testing intrudes so far into an employee's privacy that it constitutes an unreasonable search in violation of the fourth

amendment. Workers raise this argument not only against government employers, but also against private employers. Once again, however, the fourth amendment protection against unreasonable searches protects only against unreasonable governmental interference. When a private business is screening for drugs, there is no government involvement and therefore no violation of this constitutional guarantee against unreasonable searches. Courts have found that even government employees, performing certain duties, have less of a right to expect privacy than others and therefore cannot maintain that a drug test is an unreasonable search.

A recent federal district court case upheld the testing of Washington, D.C. police officers suspected of drug use.11/ The court reasoned that

> ... [W]hile as a matter of degree we do not necessarily extend to the uniformed civilian services the same narrowly circumscribed expectation of privacy accorded to members of the military, the fact remains the police force is a para-military organization dealing hourly with the general public in delicate and often dangerous situations. So we recognize that, as is expected and accepted in the military, police officers may in certain circumstances enjoy less constitutional protection than the ordinary citizen.12/

Urine testing of other government workers also has withstood recent challenges that it violates the fourth amendment. In a case decided in a federal court in Georgia, city employees working around high voltage electric wires argued that urine testing violated their fourth amendment rights.13/ The court agreed with the terminated employees that the testing was a

search, but said that because "the government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties, ... the employee cannot really claim a legitimate expectation of privacy from searches of that nature."14/ The court balanced the intrusion of an employment-context urinalysis against the employer's need to determine whether employees engaged in extremely hazardous work are using drugs. It found that the constitution was not violated because the search was a reasonable one.

However, the courts have not clearly settled when government officials can be subjected to drug testing. Last year, a federal court, while allowing pre-employment and "for cause" testing, rejected a random screening program for state correctional officers because it allowed testing even where there was no reasonable suspicion that the officer was using drugs.15/ The court found that, before requiring a test, the state had to have "reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic beverages or controlled substances."16/

Another federal court has held that, while random drug testing may be reasonable in situations where public employees such as school bus drivers and mechanics directly affect public safety, it is an unreasonable search and seizure to subject a

school bus attendant to urine testing for drugs where there was no reason to believe the employee used or was under the influence of drugs and where she had no responsibility for the safe operation of the bus.17/

In both these cases, government attorneys argued that, under the circumstances, random testing was reasonable. In the case of the correctional officer, there were reports of illegal drug activities within the prison and one of the officers had been seen with individuals who were being "looked at" by law enforcement agents for drug-related activities. In the case of the bus attendant, the school officials expressed a generalized concern over safety on their buses, based on a significant increase in traffic accidents, an increase in absenteeism, erratic behavior by some employees and the discovery of needles and syringes in Transportation Department restrooms. The government is appealing these cases.

Because the fourth amendment does not constrain the private employer, he or she has more freedom to conduct searches in an effort to detect and deal with substance abuse in a company. For example, when investigations linked several Burlington Northern train accidents to employee alcohol or drug abuse,18/ the railroad unilaterally implemented a surveillance and search program, using dogs trained to detect drugs, in order to stop on-the-job alcohol and drug use. The union protested this action

and argued that the dog surveillance program was an unconstitutional search.

A federal court specifically held that the search was not unconstitutional, since the railroad, a private entity, was not bound by the fourth amendment.[19] The court stated that there was "nothing prohibiting a private entity from requiring any person, including an employee, to submit to a 'search' by such a dog as a condition of entering that entity's premises, or refusing entry to any person believed to be in possession of an illicit substance."[20]

Arbitrators similarly recognize that the private employer's right to search is broad. A 1983 decision approved a company search of employees' lunch boxes, trousers, shoes, socks, lockers and vehicles after reports that employees were bringing drugs and handguns onto company property.[21] The arbitrator explained:

> Arbitrators have consistently held that the employer has a right to conduct a search of lunch boxes, lockers and persons and that [penalties for] refusal to permit a search may include discharge. These arbitrators have been attentive to the motivation for the search and the circumstances under which it was conducted, attempting to balance the legitimate interest of the employer and the personal dignity of the employee.[22]

The arbitrator found that the search was motivated by the company's justifiable alarm at reports that employees were carrying drugs and handguns onto company premises. The company hired a professional security consultant, who conducted the search with as much regard for personal privacy as the legitimate ends of the search permitted. Although the timing of the search

was unannounced, advance notice of the company's policy was posted on the company bulletin board, the production office, the change room and the gates to the plant.

The arbitrator upheld this search because the employer was justifiably concerned about the health and safety of all his employees and conducted the search with reasonable regard to the personal privacy and dignity of the worker. The arbitrator recognized that informing employees of the search immediately before it was conducted would destroy its effectiveness. He acknowledged, however, that the employer could accommodate both his own and his workers' needs by notifying them that he would conduct such searches in the future.

This case illustrates an important concept. An employer often can implement many needed drug abuse prevention, identification and intervention programs without undue employee resistance if he clearly communicates what he intends to do, explains why a search program is necessary and consistently enforces the policy that he has adopted.

C. Due Process

The fifth and fourteenth amendments of the Constitution require the government to provide a person with due process before depriving him "of life, liberty, or property."23/ This is a requirement that the government engage in a fair decisionmaking process before taking measures that affect an individual's basic rights.

The courts have held that the actions a government employer takes toward its employees must be reasonably related to their jobs. When the government plans to penalize employees, it generally must notify them in advance and provide them with an opportunity to defend themselves.

Due process arguments made against government employers using drug testing generally claim that the tests are inaccurate, that the results are insufficiently related to work performance or that the employee was punished as a result of a urinalysis without being afforded an adequate opportunity to contest the test results. Again, while private employers are not bound by the constitutional guarantee of due process, wise employers take into consideration workers' notions of what is fair and allow an opportunity to discuss alleged drug use. Therefore, although the next few cases will deal with government workers, they have relevance to private industry.

1. Accuracy and Reliability

Courts that have passed on government employees' challenges of urine testing have consistently confirmed the accuracy and reliability of the tests. In a case decided in a Georgia federal court in 1984, municipal fire fighters and police officers argued that both urine testing and polygraph examinations were so unreliable that their use violated protected constitutional rights. The court examined the polygraph issue in detail and agreed that, in spite of the city's need to monitor police and

fire services, the tests were impermissibly unreliable. The urinalysis challenge, however, was presented, discussed and dismissed in a brief footnote, with the explanation that "the court is not persuaded that use of such testing procedures will violate plaintiffs' constitutional rights."24/ The Supreme Court of Georgia upheld a finding that drug testing procedures were reliable when used as the basis for revoking parole.25/

These courts did not find the lack of perfect accuracy in urine testing to be significant enough to serve as the basis for a constitutional challenge. Indeed, in an analogous situation, the U.S. Supreme Court has accepted the reliability and accuracy of breath testing equipment.26/ The Court held in 1984 that due process does not require state police to retain the breath samples of suspected drunk drivers tested on a medical device called an Intoxilyzer. The Intoxilyzer measures the alcohol level of the breath of the person tested. Although, like urine testing, it may not be perfectly accurate, the Court found that the possibility of a false positive (registering the presence of alcohol when none was there) was so slim that the preserved sample would have virtually no exculpatory value to the drunk-driving defendant. Therefore, the California police, though technically capable of preserving breath samples, were not required to do so because of the accuracy of the testing equipment.

"The materiality of breath samples," the Court reasoned, "is directly related to the reliability of the Intoxilyzer itself.... [I]f the Intoxilyzer were truly prone to erroneous readings, then Intoxilyzer results without more might be insufficient to establish guilt beyond a reasonable doubt."[27/] However, the justices believed that the testing device results were sufficient to establish guilt beyond a reasonable doubt because they found that the test was not prone to erroneous results.

Like the Intoxilyzer, the accuracy of the urine tests themselves is nearly perfect, particularly when, as recommended by manufacturers, positive results are confirmed by a second test.

In contrast to breath-alcohol testing and urine testing, courts and legislatures have found polygraph examinations -- lie detector tests -- too unreliable to use even to support employment-related decisions. Recall the fire fighters' and police officers' challenge of lie detectors and urine tests. The court ruled that the city could not use lie detector tests to combat drug use among its police officers and fire fighters -- but it could use urine testing as the basis for disciplinary action. One-third of the states have laws prohibiting private employers from requiring employees to take lie detector tests.[28/] Results of lie detector tests are generally inadmissible in court.[29/] Arbitrators also refuse to consider results of lie detector tests

as proof of the truth of the tested person's response.30/ This has not been the case with urine testing equipment.

2. Relationship to Work Performance

The relationship between test results and work performance presents a more difficult legal question than does the accuracy of the test itself. At present, urine screening detects the presence of the metabolites of drugs in the body. Test results will be positive when a recently ingested substance is detected in the sample, even though the person tested may not presently be "impaired" or "intoxicated." Current technology cannot yet measure impairment. The courts are not, however, dismissing urine testing in its present state simply because it is not able to measure physical impairment perfectly.

Opponents of the test have argued that, since ingestion of the tested substance does not necessarily mean impairment at the workplace or long-term intoxication, the results have no relation to on-the-job performance. However, longer-term impairment from the use of drugs is often difficult to measure. Reports of a recent Stanford University study of pilots who had smoked marijuana indicated erratic and potentially dangerous performance on a simulator 24 hours after use of the marijuana, long after any sensation of being high was gone.31/ In addition, theft and drug dealing in the workplace, absenteeism due to substance abuse, accidents, worker's compensation claims, health care costs and employee morale are connected with employees who use drugs on

and off the job. Nevertheless, the relationship between test results and work performance at times presents difficult legal questions, both because of the often intangible, immeasurable nature of adequate performance and the inability of the tests to measure impairment.

A recent Louisiana state court case involved a city van driver's disqualification for unemployment benefits due to misconduct on the job.[32/] A co-worker had admitted leaving the company building to smoke marijuana in the company van and was fired. The van driver, however, denied smoking marijuana on the job. When his urine test came up positive for marijuana, the city fired the driver for being under the influence of marijuana during working hours. The driver had testified that while he had not smoked it on the job, he had smoked marijuana at 1:00 a.m. the day he was tested. He successfully argued at the administrative and trial court levels that the city had failed to prove that he was "intoxicated" on the job or that he was unable to perform his work in a safe manner because of his off-the-job behavior.

The state court of appeal reversed, ruling that it was an error to require the agency to prove intoxication or inability to work. "Merely smoking marijuana, or drinking alcohol or taking any other 'recreational' drug that may impair one's driving, while one is supposed to be working as a driver," the court explained, "is misconduct connected with the employment."[33/]

The appellate court balanced the public interest against the employee's rights and found the test to present an acceptable answer to a serious employment issue. Nevertheless, the two lower tribunals did hold against the city. To avoid the problem of trying to link ingestion of drugs to impairment, many companies have drafted policies which make it a violation for employees to have drugs in their system on the assumption that illegal drug use can negatively affect performance and present safety hazards, even without present intoxication.

3. Opportunity to Contest Results

The due process guarantee of fair decisionmaking also means that a government employer must provide an employee with a reasonable opportunity to contest charges against him before he is punished.

For example, a federal court has held that it is a violation of a government employee's right to due process of law to terminate that person's employment on the basis of a positive urine test without allowing the employee the opportunity to have an independent analysis of the sample.34/ Courts have also recognized the importance of an employee's right to a hearing on a decision to terminate employment based on a positive urine test while finding that safety considerations may require holding that hearing after a person is suspended from current duties.35/ The principle behind these decisions is that the due process afforded the government employee must be a reasonable one -- reasonable

based on all of the circumstances. The same considerations of reasonableness and a balancing of factors should enter into any disciplinary decision based on drug testing. Private employers are not bound by the constitutional requirement of due process, but, as in other areas, they should act reasonably when they have evidence that an employee is abusing alcohol or drugs.

Good personnel practices, good public relations and most labor contracts require that an employee be given some notice of the reason for any disciplinary action and some opportunity to discuss that action with a superior. The private employer's best insurance against charges of unfairness in disciplinary actions is to advise employees in advance what will happen if they test positive for drug use or are otherwise identified as substance abusers. Supervisory personnel should offer to meet with an employee to discuss his work-related problems before discipline is instituted. (Caution: Supervisors should not discuss an individual's personal drug problems or accuse anyone of drug use -- this should be handled by trained personnel.) Employers should consider retesting any worker who presents plausible objections to the results of a single positive urine test.

D. Negligence Law

Unlike the constitutional claims just discussed, negligence claims can be brought against the private employer as well as government entities. Employee negligence actions against employers are generally of three types. First, an employer may

be liable for negligence in hiring a substance abuser who harms another of his employees. Second, an employer may be liable for negligence if he fails to conduct the drug screening procedure with due care. Third, while an employer has a qualified privilege to communicate test results to those in the company who need to know about them, an employer who maliciously spreads untrue reports of positive test results will not be protected from his employees' charges of libel and slander.

1. Negligent Hiring

A 1984 New Mexico case involved a boy who was sexually assaulted by an intoxicated hotel employee. The boy's parents sued the hotel, claiming that the hotel was negligent in hiring and retaining the employee. The employee had previously been fired from his job as a dishwasher because of drinking. The hotel later rehired him, even though other hotel employees knew that he regularly drank on the job.

The appellate court found that there was enough evidence for a jury to decide whether the hotel should have foreseen, and therefore should be held responsible for, the employee's behavior. It sent the case back for a new trial so that a jury could decide on the hotel's liability and the amount of damages.36/

This case illustrates the importance of controlling substance abuse in the workplace. An employer has a duty to foresee

the dangers presented by an impaired employee, and he can be held liable for substantial damages if he fails to do so.

This duty does not extend only to visitors or guests of the company. Every employer has an obligation to maintain a safe workplace for his employees.[37] This obligation is not met when an employer hires an individual who injures co-workers as a result of a substance abuse problem an employer carelessly failed to detect.

An established company policy and program against employee substance abuse, consistently enforced, could serve as an effective defense to a negligent hiring claim. An employer who has made clear that substance abuse on the job will not be tolerated, who has followed through with testing and other means of detection and who has imposed sanctions and/or offered rehabilitative assistance to substance abusers will have a better chance of identifying and dealing with the impaired employee before he causes harm. Furthermore, the employer who has instituted and consistently enforced such a policy is also less likely to be held responsible for injuries caused by an employee who, without detection, violates the company's rules on substance abuse.

2. Negligent Testing

In 1982, two Michigan job applicants were refused employment after positive urine tests. They filed suit against the laboratory that performed the tests. To support their claim that the

laboratory was liable for negligent testing, they introduced into evidence the device manufacturer's instructions which suggested that results be confirmed by an alternate testing method. Because of its failure to follow the manufacturer's labeling, the laboratory agreed to a settlement with the two job applicants.38/

Also in Michigan, two applicants for fire fighting positions sued the City of Detroit and the laboratory that had returned positive test results for marijuana. Based on these results, the city had revoked the applicants' certifications of eligibility for fire fighting positions. The city had confirmed the test results as suggested by the manufacturer. The federal court dismissed the negligent testing claims before the case reached trial.39/

These cases show the importance of following manufacturer's instructions when conducting drug screening. But an employer's duty to test with care encompasses more than simply adhering to the instructions provided by a test manufacturer. It also includes proper training of employees who will administer the tests, assuring that the tests will be performed fairly and accurately and taking adequate care to protect the chain of custody over the urine samples. Of particular importance is selecting a laboratory which has high quality control standards to conduct the testing.

3. Libel and Slander

A bus driver for a major private transportation company was suspended from work after a drug test, given as part of the required company physical, was reported as positive for marijuana. News of his suspension and the test results spread to the bus driver's family, co-workers and acquaintances. Two weeks after the first urinalysis, the bus driver was tested again. The results were negative and the company reinstated him.

A state trial court awarded the bus driver $5,000 damages for libel and slander. The court held that the laboratory and the company physician, knowing the purpose of the test and the consequences of an erroneous report, showed reckless disregard for the truth by communicating the test results without ensuring that they were correct. The Tennessee court of appeals, however, reversed this decision, holding that there was no libel or slander because the plaintiff could not prove actual malice.40/

On the other hand, in a Texas case, a railroad switchman sued his employer for libel and slander after urine test results falsely indicated the presence of methadone. The company physician who administered the urine test had explained to the company that further study would be required before he could draw any conclusions on drug use. Without any further investigation, however, the company instituted disciplinary proceedings. A second urinalysis, performed at the employee's request, indicated that a compound was present in the urine sample which had

characteristics of methadone but was not in fact methadone or any other commonly abused drug. The company nonetheless issued a statement that the switchman had been using methadone, and that this justified his dismissal. This statement was circulated throughout the company and to outsiders. The switchman collected $150,000 for damage to his reputation and an additional $50,000 in punitive damages from the railroad.41/

These cases demonstrate that employers should confirm test results and should not publicize results beyond those people who absolutely need to know. As the Texas decision proves, errors in this area can cost many thousands of dollars.

E. Labor Law

An employer who plans to institute a drug screening program or other means of detecting illegal drug use should determine whether the plan complies with employment or union contracts, and first renegotiate those contracts if it does not.

Earlier, in the context of a private employer's right to conduct searches, this paper discussed a union's suit against the Burlington Northern Railroad. That case also raised a second issue of contract law. The union argued that the detector-dog program, unilaterally implemented by the railroad, was in violation of the Railway Labor Act because it was a major change in employment conditions, made without required union consultation.

The railroad had a safety rule prohibiting on-the-job use or possession of drugs or alcohol; employees were well aware of that rule. The railroad argued that use of a detector-dog search program was within its managerial discretion to enforce the no-alcohol, no-drugs rule.

The court halted the program, agreeing with the union that the employer had changed the employment contract without the legally required union consultation. Even though there was already a rule banning drugs and alcohol on the job, a program to enforce that rule could be instituted only through collective bargaining between the railroad and the union.42/

The language in an employment or union contract binds an employer and must be carefully drafted. One arbitrator held that a clause in a union contract prohibiting the "sales or use of intoxicants or drugs" did not prohibit a union member's possession of marijuana.43/ Obviously that employer did not condone employees bringing drugs into the company as long as they did not sell or use them. He simply lacked the foresight to consider that the phrase he was using could technically be interpreted to exclude drug activity involving possession alone.

Whether judge or jury, a judicial decisionmaker is required to be objective. Labor arbitration cases often differ from court cases in this respect: the arbitrator's decisions may reflect conscious or unconscious bias in favor of allowing an employee to keep his job.44/ Companies should therefore be alert to the

existence of any careless terminology in the employment contract that might permit an arbitrator to find a way to excuse instances of substance abuse.

F. Rehabilitation Act

The Drug Abuse Prevention, Treatment and Rehabilitation Act of 1972 prohibits denial of federal civilian employment, except for certain sensitive positions, to anyone on the basis of prior drug use, unless that person cannot properly function in his or her employment.45/ Similarly, the Rehabilitation Act of 1973 prohibits discrimination against any handicapped individual by any employer who receives federal financial assistance.46/ Some have argued that the federal Rehabilitation Act (and similar state statutes) prohibit the use of urine testing to identify employees or applicants who are using drugs. However, an analysis of the statute, as interpreted by the courts, indicates that the Rehabilitation Act will probably have little, if any, impact on the use of drug testing in the workplace.

It is clear that the Rehabilitation Act protects alcoholics and drug abusers from discrimination in employment.47/ The Act prohibits such discrimination against former drug abusers as a group.48/ However, former drug abusers by definition should suffer no adverse effects from workplace drug testing since they are no longer using drugs.

The issue then becomes what effect the Act may have on current drug users. While the Rehabilitation Act covers alcoholics and drug abusers, the protected class of "handicapped individual" is explicitly limited to exclude an

> ... alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to the property or safety of others.[49]

Under this exclusion, all persons who are impaired on the job and any drug user who holds a position which affects the safety of the public or other workers would not be considered "handicapped" and therefore would not be entitled to protection under the Act.[50]

The only remaining group who might be adversely affected by workplace drug testing and could still arguably be entitled to protection under the Act are occasional or casual drug users. But again the definition of "handicapped individual," the prerequisite status for protection under the Act, appears to exclude these people from coverage. The Act defines a "handicapped individual" to be

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having any impairment.[51]

Although work is definitely classified as a "major life activity,"[52] the courts have held that the ability to qualify for any one job or even a narrow category of jobs is not a "major

life activity" if there are other options for satisfactory employment.[53/] Therefore, occasional use of marijuana or other drugs, which would disqualify a person from certain jobs, such as police officer or fire fighter, would not necessarily be a "handicap" under the Act.[54/] Occasional drug use also would not constitute a physical or mental impairment which "substantially" limits a person's major life activities. The Act appears to cover only the kind of chronic drug abuse that would prevent a person from performing substantially all jobs which might otherwise be available. In most cases however such a person would fall within the exception to the Act relating to drug abusers whose current use of drugs prevents performance of duties of employment or constitutes a direct threat to the property or safety of others.

Therefore, the Rehabilitation Act does not appear to pose a significant obstacle to drug testing in the workplace or to create any greater rights for workers who use drugs than would ordinarily exist under the Constitution and other protections discussed above. Indeed, no court has found these "rights" to exist. The only clear protection offered by the Rehabilitation Act is for prior drug abusers who no longer use drugs. Under the Act, they cannot be discriminated against as a class. However, since they have ended their drug abuse, they would not suffer negative effects from testing, i.e., they would not test positive for drugs.

IV. AVOIDING LEGAL CHALLENGES

The private employer is not bound by the constitutional restraints imposed upon the government employer. Nevertheless, private companies will be held accountable for failing to act reasonably in conducting employee urine testing or other drug detecting programs. This paper began by pointing out the clash between changing social attitudes and the laws as they affect drug testing. The private employer is legally entitled to do a great deal more than what may be socially accepted. However, because social attitudes can and do shape law and employer-employee relations, a wise employer will be sensitive to those attitudes in structuring a testing program. A drug testing program, if carried out with reasonableness and discretion, can satisfy both social and legal standards.

There are two key threshold questions that a company considering a drug testing program should address. If a company can answer those questions persuasively, its workers will in all probability accept the company's testing program and policy and not file legal challenges.

The first question an employer must answer is "Why do I want to test?" A company should be able to justify the decision to test by clearly showing employees why drug use cannot be tolerated. Would drug use cause an employee to be unfit for his job? Would drug use endanger either the safety of co-workers or the safety of the public? Does an employee hold a position of public

trust? Private companies are successfully testing across-the-board. But keep in mind that some employees -- the night janitor, the grocery store clerk -- may be able to prove that they can perform their jobs, and perform them without endangering anyone's safety, after smoking marijuana or taking so-called "soft" drugs. Both the courts and arbitrators will probably be more supportive of testing if the employees concerned are working around high-voltage wires than if they are bagging groceries. On the other hand, many companies are taking the position that illegal drug use by any of their employees affects health, safety and productivity and will not be accepted. These across-the-board policies may well be upheld.

The second question an employer must answer is "What do I do when I find that someone is using drugs?" Before beginning testing, a company must develop clear procedures, based upon a fully articulated, written policy, for dealing with employees who test positive. These procedures must be clearly communicated, consistently enforced and fairly applied. They should be firmly based on the principle that drug abuse affects the health and safety of all workers and that, where possible, drug abusers will be given assistance in overcoming their problem.

An employer must ensure that an employee substance abuse program is reasonable. Among the factors he or she should keep in mind are the following:

- Demonstrate the need for drug testing in the company; where possible, document a relationship between job performance and substance abuse.
- Develop a specific substance abuse policy and program in consultation with all parts of the company that may be affected. Union representatives, occupational health and safety personnel, security staff, personnel managers, legal advisors and, most importantly, top management all must be involved. Often companies have found it useful to bring in outside consultants to help identify problems and adopt a workable policy.
- Notify employees of the policy. Tell them in advance the penalties that will be imposed for specified violations. If necessary, modify private employment contracts and union contracts to reflect the company's substance abuse program.
- Follow through. Do not let a substance abuse program become a "paper" policy.
- Test for substance abuse carefully. Follow the manufacturer's instructions. Confirm all positive test results with another test. Make sure that persons who administer the tests and perform laboratory analyses are qualified to do so.

- Notify employees of positive test results and provide them an opportunity to contest disciplinary actions taken on the basis of those results.
- Keep test results confidential. Do not release positive test results until their accuracy has been verified by a confirmatory test and, if possible, by corroborating evidence of substance abuse. Do not let anyone who does not need to know have the results.
- Consider setting up an employee assistance program or improving an existing one.

V. CONCLUSION

Statistics abound on the costs of employee substance abuse in terms of decreased productivity, increased absenteeism, accidents at work, theft, higher health care premiums and more union grievances. There are also costs that cannot be measured in dollars: the negative publicity suffered by affected companies; the damage to positions of public trust when a police officer or a corrections guard is using, or even rumored to be using, drugs; the lowered morale of nonabusers forced to work beside co-workers who are not pulling their own weight, who are endangering others' safety and who are committing crimes right in front of them. These realities make it relatively easy for most companies to answer the question, "Why do I need to test for drugs?" The more difficult question is the second one, "What do I do when I find out that someone is using drugs?"

A drug screening program is just one of many ways of detecting drug problems. Undercover surveillance, use of drug-detector dogs and searches of employees' lockers, lunch pails, automobiles and even their persons can be used instead of -- or as a supplement to -- a drug screening program. However, without a drug detection program, only the most obvious problems will be spotted -- and only if an alert supervisor is lucky enough to be in the right place at the right time and has been trained to handle the situation properly. Whatever the method or combination of methods a company decides to employ, the consequences remain the same. The company will be forced to adopt a program to deal with the abusing employee, either by firing him or by helping him to obtain treatment.

Assisting an employee to obtain treatment is almost always the better course of action. The wise employer recognizes the need to provide health assistance to his impaired employees for moral, humane and, as important, economic reasons. While private employers have no legal obligations to rehabilitate their employees, it is often better, and less expensive, to keep a worker working than to find and train a replacement -- who may turn out to be a substance abuser himself.

There are several services available to industry today, including training programs, that can help companies handle drug and alcohol problems in a way that allows early intervention and effective treatment. This reduces absenteeism, prevents acci-

dents and makes for a healthier and safer workplace. Working through trained counselors, employers can improve the health of their employees -- and improve their job performance.

A carefully planned and implemented substance abuse policy will help a company avoid both the problems of employee substance abuse and the employee dissatisfaction that results in legal action against the company. Judges and arbitrators increasingly are recognizing the costs of substance abuse in the workplace to employers, workers and the economy. They will uphold measures to deal with the problem, including urine testing, when they are instituted in a reasonable manner. Employers who follow the above guidelines and have answered the questions "Why do I want to test?" and "What do I do when someone tests positive?" should be able to use urine testing effectively and legally.

FOOTNOTES

1. Time, March 17, 1986, p. 57.

2. The Presidential Commission on Organized Crime in their 1986 report has even suggested the usefulness of drug testing as a tool in reducing the demand for illegal drugs in this country. This article will, however, focus on the primary reasons for drug testing -- protection of the integrity and safety of the workplace, and improving the productivity of the workforce.

3. San Francisco Ordinance No. 527-85 (1985). Testing of other employees is limited to situations where the employer has reasonable grounds to believe the employee's faculties are impaired on the job, the impairment presents a "clear and present danger" to the employee or others, and the employer provides an opportunity, at employer expense, to have any blood or urine samples tested by an independent laboratory and to rebut or explain the results of any test.

4. Such legislation is being considered in California, Maine, Maryland and Oregon.

5. Maryland House of Delegates Bill No. 1672 (February 7, 1986).

6. For example, the Southern Pacific Railroad reported a 71 percent reduction in accidents and injuries attributed to human error after it began drug and alcohol screening (Time, October 21, 1985, p. 61); the Georgia Power Company stated that the accident rate at its Vogtle nuclear power project had decreased steadily since its drug program was set up, from 5.4 for every 200,000 manhours in 1981 to .49 in 1985 (Washington Post, May 5, 1986, p. B8).

7. Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("the First Amendment has a penumbra where privacy is protected from governmental intrusion"); Roe v. Wade, 410 U.S. 113, 153 (1973) ("a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that

right in the First Amendment, ... in the Fourth and Fifth Amendments, ... in the penumbras of the Bill of Rights, ... in the Ninth Amendment, ... or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment." (citations omitted)).

8. "The right to possess and use marijuana in one's home is not and cannot be classified as a fundamental right protected by a constitutional zone of privacy." Louisiana Affiliate of the Nat'l Org. For the Reform of Marijuana Laws v. Guste, 380 F. Supp. 404, 409 (E.D. La. 1974), aff'd. 511 F.2d 1400 (5th Cir. 1975), cert. denied, 423 U.S. 867 (1975).

9. "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 upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched." U.S. CONST. AM. IV.

10. Officials of the American Civil Liberties Union and the Legal Action Center, both proponents of severe restrictions on drug testing, acknowledge that such constitutional protections do not apply to private employers. Washington Post, May 9, 1985, p. D1. Testimony of Paul N. Samuels, Executive Vice President, the Legal Action Center, before the House Select Committee on Narcotics Abuse and Control, May 7, 1984.

11. Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. App. 1985).

12. Id. at 1008.

13. Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985).

14. Id. at 491.

15. McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985).

16. Id. at 1130.

17. Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986); see also Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976) (upholding blood and urine tests of bus drivers when they are involved in serious accidents).

18. Even with limited authority to confirm drug or alcohol use, the Federal Railroad Administration has stated that between 1975 and 1984 alcohol or drug use played a causal role in, or materially affected the severity of, at least 48 accidents, which resulted in 37 futalities, 80 nonfatal injuries and $34.4 million in damages. Testimony of John H. Riley, Administrator, Federal Railroad Administration, before the House Select Committee on Narcotics Abuse and Control, May 7, 1986.

19. Engineers v. Burlington Northern R.R., 117 LLRM 2739 (D. Mont. 1984).

20. Id. at 2740.

21. Shell Oil Co. v. Oil, Chemical and Atomic Workers, 84-1 Lab. Arb. Awards (CCH) 3101 (1983) (Brisco, Arb.).

22. Id. at 3104.

23. The federal government is bound by the fifth amendment, which provides: "No person ... shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. AM. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. AM. XIV §1.

24. Hester v. City of Milledgeville, 598 F. Supp. 1456 (M.D. Ga. 1984), aff'd & rev'd in part 777 F.2d 1492 (11th Cir. 1986). The appellate court held that the city could order employees to take a polygraph if, among other conditions, the results of the test would not be used as the sole ground for disciplinary action. The court left open the possibility that, under certain circumstances, disciplinary action based on a polygraph examination would not violate due process requirements.

25. Smith v. State, 250 Ga. 438, 298 S.E.2d 482 (1983).

26. California v. Trombetta, 104 S.Ct. 2528 (1984).

27. Id. at 2534 n.10.

28. See Carr, Employer Use of the "Lie Detector": The Arbitration Experience, 1984 LAB. L.J. 701, 702-3.

29. See id.; see also 3 J. WEINSTEIN, EVIDENCE ¶607[04] for case survey.

30. See e.g., Glen Manor Home for the Jewish Aged v. Union of Hosp. and Health Care Employees, 85-1 LAB. ARB. AWARDS (CCH) 3139, 3141-2 (1984).

31. Time, March 17, 1986, p. 61.

32. New Orleans Public Service v. Masaracchia, 464 So.2d 866 (La. Ct. App. 1985).

33. Id. at 868.

34. Banks v. Federal Aviation Admin., 687 F.2d 92 (5th Cir. 1982) (the FAA allowed a laboratory to throw away samples before employee could independently inspect and test them).

35. Harvey v. Chicago Transit Auth., No. 83-C-9074, slip op. (N.D. Ill. 1984) (involving disciplinary action against a Chicago bus driver).

36. Pittard v. Four Seasons Motor Inn, 688 P.2d 333 (N.M. Ct. App. 1984).

37. Breach of this duty may not only constitute negligence, but may be a violation of certain laws. For example, the Occupational Safety and Health Act requires that an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees." 29 U.S.C. §654. A substance-impaired co-worker operating heavy and/or dangerous machinery could present such a hazard.

38. Triblo v. Quality Clinical Laboratories, No. 82-226166-CZ (Mich. Ct. App. filed July 15, 1982; plaintiffs Chase and Medina withdrew after settlement reached).

39. McCleod v. City of Detroit, No. 83-CV-2163-DT (E.D. Mich. 1985).

40. Ivy v. Damon Clinical Laboratory, slip op. (Tenn. Ct. App. 1984).

41. Houston Belt & Terminal Ry. Co. v. Wherry, 548 S.W.2d 743 (Tex. Civ. App. 1976).

42. Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co., 620 F. Supp. 163 (D. Mont. 1985).

43. B. Green & Co. v. Warehouse Employers Union, 71 Lab. Arb. (BNA) 685 (1978) (Cushman, Arb.).

44. See, e.g., Dufek, Underhill, "Arbitration Can Thwart Employer No-Drug Policy," Legal Times, March 18, 1985, p. 21.

45. 42 U.S.C. §290ee-1.

46. 29 U.S.C. §701 et seq. This statute has a potentially broad impact on private employers because of the large number of companies who do work under government contracts.

47. See 29 C.F.R. §32.3; 43 Op. Atty. Gen. No. 12 (April 12, 1977).

48. Davis v. Bucher, 451 F. Supp. 791, 795-96 (E.D. Pa. 1978).

49. 29 U.S.C. §706(7)(B).

50. See McCleod v. City of Detroit, Civil No. 83-CV-2163-DT (E.D. Mich. 1985) (holding that persons removed from employment as city fire fighters after testing positive for marijuana use were not "handicapped individuals" protected by the Rehabilitation Act).

51. 29 U.S.C. §706(7)(B).

52. 29 C.F.R. §32.3.

53. See Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980).

54. McCleod v. City of Detroit, Civil No. 83-CV-2163-DT (E.D. Mich. 1985)

HOUSE SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL

Hearing on Drug Abuse in the Workplace

May 7, 1986

TESTIMONY OF THE LEGAL ACTION CENTER

Paul N. Samuels
Executive Vice President

My name is Paul Samuels. I am Executive Vice President of the Legal Action Center. I would like to thank the Committee for giving me the opportunity to testify.

I would also like to thank Chairman Rangel and the members and staff of the Select Committee for the excellent work you have done to combat the epidemic of drug abuse that has gripped our nation. Many people are leading drug abuse-free and productive lives because of the Select Committee's work, and you are to be congratulated for this most important accomplishment.

The primary mission of the Legal Action Center is also to reduce drug abuse and to assist in the rehabilitation of those who suffer from it. We have concentrated for more than a decade on legal issues involving substance abuse, especially in the context of employment. For this reason, we have what may be a unique perspective on the problems of drug abuse in the workplace and urine testing for drugs by employers.

Let me state at the outset that we are delighted and encouraged by the growing awareness among employers and others in our society of the magnitude of the destruction -- both human and financial -- caused by drug abuse. Greater attention to this problem, and more resources directed toward its eradication, can only benefit us all.

Unfortunately, there are no easy solutions to the problem of substance abuse in the workplace, just as there

are no easy solutions to the drug problem in general. Employers are entitled to a workforce that is capable of performing in a reasonable manner. Employers are clearly entitled to refuse to hire drug abusers and addicts who are unable to perform the jobs they apply for. Employers are entitled to discipline, and if necessary, terminate employees who are unable -- for whatever reasons -- to perform the work they were hired to do.

At the same time, persons fully capable of performing their jobs without constituting a threat to others should not be forever barred from employment because they once had a drug abuse problem 1 or 5 or 20 years ago. Nor should a functioning and productive employee who develops a substance abuse problem be treated any differently from an employee who is stricken with any other illness: he or she should be given an opportunity to obtain treatment and allowed to continue working or to return to work when able to perform the duties of the position.

We believe that these are fair and workable standards with which to approach substance abuse in the workplace. Indeed, they are embodied in existing legislation on the federal level and in many states.

The federal Rehabilitation Act of 1973 outlaws discrimination by any federally assisted employer against

handicapped persons who are able to perform the job [illegible] drug abuse is considered a handicap under the Rehabilitation Act, employers are prohibited from firing or refusing to hire a person with a history of substance abuse unless "the use of...drugs prevents such individual from performing the duties of the job in question or [his or her] employment by reason of such current...drug abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. §§706(7), 794. Many states, including Connecticut, Florida, Illinois, New Jersey, and New York, have enacted similar statutes.

We believe that any use of urine testing for drugs by employers should, and to be legal must, be consistent with these principles. When examining the current state of the law regarding employer use of urinalysis, it is perhaps most useful to focus on two separate questions: when is it legal for employers to require urine tests?, and what may employers legally do with the test results?

Most of the litigation concerning the legality of requiring testing has centered on whether urine testing for drugs by public employers violates employees' constitutional rights to be secure from unreasonable search and seizure, to privacy and to due process. (Private companies would not, of course, be subject to these constitutional strictures.)

Courts have ruled that urine testing by public agencies is constitutional if the employer has probable cause or reasonable suspicion to believe that the employee tested is abusing drugs. Testing without probable cause raises constitutional problems.

It should also be noted that the Rehabilitation Act, which reaches those private companies that are federally assisted, and some state laws prohibit employers from using non-job-related inquiries and selection criteria concerning handicaps. These statutes may be interpreted to bar urine testing until the applicant is hired or at least offered employment conditional on submitting to the test, on the theory that they do not reveal whether the job applicant is capable of performing the duties of the position sought. Other limitations on the legality of a private employer requiring urine tests as a condition of employment are sometimes found in collective bargaining agreements. Legality aside, there has of course been a great deal of controversy as to the propriety and effectiveness of employers requiring submission to urine testing.

The other important question that needs to be addressed is what actions an employer legally may take if an employee's urine test is "positive." A great number of people in arbitration and court cases have challenged the accuracy of

test results, claiming that they were the victims of "false positive" test results, i.e. the test result was positive even though the subject of the test had not used drugs.

False positives can arise in several ways. While there are a number of different urinalysis tests now being marketed, and manufacturers and proponents of the tests believe they are generally reliable, no one claims that any of them is infallible. Even a small error rate becomes significant when large numbers of samples are tested. Indeed, most urinalysis experts -- and the makers of the tests themselves -- recommend that any positive result be confirmed by the use of a gas chromatography/mass spectometry test, the most accurate testing method available. However, many employers do not do such confirmatory testing because of the additional expense.

Accuracy problems can also arise because of laboratory error, including improper procedures and misinterpretation of test results, and by chain of custody problems. A urine specimen may be mislabelled, mishandled, contaminated on the way to or at the drug testing laboratory itself, or deliberately switched or replaced by someone who knows a true sample would reveal drug abuse. Recent studies of drug-screening laboratories by the Centers for Disease Control found some disturbingly high rates of inaccuracy. A number of arbitrators

and a few courts have overturned disciplinary or hiring decisions on these grounds.

Even if a positive urine test result is accurate, there are serious questions as to whether an employer can legally refuse to hire or fire an individual solely on the basis of that one test. As mentioned earlier, the federal Rehabilitation Act and a number of state laws only permit an employer to take action against an employee with a drug abuse problem if that problem is job-related. Urine tests unaccompanied by other evidence, such as intoxication on the job or unsatisfactory work performance, may not be enough to meet that standard of proof. Urine tests reveal only if a person ingested a drug at some prior time; they do not reveal whether the individual was intoxicated or impaired on the job or at the time the test was given.

We believe that the best way to eliminate drug abuse in the workplace is to establish a good employee assistance program (EAP). Employers should train supervisors to identify and refer troubled employees to the EAP, and encourage employees to go on their own. The EAP should include appropriate diagnosis, referral, treatment, and aftercare services. Confidentiality should be maintained to the maximum extent possible, and as required by applicable federal and state statutes (See 42 U.S.C. §§ 290dd-3 and ee-3, 42 C.F.R.

Part 2). Employers should retain those employees who overcome drug abuse; job performance problems caused by they need not continue to employ substance abusing employees unable to perform the job.

Urinalysis tests are designed to assist qualified physicians and other health care professionals in the diagnosis and treatment of drug abuse and addiction. Provided that an employer implements necessary safeguards to ensure that the results will be accurate, urine testing can be a useful and appropriate tool in an employer's campaign against drug abuse if used as part of a confidential employee assistance program to help diagnose and treat drug abusing employees (subject of course to collective bargaining statutory or constitutional constraints). Employees must be given advance notice of the company's policies, and discipline must relate to job performance.

We believe that this type of program will address the problem of substance abuse in the workplace in both a fair and effective manner. Employers will reduce the drug abuse at their worksites, hold on to valued and trained employees who overcome drug abuse problems, and weed out drug abusers who are unable to perform the job and unwilling to enter or respond to treatment. Employees and job applicants will receive individualized and just consideration, the assurance

that discipline will be based on job-related factors, to perform the job, and appropriate treatment.

We look forward to working with the Select Committee on these important issues, and would be happy to provide whatever assistance we can, whenever we can.

TESTIMONY BEFORE U. S. HOUSE OF REPRESENTATIVES

SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL

LABORATORY ANALYSIS OF URINE SPECIMENS FOR DRUGS OF ABUSE

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MAY 7, 1986

The increasing abuse of drugs in the workplace is causing many employers to begin testing for the presence of drugs and drug components in the urine of their employees. These tests are designed to decrease the chance of hiring an individual who abuses drugs, to determine if drugs are involved in unusual or dangerous employee behavior, and to identify drug abusers in the workplace so that they can be directed to assistance programs. The goals are to increase employee efficiency, improve employee safety and ultimately, increase company productivity. For this much importance to be placed on the results of urinary drug tests, there is no room for error; the drug identification must be accurate and beyond any reasonable doubt.

A urine drug testing program is a complex relationship between a company and a qualified laboratory. The components of a successful program include sample collection, transport to the laboratory, storage in a secure place within the laboratory, analysis of the sample, and a report of the results back to the company. Such a urine testing program has two important features that distinguish it from usual analysis by a clinical toxicology laboratory. First, the samples are forensic specimens, and strict chain-of-custody must be followed during all phases of the program. This assures that the integrity of the sample is not violated and that personnel who handle the sample can be identified. Second, the actual analysis is divided into screening and confirmation tests. Screening tests are usually easy and relatively inexpensive to perform. Unfortunately, the results are not one hundred percent accurate. Thus, a second, confirmatory test that is sensitive and specific for the drug and drug component in question must be performed.

The issues, pertaining to the laboratories involved in urine drug testing are as follows:

1. Certification of such laboratories should be improved.

2. Accurate analysis of each sample must be performed by the laboratory, and all positive samples must be confirmed by either gas chromatography coupled with mass spectrometry, gas chromatography, or high performance liquid chromatography.

3. Laboratories must be experienced in the handling of forensic samples.

4. Blind, quality control samples must be used to monitor daily laboratory performance.

Currently, laboratories can be certified by several mechanisms, the best of which is the College of American Pathologists. While participation in this certification program does test the laboratory's ability to detect drugs in blood or urine, it does not focus on drugs of abuse. Furthermore, the laboratory knows when such certification samples are coming, and they can devote unusual effort to their analysis. The Department of Defense Certification Program specifically tests the laboratory's ability to detect marijuana, cocaine, and amphetamine abuse. To my knowledge, no certification program, other then the Department of Defense, provides samples to be analyzed without the laboratory's knowledge.

Thin layer chromatography or immunoassay methods for qualitative drug analysis are easy and relatively inexpensive to perform and are adequate as screening tests. However, more specific methods of analysis are required to confirm all positive samples. The preferred method for confirmation of urines that have been screened positive are gas chromatography coupled with mass spectrometry, gas chromatography or high performance liquid chromatography. These methods are neither easy to perform nor inexpensive. In an attempt to keep costs low, some laboratories may choose to use thin layer chromatography to screen a sample and an immunoassay to confirm positive specimens. This method of urine drug analysis will result in an unacceptable number of false positive samples, leaves reasonable doubt as to the accuracy of the report, and is probably not legally defensible. Given the consequence of positive results, only the highest possible standards of analysis are acceptable.

The analytical result is only as good as the integrity of the sample. High integrity can be assured by rigorous chain of custody procedures, routinely followed in reputable forensic toxicology laboratories. Only laboratories familiar with the handling and storage of forensic samples

should, therefore, be involved in urine drug testing programs. Furthermore, monitoring of this activity should be an integral part of certification and quality control programs.

Finally, good quality control programs are necessary to monitor daily laboratory performance. This is the only way to determine whether false positive and false negative data is being reported by the laboratory to the employer. False positives can be eliminated by the use of a well-validated confirmation assay for all samples that initially test positive. False negatives can be detected only by blind quality control samples that are processed in a manner similar to routine urine specimens without the laboratory's knowledge (1).

In summary, the highest standards of laboratory practice are necessary to assure that urine tests for drugs are accurate. The specimen identity must be indisputable, the analysis must be specific and accurate, and the results must be legally defensible. It is possible to achieve these goals in testing for drugs in the workplace. however, it will likely be necessary to exercise controls over the continued monitoring of the laboratories involved in such drug testing programs.

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STATEMENT BY

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SUBMITTED TO THE

SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL
U.S. HOUSE OF REPRESENTATIVES

ON

DRUG TESTING OF ALL FEDERAL EMPLOYEES

ON

MAY 7, 1986

My name is Kenneth T. Blaylock. I am the National President of the American Federation of Government Employees, AFL-CIO. We represent 700,000 federal workers across the country.

We are pleased to appear here today to testify on a frightening proposal to drug test all federal workers, and we want to express our appreciation to the chair for holding this timely hearing. We hope this hearing receives wide attention. The drug testing proposal should concern all workers because if you can do this to federal employees, you can do it to every one else. Under this scenario, federal employees would be tested first, closely followed by contractor employees and their suppliers. With this precedent, all employees would be vulnerable to this intrusion.

There used to be a time when conservatives had principles. We disagreed with them over the role of government in society and the dangers of economic power to a democratic society, but at least we understood the principle on which their philosophy rested. Henry David Thoreau succinctly summarized this philosophy saying, "The government which governs least, governs best".

But now we face an Administration parading under a conservative banner which seems ready to sacrifice any conservative principle for the sake of a momentary P.R. advantage. We have seen this Administration sacrifice the principle of separation of church and state for a simplistic stance in favor of prayer in the school; we have seen them

sacrifice the principle of individual choice for the government dictated morality of banning abortions; and we have seen the principle of national sovereignty subverted in order to back Somoza thugs known as "contras".

Now we see the culmination of this cynical fear mongering in lieu of principle to endorse the witch hunt mentality of universal drug testing of federal employees.

Let's put one issue to rest. AFGE and the members of AFGE detest drugs. We detest the harm that drugs cause to individuals and society. We hate the criminals that prey upon the weak and susceptible for the sake of "the profits" of the drug trade. We stand ready to enlist all federal workers and their families to put a halt to the illegal drug trade. AFGE has long sought to negotiate strong drug and alcohol treatment programs. We have developed model contract language to address our concerns. The Code of Federal Regulations (792.101-105) as mandated by Public Law 91-616 establishes as policy the need to "offer appropriate prevention, treatment and rehabilitation programs and services". Yet all too often we see "paper programs" with no money or skilled personnel to back them up and effectively deal with this problem.

As a matter of fact, we have difficulty in understanding why a universal drug testing program which at the minimum would conservatively cost $54 million [$11 per initial screening with an experience factor of 20 percent testing positive, and $75 for follow up tests (cost estimates derived from Roche Medical

Services)] is being proposed while at the same time the Administration is proposing cuts (according to the President's FY 1987 Budget Appendix) to the account in Customs, which is involved in drug interdiction, by $14 million and 1,547 personnel. The initial $54 million cost would go to over $100 million if the testing were extended to the contractor work force.

We will work with all people concerned with drugs in our society to restore and bolster drug prevention and interdiction funding. However, what AFGE will not do is compromise the fundamental, constitutional principles of privacy and freedom from arbitrary search and seizure for the sake of a McCarthy-like witch hunt. We refuse to be stampeded into acquiescing to a program which is morally repugnant and repulsive to a free society.

Let's step back and recognize exactly what we are talking about. The proposal is to single out 2 million of the nation's 113 million work force and tell them once or twice a year that they will be mandated, forced at threat of job loss, to go to a secure area and urinate publically--that is, in front of a witness. (Without the public urination, drug users inevitably will smuggle in a "clean" urine sample.) If that person (as many people are) is on a prescription drug, they will have to go through the secondary anxiety of the follow-up testing. All of this with no guarantee that the greatest substance abuse in the work force will be addressed at all--alcohol abuse.

Let us note that the previous cost estimates are not the total cost which will be borne by the government for this program. In addition, the cost of the public witness must be factored in; the lost work time must be added. Even if the tests are 99.5 percent accurate at the second level of tests, the federal government would have 200 misdiagnoses. Aside from the injustice to those 200, the federal government would be liable for penalties from those 200 employees. Judging from the Texas court case which awarded $200,000 to a former employee who was falsely accused of illegal drug use, this would generate an additional cost of $40 million plus legal costs. Of course, the human side cannot be neglected. What happens to those individuals who have their careers and lives ruined because of errors in the testing process or mistakes in processing the results? This has happened. The army has discharged servicemen, ending their military careers and thereby prejudicing private employers from hiring these individuals. Then they found out the tests were flawed.

It should be noted that press reports allege 20 percent of all of DOD Compuchem tests were off the mark by 20 percent or more of their readings of quality control samples in 26 percent of all 1984-1985 test batches.

Yet, even given these fiscal concerns, this should not be the consideration which decides this issue. Even if there is no cost to the entire testing process, and even if the tests are 100 percent accurate, should an employer, even the federal

government--without overwhelming need because of the nature of the job or reasonable cause--subject their entire work force to such an invasion of privacy as a condition for holding a job and earning a living?

For AFGE the answer is a clear "no". For those who answer "yes", they should recognize what a slippery slope they are on. Lie detector tests on any legal or moral issue as a condition of employment--as a condition of life--become feasible and consistent. All the legal and constitutional protections against arbitrary use of governmental power against individuals become waived to the economic power of the employer over the employee.

The Fourth Amendment to the Constitution protects an individual's reasonable expectations of privacy from unreasonable intrusions by the state. In determining whether an individual has reasonable expectation of privacy and whether the governmental intrusions are reasonable, courts have generally weighed the need to search or seize against the invasion such action entails (the so-called "balance test"). Even where the public interest clearly weighs in favor of such drug testing (for example, police officers), the courts have held that "there must be a reasonable objective basis to suspect that a urinalysis will produce evidence of an illegal drug use" (Turner et. al. v. Fraternal Order of Police, et. al., No. 88-1213, November 13, 1985). In a similar case, involving bus drivers, the court upheld drug testing, but only when bus drivers were

involved in a serious accident or two supervisory employees concurred that the employee was likely under the influence of intoxicating liquors or narcotics.

Now, I ask you how can the federal government meet this "need" standard in drug testing a GS-4 clerk typist in the Census Bureau. What issues of public safety, or public interest, will the federal government bring to bear to show that this clerk typist should be deprived of the constitutional protections enjoyed by a normal U.S. citizen? We are sure they cannot.

AFGE knows of no full scale, crisis level drug problem within the federal government. We would like to see documentation of what type of drug problem exists. Additionally, there is no evidence that Federal employees have a greater problem than other groups of workers. In fact, there is evidence to the contrary in that there are only a handful of cases each year involving illegal drug use.

However, after hearing Attorney General Meese's endorsement of this proposal, we are concerned about the potential use of hallucinogenics at the Justice Department.

Even given the facts, we are not reassured that this proposal will die a deserved death. We are fearful because there has been a long-term, gradual erosion of worker rights for federal employees as compared to the rest of the civilian work force.

Unlike other workers, federal employees are:

- o Denied full political participation in our democratic society;
- o Denied the option of an agency shop;
- o Denied the fundamental right to strike;
- o Subjected to polygraph tests in great numbers (the recent House legislation on polygraphs continues this separation);
- o Subjected to arbitrary performance appraisal systems;
- o Denied a "property" right to their earned retirement; and
- o Subjected to invasion of privacy by computerized data banks.

We are greatly concerned that there are some people in this Administration who believe it is in their interest to separate federal employees from the rest of the work force, to create a second class work force stripped of fundamental rights of citizenship, politically neutered, and thus subjected to political manipulation and ideological conformity.

We hope this committee will help AFGE assert that a federal employee is not a second class citizen, that he or she deserves the full scope of rights granted to other workers in our society.

Thank you.

Washington, D.C. 20540

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DRUG TESTING AND URINALYSIS IN THE WORKPLACE: LEGAL ASPECTS

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DRUG TESTING AND URINALYSIS IN THE WORKPLACE: LEGAL ASPECTS

I. INTRODUCTION

The sudden, increased attention to the problems of drug abuse in the workplace has given rise to numerous questions concerning the legality of employer screening programs for drug use among employees. The legal questions affect both public and private sector employees, and the applicable laws and court decisions have arisen at both the federal and state level. Because of the novelty and complexity of the legal issues involved, there has yet to emerge a consensus on the proper approach to be taken by employers, employees, and governmental officials. This report presents a brief overview of the general legal principles most likely to be applied in this developing area of the law.

II. PUBLIC SECTOR EMPLOYEES

1. Constitutional Rights

Because the federal constitution applies to governmental action, rather than purely private action, its protections are implicated in any urinalysis testing program of government employees, both federal and state.

a. Fourth Amendment

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. The courts have ruled that extraction of bodily fluids involves a search within the meaning of this amendment.

Schmerber v. California, 384 U.S. 757 (1966) (blood); McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Io. 1985) (urine). Generally, when the government seeks to conduct a search, a warrant is required. There are, however, unusual circumstances that permit warrantless searches. One such situation involves consent; but for the search to be valid there must be a showing that the consent was voluntarily given and that the subject of the search was aware of the possible choices. Johnson v. United States, 333 U.S. 10 (1943); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

One court has held that a consent form signed by government employees authorizing urinalysis testing was inadequate to meet this standard. McDonnell v. Hunter, 612 F. Supp. 1122. Another exception permits warrantless searches of heavily regulated industries. Although one court has applied this test to uphold state mandated urinalysis testing of jockeys, Shoemaker v. Handel 608 F. Supp. 1151 (D.N.J. 1985), it is possible the Supreme Court would be unwilling to extend the heavily regulated industry exception to the warrant clause much beyond the industries already included in this exception; guns (United States v. Biswell, 406 U.S. 311 (1972) and liquor (Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)).

There are, however, two lines of cases suggesting that requiring government employees to submit to urinalysis tests at the risk of disciplinary action might be upheld as comporting with the Constitution: the first line of cases upholding state laws that require drivers to submit to blood alcohol or breathalyser tests if they are suspected of driving while under the influence of alcohol (see Mackey v. Montrym, 443 U.S. 1 (1979)) and the second line of cases permitting the government as employer to conduct searches of employee lockers and other personal areas for purposes related to job per-

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formance. United States v. Collins, 349 F. 2d 863 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966) (custom officer's locker on suspicion of pilfering). One requirement of these cases is that the evidence sought must not be related to a suspicion of criminal activity or an intent to bring a criminal prosecution. United States v. Hagarty, 388 F. 2d 713 (7th Cir. 1968) (wiretap used in a perjury trial). If either of these two rationales are used, it is possible that the courts will require, as they have in these lines of cases, some measure of suspicion or cause focusing on an individual in order to justify the urinalysis requirement.

While there are presently too few cases from which to generalize, one might say that some justification amounting to reasonableness or reasonable suspicion seems to be the standard that the courts have used in validating urinalysis testing of government employees. In Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985), the court upheld a city's requiring sewer and electrical workers (whose jobs involved safety concerns) suspected of using drugs on the job to submit to testing under pain of dismissal. The decision was based on the line of cases permitting government to conduct warrantless searches of its employees for performance related investigations. In Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F. 2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976), the court upheld a transit company rule requiring bus drivers to submit to blood and urine tests after being involved in an accident or being suspected of being intoxicated or under the influence of drugs. According to the court, the test under the Fourth Amendment is reasonableness, and the city's "paramount" interest in protecting public

safety overrides whatever expectation of privacy employees in that situation have. Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F. 2d 1264, 1267. Although the court in McDonnell v. Hunter, 612 F. Supp. 1122, ruled against the state prison's program of requiring prison employees to sign consent forms permitting various kinds of warrantless searches including urinalysis screening for drugs, its reasoning would permit testing of employees upon whom reasonable suspicion drawn from specific facts focused. This case also rejected the state's argument resting on the consent forms signed by its employees, generally prior to being hired, finding that such a procedure was not sufficiently voluntary to waive a constitutional right.

Not only are there too few of these cases from which to draw meaningful generalizations concerning what tests the courts will require of government urinalysis testing programs of employees, none of the cases actually involved wide-scale random urinalysis testing [1/] as seems to be contemplated by the recommendations of the President's Commission on Organized Crime Final Report. The one instance of a government-mandated random drug testing program that has been upheld by the courts is that conducted by the Defense Department among the uniformed services as mandated by Pub. L. 92-129, 85 Stat. 348 (1971). The statute had required the Secretary of Defense to begin a program for drug dependent members of the Armed Forces. The program established under the law identified drug abusers, prescribed medical treatment and follow-up supervision, permitted discharge of those failing the rehabilitative program, and developed

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1/ Although McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Ia. 1985), involved regulations that permitted random testing, there was evidence that random tests were not conducted and that as a practical matter tests were conducted only upon articulable suspicion of drug or alcohol impairment.

evidence that could be used in court martials. Nonetheless, the court upheld the program and its intrusion into Fourth Amendment areas on the basis of a reasonableness standard, drawing an analogy with administrative searches of closely regulated industries as approved by the Supreme Court in Camara v. Municipal Court, 387 U.S. 528 U.S. 523 (1976).

Whether a government-wide urinalysis program could meet this standard is problematic. There are considerable distinctions between the military and the civil service. Readiness and obedience are the canons of the military profession, as is the prospect of being called to duty anytime. Civilian employees are not subject to such rigors, nor are all of their tasks equally vital to the nation's security. On the other hand, the possibility that drug use is so great in the United States that drastic measures must be undertaken may provide weighty arguments toward eliminating any users from the government employ as inconsistent with the massive efforts against the drug epidemic. Congressional findings of this nature attached to a statute requiring drug testing might sway the courts into considering such random testing reasonable under the circumstances.

The cases involving the extraction of bodily fluids require that the tests be administered in a manner that comports with due process, or in a manner that does not excessively intrude upon the subject. Thus, in Schmerber v. California, 384 U.S. 757 (1966), the Court upheld a blood test administered to an unconscious suspect, by medical personnel in a hospital, at the request of the police. In Rochin v. California, 342 U.S. 165 (1952), evidence obtained by forcibly administering an emetic was held inadmissible as a process offending human dignity. In Winston v. Lee, 105 S. Ct. 1611 (1985), the Court found that extraction of a bullet under general anesthesia was in the nature of an intrusion so substantial to be impermissible as unreasonable under the Fourth

Amendment even if there were the likelihood that it would reveal evidence of a crime. Factors to be considered in authorizing surgical procedures are threat to safety of the individual and extent of intrusion on personal privacy and bodily integrity. It is, thus, possible that in addition to the question of whether the urinalysis test has been justified by some measure of suspicion focusing on an individual, the courts will scrutinize the testing itself. Some questions that may arise include: whether there need be an observer and who that observer must be, how situations in which no urine can be produced immediately be handled, and whether the tests be conducted by agency medical personnel, non-medical personnel, or medical personnel from outside the agency.

b. Fifth Amendment

The Fifth Amendment is concerned with the process by which the government proceeds against an individual. The cases have not sufficiently addressed the due process concerns that might arise in drug testing cases. Among those sure to arise if government-wide testing is begun involve:

1. Whether positive tests will be retested.
2. Whether persons will be allowed some kind of hearing to offer evidence to dispute the results of tests.
3. Whether persons may be dismissed on the basis of the tests alone (without corroborating evidence of malperformance of duties).
4. What measures will be instituted to protect the specimens as to chemical requirements and as to linking them with the identity of those being tested, i.e., to protect the chain of custody.
5. Confidentiality.
6. Relationship with rehabilitation program.

2. Protections under the Rehabilitation Act of 1973.

The Rehabilitation Act of 1973 affords protection to handicapped individuals working for employers receiving federal financial assistance. Under section 504 of the Act, no otherwise handicapped individual shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving federal financial assistance. 29 U.S.C. § 794. The term "handicapped individual" is defined by section 7(6) of the Act as any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational services provided under the Act. 29 U.S.C. § 706(7)(A). The definition, however, expressly excludes from the anti-discrimination provisions of the Act "any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. 29 U.S.C. § 706(7)(B). The Act therefore limits the extent to which individuals who are alcohol or drug abusers may argue that their conditions constitute handicaps which may be protected against discrimination.

It has been observed that the exclusion of alcoholics and drug abusers, was added to the Act by Congress in 1978 in order to make it clear that employers are not to be required to employ them if they cannot perform their jobs properly or if there is a present threat to property or safety: "Thus, the catch-22 for employees is that they must simultaneously prove that they are handicapped by their chemical dependency, but not so handicapped as to be unqualified to perform their job." Geidt, "Drug and Alcohol Abuse in the Work-

place: Balancing Employer and Employee Rights," 11 Employee Relations Law Journal 181, 184.

III. GENERAL LEGAL CONSIDERATIONS

1. Reasonableness of Policy

For governmental employers, the Fourth Amendment mandates reasonableness criteria in the administration of the tests, both in singling out employees for tests and in the actual testing procers, itself. See supra, I, 1, (a). While the Fourth Amendment may not dictate reasonableness in testing to non-government employers, tailoring a testing program to reasonableness criteria may help to avoid subsequent legal problems. Thus, testing only those employees for whom a cause exists, setting standards for when such tests would be conducted, requiring double tests for positive results on the first test, informing employees fully in advance of the motives and the possible consequences of the tests, securing the privacy of the results of the tests, testing the specimens only for drugs, and not for other conditions such as diabetes, pregnancy, and setting up safeguards to assure the confidentiality of the test results may all help to eliminate legal challenges to such program or to their results. Most helpful, would be providing time for rehabilitation before instituting disciplinary action. Attorneys advising management on these substance abuse testing programs advise them to

> simultaneously engage in three difficult and delicate balancing acts. First, they must select investigative techniques that will be effective and reliable, yet will avoid the creation of a police-state atmosphere alienating to the work force or in violation of employees' privacy rights. Second, in deciding how to deal with identified abusers, they must walk the fine line between rehabilitation and discipline.

> Finally, they must weigh the need for discipline against the risks of costly litigation or arbitration. 2/

2. Privacy

a. Public Employees.

The mention of urinalysis testing in the workplace arouses cries of "invasion of privacy," and provokes people to conjur up images of an Orwellian state. Legal protection of privacy interests is, however, very limited.

The federal constitution protects privacy basically under the Fourth Amendment, as discussed supra, section I (1). The courts have never recognized a general right to privacy or implied such a right under the federal constitution except in certain narrow circumstances, none of which directly apply to drug testing programs. The leading case is Griswold v. Connecticut, 381 U.S. 479 (1965), in which the court held a state statute prohibiting the sale of contraceptives to be void as violative of a right to privacy emanating from the Bill of Rights but not tied to any specific right. That right to privacy has been confined to certain very basic human situations. Griswold involved marital privacy. Stanley v. Georgia, 394 U.S. 557 (1969), contains dictum speaking of a fundamental right

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2/ Geidt, Thomas E., "Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights," 11 Employee Relations Law Journal 181, 182 (1985). Robert T. Angarola, in an undated paper entitled "Substance Abuse in the Workplace -- Legal Implications for Corporate Action," at 14 advises: To be most effective, urinalysis should be used as part of a comprehensive health and safety program aimed at detecting and preventing substance abuse . . . .

> The testing and sampling procedures set out in the manufacturer's instructions must be closely followed . . . .
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> . . . I would support using outside advisors in setting up the urinalysis testing program . . . .

to privacy that might encompass freedom from governmental intrusion upon the films one watches in the privacy of one's home. None of the cases, however, suggests that a reasonable intrusion into one's privacy by a governmental employer seeking to investigate fitness for duty runs afoul of any constitutional right to privacy.

Another way privacy may be protected is by statute. The federal Right to Privacy Act, 5 U.S.C. § 552(a), is a limited statute that applies to systems of records, not to actions, by the federal government. Under it, nondisclosure is mandated for certain records maintained by the federal government or maintained at the behest of the federal government. Under its provisions, therefore, although there would be no protection for employees against urinalysis testing itself, there would be protection against indiscriminate dissemination of the results of such tests.

b. Private Employees.

Private employees may have legal protection for privacy interests in one of three ways: (A) state constitutional or statutory privacy provisions; (B) common law protection against the tort of invasion of privacy; and (C) common law protection against libel and slander.

A. State constitutional or statutory protection of privacy interests.

At least nine states -- Alaska (Alas. Const. Art. I, sec. 22), Arizona (Ariz. Const., Art. II, sec. 8), California (Cal. Const. Art. I, sec. 1) Hawaii (Ha. Const. Art. I, sec. 5), Illinois (Ill. Const., Art. I, sec. 12); Louisiana (La. Const., Art. 1, sec. 5); Montana (Mont. Const. Art. II, sec. 9); South Carolina (S.C. Const. Art. I, sec. 10), and Washington (Wash. Const. Art. I sec. 7) -- have specific constitutional provisions that mention a right to privacy in addition to that protected by their constitutional clauses against unreasonable searches and seizures.

Most of these provisions are worded broadly: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." Ha. Const. Art. I sec. 6. They are, thus, subject to judicial interpretation. Since we could find no reported case discussing an employment urinalysis testing program vis a vis a state privacy statute it would be difficult to predict whether such clauses will in future the be held to provide greater individual protection for employees against such testing than search and seizure clauses provide. The same is true for state privacy statutes.

In the area of worker privacy, the general trend for the states has been to enact specific statutes protecting employees against particular practices of employers that are deemed intrusive. Types of procedures that have been the subject of such laws include employer use of polygraph tests. Cal. Labor Code. § 432.2(a); Conn. Gen. Stat. Ann. § 31-51g; Del. Code tit. 19 § 704; D.C. Code Ann. § 36-802(a); Ga. Code Ann. § 43-36-1; Ha. Rev. Stat. § 377-6 (10); Id. Code § 44-903; Io. Code Ann. § 730.4; Me. Rev. Stat. Ann. § 1320; Md. Code Ann. Art. 100 § 95(b); Ma. Stat. Ann. § c 149 § 19B; Mi. Laws Ann § 37.203; Minn. Stat. Ann. § 181.76; Mo. Code Ann. § 39-2-3-4; Neb. Rev. Stat. § 81-1932; N.J. Stat. Ann. § 2C:40A-1; N.Y. Labor Law § 737; Or. Rev. Stat. § 659.225(1); Pa. Sta. Ann. tit. 19 § 7507; R.I. Gen. Stat. § 28-6. 1-1; Utah Code Ann § 34-37-2(5), 34-37-16; Vt. Stat. Ann. § 494a(b); Wa. Rev. Code § 49.44.120; W.Va. Code § 21-5-5b; Wisc. Stat. Ann. § 111.37.

There are also state laws that limit the right of employers to gain information about the nonemployment activities of employees; some require advance approval by the employee. Ill. Rev. Stat. c 48 § 2009, for examole,

prohibits employers from gathering information about employees' nonemployment activities without written authorization. It exempts, however, activities occurring on employer's premises or during working hours interfering with performance of duties and activities that constitute criminal conduct that may be expected to harm employer's property, business, or that could cause employer financial liability.

B. Common law protection against the tort of invasion of privacy.

Although individuals facing employment drug screening may initially recoil from the idea and invoke the protection of an abstract right of privacy, the law provides little protection in this situation for an invasion of privacy. If the employer tests an employee and makes public use of the test results, there may be a right of action in court for the tort of invasion of privacy by publicly disclosing private facts. There are strict limits to this action; the disclosure must be public, i.e., there must be publicity given to the private fact. Telling it to a few coworkers may not satisfy the publicity requirement. Eddy v. Brown, No. 62,086, Feb. 25, 1986 (Sup. Ct. Okla.) held that an employer's telling a limited number of coworkers that an employee was undergoing psychiatric treatment was insufficient to permit recovery on the basis of invasion of privacy.

On the other hand, in Bratt v. I.B.M., No. 85-1545 (1st Cir. March 6, 1986), under Massachusetts law, it was seen as possible to hold an employer-compensated private doctor liable for invasion of privacy for revealing the psychiatric diagnosis of a patient to various management officials of the employer. It is unclear whether publicizing urinalysis results could be successfully pursued as an invasion of privacy, but the

possibility should make employers careful about the dissemination of the records of such tests.

C. Libel and Slander. "Defamation is . . . that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."[3/] Labeling an employee a drug addict or user may raise the question of whether one form of libel per se, i.e., libel for which no special damages need be proven to recover, may be held to apply to the situation in which a person is accused of drug addiction: as an accusation that calls into question one's ability to conduct oneself in one's business or calling or profession. Since it is actionable to accuse a chauffeur of habitually drinking, Louisville Taxicab & Transfer Co. v. Ingle, 229 Ky. 518; 17 S.W. 2d 709 (Ky. 1929), accusing a bus driver or airline pilot of drug use might equally be actionable, forcing the employer to prove the truth of the accusation or pay damages.

3. ACCURACY OF THE TESTS

While there is some dispute about the accuracy of the tests,[4/] any of the tests is only as accurate as the procedures used in administering it.[5/] If some-

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3/ Prosser, W., "Handbook of the Law of Torts," 756 (1964) (footnote omitted).

4/ Dr. David Greenblatt, chief of clinical pharmacology at Tufts New England Medical Center, is quoted as saying that "'False positives can range up to 25 percent or higher,'" and calling the test "'essentially worthless,'" New York Times, p. 17, col. 1, sec. 3 (Feb. 24, 1985). The manufacturer of the test being discussed, SYVA Corporation of Palo Alto, California, claimed a 95 percent accuracy rate. Id.

5/ In 1983, the United States Navy discovered that an Oakland laboratory was permitting a lax procedure in administration of the drug testing program. As a result of the discovery over 1800 disciplinary actions were reversed. In 1984, it was reported that the Army was reviewing tests conducted at Fort Meade, Maryland, because "'inadequate, sloppy and poorly documemted' records, an 'inadequate' attitude toward security in the test areas, and 'inadequate staffing' in the labs," resulted in 97 percent of the tests being found to be "'not scientifically and legally sup-
(continued)

one were to lose a job or fail to be hired for a position solely on the basis of test findings, there is a possibility that he or she could successfully bring a negligence action against the employer and the testing concern provided that he or she could convince a court that the test was inaccurate or the people conducting it were neglectful. If the government is called upon to prove that it had reasonable cause to dismiss an employee because of positive test results, it might have to convince a court of the accuracy of the test itself and the correlation between the test and the person's ability to perform the work in question.

Currently courts have accepted blood alcohol and breathalyzer tests for purposes of showing impairment or intoxication both by crediting expert testimony and by accepting state implied consent laws.[6/] To date there has not been the generalized acceptance of urinalysis testing for drugs that has been accorded to breathalyzer and blood testing for alcohol. There is also some indication that because of the magnitude of the testing, the possibility of error is much greater in testing urine for drugs than

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(continued): portable' in proving marijuana or hashish use." Atkinson, Ric., "Federal Report," the Washington Post, A 21 (April 27, 1984), quoting panel of experts ordered to review testing procedures.

6/ These are laws that require motorists to submit to blood alcohol tests or breathalyzer tests to determine intoxication and that usually stipulate the amount of alcohol in the blood or breath sample that will be rebuttable proof of intoxication. See Cleary, E., McCormick on Evidence § 205 (1984).

in testing breath for alcohol. [7] A recent article [8] discusses some of these problems as follows:

> Toxicologists say confirmation testing has been refined -- in particular through technology called gas chromorography/mass spectometry -- to a point where error rates can be brought close to zero.
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> 'The real room for error is not with the technology but with administrative error,' says Metpath's Dr. Bates. 'A human being has to pick up the sample and put it into the machine.' It may sound trivial but it's not. When the volume of work goes up, the error rate goes up. That's the scary part.
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> 'My company makes millions of dollars doing drug testing, but I wouldn't want somebody taking my urine, he adds.' 'I think it's an invasion of privacy. I would always be afraid that somebody might . . . mix up samples. It may only happen in one out of 100,000 cases. But I always have that fear.'

The possibility of low error rates may not be as reassuring as it first seems. Since most of these tests, especially in pre-employment situations, are uncorroborated, a low error rate translates into possibly unacceptable numbers of false accusations:

> Laboratories largely are unregulated, and the level of quality varies enormously. In various studies, error rates have generally fluctuated between 3 and 20 percent.
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> 'With 4 million to 5 million people being tested a year, a 1 percent rate of inaccuracy means that 40,000 to 50,000 would be falsely accused,' says NORML's Mr. Zeese. [9]

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[7] Generally, police test motorists one at a time and after having some cause, e.g., wavering auto, for testing. What is being considered in terms of drug testing seems to be wholesale testing on a random basis.

[8] Stille, A., "Drug Testing:" The scene is set for a dramatic legal collision between the rights of employers and workers, "National Law Journal" 1, 24 (April 7, 1986).

[9] Id.

4. UNIONIZED EMPLOYERS

Under the National Labor Relations Act, 29 U.S.C. §§ 151-69, it is an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. 29 U.S.C. 158(a)(5). The Act defines the obligation to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d).

As a term or condition of employment, a drug screening program would be subject to the employer's obligation to bargain with the union under the Act. Moreover, it is a refusal to bargain for an employer to impose a change of working conditions unilaterally without bargaining with the union. A unionized employer would therefore violate the Act by requiring drug screening without notice to the union, and without bargaining over the scope and extent of the program.

Although the subject is relatively new to collective bargaining, some unions and employers have already negotiated comprehensive drug screening and rehabilitation arrangements. Professional basketball players, for example, have negotiated such a program under a collective bargaining agreement.

5. NON-UNION EMPLOYERS

It is difficult to generalize about the employment policies on non-union employers, since employee relations in such workplaces are completely subject to employer control, restricted only by the federal labor standards laws, concerning matters such as minimum wage, overtime, child labor, safety and health, and pensions and benefits. The non-union employer is also subject to state laws, which vary substantially throughout the fifty states.

IV. SUMMARY

Because the law is emerging and because there are so few cases, it is difficult to generalize or predict concerning the requirements the courts will impose on a program requiring testing for drugs in the workplace. Some public sector emoloyees will surely raise challenges to such programs on the basis of the United States Constitution. Private sector employees seeking to challenge such programs, however, will be required to resort to state and federal statutes, labor contracts, and common law rights.

M. Maureen Murphy

Vincent E. Treacy

Vincent E. Treacy
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April 16, 1986

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DRUGS ON THE JOB
800-COCAINE SURVEY

The results listed below are based on a random sample of 227 callers to the 800-COCAINE National Helpline at Fair Oaks Hospital in New Jersey. The survey was conducted in February and March 1985.

75% said they had used drugs on the job
64% said that drug use had hindered their work performance
25% reported daily drug use at work
45% reported weekly drug use at work
10% reported monthly drug use at work
83% used cocaine at work
39% used alcohol at work
33% used marijuana at work
13% used pills at work
10% used opiates at work
64% said that easy access to drugs at work increased their use
26% said they had been fired from a previous job due to drug use
44% said they had dealt drugs to fellow employees
18% reported having a drug-related accident on the job
18% said they had stolen money from co-workers to buy drugs
39% said they feared that a salary increase would increase their drug consumption

Profile of Survey Subjects

Male 70%; Female 30%
Average Age 30 yrs.
20-29 yrs. 53%
30-39 yrs. 40%
40+ yrs. 7%
Income: under $25,000
$26,000-50,000
over $50,000

For additional information contact:

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The Washington Post

SUNDAY, FEBRUARY 2, 1986

Many Employers Testing Workers for Drug Use

By Ruth Marcus and Margaret Engel
Washington Post Staff Writers

There is a new reality for millions of American workers, and Juanita M. Jones, a 49-year-old grandmother of four, contends that she is a victim of it.

A District school bus aide for disabled children, Jones, who had been praised as a model employe, was fired in August 1984 based on a single urine test that indicated marijuana use.

Jones, who has sued the city in federal court, was tested as part of a mass screening of school transportation workers. Although she denied using drugs and supplied two additional urine tests to support her claim, she was told to punch out her time card and was fired immediately.

Jones is caught up in a phenomenon affecting thousands of American work places as employes and job applicants are being required to let their body chemistries reveal their personal secrets.

Professional athletes, police officers and ordinary office workers are submitting urine samples to be checked for evidence of marijuana, cocaine and other drug use. Thousands of military recruits—and soon the entire 2.1 million active duty force—are having their blood tested for exposure to the AIDS virus. Bus drivers and amusement ride operators are being told to spit into plastic cups to have their saliva examined to see if they have recently smoked marijuana.

Mass screening to detect a variety of drugs—sometimes weeks after use—has become economical and popular. At the same time, technological advances have made it possible to test people for susceptibility to an array of diseases, from AIDS to sickle cell anemia. Although genetic screening is not thought to be performed widely, many observers say it is just a matter of time before such tests are perfected and put to use.

Employers praise drug testing as necessary and prudent in an age of widespread drug abuse, which they say cuts into productivity, increases absenteeism and health costs, and poses the threat of lawsuits by injured coworkers and customers.

"If somebody smokes pot on a Saturday night, it's the employer's business on Monday," said Peter B. Bensinger, former director of the U.S. Drug Enforcement Administration and now a consultant to businesses on drug testing. "It is the company's problem if its absentee rate is 2½ times higher, its accident rate is 3 times higher and the medical costs are out of sight" because of drug abuse.

Many workers find the tests embarrassing, intrusive and unfair. "What you do on a vacation or weekend should be your own business," said bus driver Gerald Dial, 35, of Greenbelt.

Dial was fired by the Washington Metropolitan Area Transit Authority after his urine tested positive for marijuana after a bus accident in 1983. He was rehired a year later after he won a grievance settlement "because of some evidence problems with the sample," according to Bob Koiss, an attorney for WMATA.

"I never considered myself a get-high kind of guy, but smoking a joint [while off the job] was my form of relaxation, like a martini," said Dial. "But you can't do anything now. You're paranoid all the time—you'll be tested."

According to a recent survey, at least 25 percent of all Fortune 500 companies screen for drugs in pre-employment physicals, up from 10 percent in 1981. Bensinger estimates that half the Fortune 500 companies will institute testing programs by 1988.

"With polygraphs, it was the sleazy companies," said Robert Ellis Smith, editor of Privacy Journal. "Now it's the Fortune 500. Even IBM is using it."

Opponents of the tests contend that they delve into the personal lives of employes who should instead be measured by on-the-job performance. More important, they warn, the tests are frequently unreliable, presenting the risk that an employe who has not used drugs will be unfairly dismissed as a result.

"There are a lot of things that may affect absenteeism and health and productivity that have nothing to do with drugs," said Arthur B. Spitzer, legal director of the American Civil Liberties Union's Washington office. "I think we would all feel very resentful if our employer inquired if we were staying up at night watching the late movie or having an extramarital affair."

Some critics of the tests say they are better suited for employes whose jobs involve public safety.

"What may be appropriate for the airline pilot may not be appropriate for the ticket clerk," said San Francisco attorney Kathleen Lucas-Wallace, who is representing a woman fired for refusing to take a urine test. "If the ticket clerk is writing tickets in a satisfactory manner, why should they be tested? If not, why don't they get fired for poor performance?"

While "nobody wants to get on a plane with a drunk pilot," she said, "it's not been a tenet in American society that employes are slaves of employers."

But Mark A. de Bernardo, manager of labor law for the U.S. Chamber of Commerce, turns these concerns aside. "The innocent have nothing to fear with it," he said.

Whatever its legitimacy, drug testing by American employers has exploded in the last two years as medical companies saw a mass market for the tests and began to sell them aggressively.

"The work force now is made up of people who went to college in the '60s and have taken their drug habits with them," said Mark A. Rothstein, a professor at the University of Houston Law Center who has written extensively on drug testing. As a result, he said, testing "is big business."

That business now reaches into nearly every segment of the work force, affecting white- and blue-collar workers alike:

- The nation's 14,000 air traffic controllers will soon be required to submit to annual drug tests, under a program approved last year by the Federal Aviation Administration. Similarly, the Drug Enforcement Administration said last month that its 4,200 employes will soon face mandatory urinalysis.
- The Miami Herald announced last month that all employes would be required to submit samples for drug testing before being hired; the Los Angeles Times adopted such a program in November and may also test employes who are suspected of having a drug problem, and the New York Times and Chicago Tribune have for years screened all new employes' urine for drug use. The Washington Post does not screen employes or job applicants for drug use.

When the Kansas City Times and Star revealed plans last month to send drug-sniffing dogs into the newsroom, company executives said the dogs were deemed to be less intrusive than urine samples. Nonetheless, the dogs were called off after a storm of protest.

- The Baltimore Orioles last week became the first professional baseball team to institute voluntary drug testing. Last summer, random urinalyses were begun on all minor league baseball players and front office employes under order of the baseball commissioner. Since 1983, professional basketball players have been tested if coaches suspect drug use.

The New England Patriots had planned to institute the National Football League's first voluntary testing program, but the deal was canceled last week after the names of players who allegedly have drug problems were revealed to the press.

- The Supreme Court last week cleared the way for a testing program for more than 200,000 railroad employes who have violated work rules or who work on trains that have been involved in accidents.
- Federal Express, TWA, Greyhound and Exxon, among other major companies, require urinalysis tests of all job applicants. In the District, school bus drivers and police and Metro employes are subject to drug testing. Since 1982 Pepco has been taking urine samples from job applicants and testing employes who are suspected of having a drug problem; Washington Gas Light Co. started a screening program for job applicants last February and since the mid-1970s has been testing employes suspected of being high on the job.

■ Under the surprise urine testing program conducted yearly by the Coast Guard on its 38,000 men and women, monitors of the same sex accompany each individual into a bathroom and witness the procedure. "We don't want them to bring in baby's urine," said Rear Admiral Henry H. Bell, chief of Coast Guard personnel.

Accuracy problems—including shoddy lab practices and failure to use a second test to confirm initial results—have plagued many drug screening programs.

In recent years, the Department of Defense fired numerous outside labs and revamped its own facilities after learning that samples were mixed up and tests conducted incorrectly. In 1984, the Army notified at least 60,000 soldiers that their positive drug tests may have been wrong.

Although test manufacturers advise that test results be confirmed through a second method, not all labs do so. Casey Triblo of Brighton, Mich., was fired from his job on a Detroit ambulance crew in 1981 after two unconfirmed tests showed evidence of marijuana use, which Triblo denied.

"I talked with a guy . . . who runs the [state] drug testing for racehorses, and they confirm any positives," said Triblo, who has sued the city and the laboratory. "It seems to me that if they give a damn racehorse the scientific validity of testing his urine with a confirmatory test, that's the least they could do for me."

The newest test to cause worker concern is one that detects exposure to the HTLV-III virus, which causes AIDS. In November, ENSERCH Corp. of Dallas, the parent company of a major Texas utility, became the first company in the nation to institute a regular screening program when it required cafeteria workers in one division to submit to a blood test to determine if they have been exposed to the virus. Several other Texas companies have followed suit, according to Robert Holt, a Dallas lawyer who represents two ENSERCH workers who tested positive. The employes have been continued on the payroll but ordered not to come to work.

In a case at Hendrick Medical Center in Abilene, Texas, a cafeteria worker was fired in September after he volunteered to donate blood and a screening showed the presence of the HTLV-III antibodies. "You could understand a company maybe getting bad medical advice, but a hospital where there are supposedly trained medical professionals is just incredible," said Holt.

Jim Graham, administrator of the Whitman-Walker Clinic, a District clinic serving homosexuals, said it is widely suspected that employers are screening blood taken in physicials. "We fear the test is being done and no one is being told," he said.

Dr. David Landers, director of a Los Angeles firm that sells medical screening services to corporations, said that after the military announced its testing program, six private employers asked him to begin testing their employes for HTLV-III antibodies. "All of them backed down when I asked them to develop a legal permission form to notify employes," he said.

Federal health officials have said persons who test positive for HTLV-III antibodies pose no risk to others.

But ENSERCH spokesman Howard L. Matson, who noted that the company tests cafeteria workers for exposure to other communicable diseases, such as hepatitis, said medical knowledge about how AIDS is transmitted is so "minimal" that the company does not want to take the risk of employing food handlers who have been exposed to the virus. However, he said, "We have not released anyone because they have AIDS or because they test-positive for AIDS antibodies, nor do we intend to."

Although once feared, genetic and susceptibility screenings are not widely used. Dr. Bruce Karrh, medical director of DuPont, said the firm abandoned a pilot blood testing project at a New Jersey plant five years ago because the tests were no more helpful than physicals.

"These tests need to be perfected better in the research community before we could use them," Karrh said of the tests, which checked for enzyme deficiencies that might indicate future susceptibility to lung disease or anemia.

Tony Mazzocchi, founder of the Committee for Responsible Genetics, a Boston-based group that monitors genetics issues, said the testing "is waiting in the wings, but it will emerge. The growth of medical surveillance firms' worries us, that genetic screening could be done and you wouldn't know it."

Concerns about errors and privacy have led lawmakers in a few areas to begin to restrict tests.

Last year, San Francisco adopted the first ordinance in the country barring employers from using urinalysis to detect drug use, except where there are reasonable grounds to believe that an employe is impaired and presents a "clear and present danger" of harm.

California has a similar bill pending, and a measure may be introduced soon in the Maryland House of Delegates that would permit employers to use only tests that measure whether employes are high on the job, rather than testing past usage. Maryland already prohibits genetic testing by employers.

Under a measure passed last April, California employers cannot fire or refuse to hire employes because of HTLV-III exposure. In Wisconsin, employers cannot use the test for hiring purposes, and New York is considering a similar measure. Lawyers for the District have interpreted existing city laws as barring employers from discriminating against those with AIDS or AIDS exposure.

As is usual in American life, as more employes are subjected to various tests, more of the cases are ending up in court.

"The first wave of lawsuits is by public employes who claim that they have been discharged because of refusals to take drug tests or as a result of the tests," said Rothstein. "Looming on the horizon are a whole series of additional lawsuits brought by either applicants for public employment or in the private sector from employes who have been discharged."

Public employes generally claim

See DRUGS, A15, Col. 1

Urinalysis Use By Employers Stirs Controversy

DRUGS, From A14

that randomly subjecting them to urine tests violates their rights to be protected against unreasonable search and seizure, and to due process. Private-sector workers are employing a host of legal theories, from invasion of privacy to violation of a federal law preventing discrimination against the handicapped.

The results have been mixed. A New Jersey court in September approved a random testing program for jockeys; a New York court the next month blocked a program requiring all teachers seeking tenure to submit to a urinalysis.

In the District, the D.C. Court of Appeals in November upheld the police department's power to require urinalysis tests of officers suspected of using drugs and to discipline those who refuse to take the test. A suit on behalf of school bus drivers was dismissed on technical grounds and is now being appealed.

In San Francisco, two former employes have sued the Southern Pacific Transportation Co. as a result of its drug screening program. One, computer programmer Barbara Luck, was fired in July after she refused to provide a urine sample in a random testing.

"Her feeling was there was no problem with her work, no question of her competence," said Luck's lawyer, Lucas-Wallace. She said Luck does not use drugs: "She's a squeaky clean client."

The second employe, office manager Raymond Pettigrew, was ordered to enroll in a month-long, 24-hour-a-day drug rehabilitation program, and later to attend sessions three times weekly after a urine test showed evidence of cocaine use.

Pettigrew repeatedly denied that he used cocaine, and a second test, five days later, showed no traces of the drug. His doctor at the treatment program found "no evidence to confirm any suspicion of chemical dependency." Pettigrew was demoted after he refused to continue attending the rehabilitation sessions.

Southern Pacific spokesman Robert Taggart said Luck was fired for insubordination. He said the company is convinced that Pettigrew was using cocaine on the basis of the first test, which he said was confirmed with two other tests.

Since the testing program—aimed primarily at employes involved in accidents—was started in August 1984, Taggart said, the railway has experienced a 72 percent drop in the number of accidents; on-the-job injuries and sick days have also been reduced.

Other employers have had similar positive results and dismiss complaints that drug testing is unfair.

"We all live according to rules set by our employer," Taggart said. "Our employer says when we have to get to work and when we can leave and when we can eat lunch. We also say when you're working for us, you can't have drugs in your system."

The Washington Post

SUNDAY, FEBRUARY 3, 1985

Many Workers Fighting Use of Drug Tests

URINALYSIS: HOW IT WORKS

- Most testing programs are run by private labs that may test a variety of medical samples.
- The most widely used drug test is a Syotex Corp. test known as EMIT. The test has been shown to be 92 to 95 percent accurate and can be programmed to test for a variety of legal and illegal drugs, including marijuana, cocaine, PCP, heroin, barbiturates and opiates.
- At the lab, a mixture containing a chemical that reacts to the specific drug is added mechanically to the urine bottles. The level of the drug's presence is then calculated automatically by a computer that "reads" the amount of light absorbed in the reaction.
- A portable system is available, with a suitcase-sized version of the analyzer, but it can tell only if drugs are present and not specific amounts.
- The test costs between $4 and $10, depending on volume.
- If the test is positive, the manufacturer and many employers require that a second test be run, a gas chromatography analysis that can cost between $40 and $100.
- Because every person's system breaks down drugs differently, some heavy users will continue to test positive two months after their last use. Other drugs, such as amphetamines, pass through the body so quickly that they may not show up.

SUBSTANCE ABUSE REPORT

Samuel Grafton, Founding Editor | Edith K. Grafton, Founding Publisher | PACE PUBLICATIONS

Volume XVII, Number 3 | March, 1986

RECOMMENDATION TO TEST FEDERAL WORKERS FOR DRUGS STIRS PROTEST

The President's Commission on Organized Crime has recommended that all federal agencies develop drug testing programs, provoking a storm of protests. In the first of a series of final reports following three years of hearings, the commission on March 3 issued "America's Habit," a 1,000-page report on drug enforcement and abuse. The report called for "suitable drug testing programs" to be implemented by all federal agencies, by companies with federal contracts, and urged private corporations to consider drug testing. The recommendation took up only one paragraph but drew fire immediately.

Among the recommendation's critics were some members of the commission, none of whom had seen the final report before it was released; the draft they had approved did not include the drug-testing recommendation. Rep. Peter W. Rodino Jr. (D-New Jersey), chairman of the House Judiciary Committee and a commission member, said the recommendation raised "serious civil liberties concerns." And the American Civil Liberties Union denounced it as unconstitutional. "In America, people cannot legally be searched by the government without specific reason to believe they are involved in a crime," said Ira Glasser, executive director of the ACLU. Rep. Don Edwards (D-California), chairman of the Subcommittee on Civil and Constitutional Rights, said: "Testing like that is repugnant in our system." And the American Federation of Government Employees called the recommendation a violation of the 4th Amendment.

But Attorney General Edwin Meese III said drug testing in the context of employment is "not a Constitutional problem." Asked if he thought drug testing would be an "unreasonable search or seizure" in violation of the 4th Amendment, Meese said: "By definition, it's not an unreasonable seizure because it's something the employee consents to as a condition of employment." And Circuit Judge Irving R. Kaufman, the commission chairman, said: "If it [drug testing] is done in a selective manner, and not across the board . . . is it an invasion of privacy? Of course. An invasion of the 4th Amendment? No."

Although the press generally reported that the commission proposed testing of all federal employees, Dr. Donald Ian Macdonald, acting assistant secretary for health with the Department of Health and Human Services, said he interpreted the commission's report as recommending drug testing "on a case-by-case basis." Macdonald said that at HHS, the costs of screening 135,000 employees would be prohibitive. Meese, asked if he favored the commission's drug-testing recommendation, said it would be a "costly process" and added: "We would look at the efficacy and the need of it."

INSIDE THIS ISSUE...

'EXTREME CAUTION' IN DRUG SCREENING URGED BY JOINT FEDERAL-INDUSTRY CONFERENCE

The National Institute on Drug Abuse has taken a stance on drug screening in the workplace. In a joint consensus statement issued following a two-day conference with representatives of business and industry early this month, the federal agency declared that urine screening "should be considered as a useful technique" within workplace drug abuse programs. But "extreme caution" in implementing drug-testing programs was urged to ensure "reliable and accurate" testing procedures.

In response to mushrooming requests coming into NIDA offices for information on urinalysis drug testing, the agency also issued long-awaited printed guidelines on workplace drug screening. According to the guidelines, false positives, or test results erroneously indicating the presence of drugs in the urine, are caused either by "cross reactivity" with other substances, or by human error. The combination of a highly accurate confirmation test and rigorous quality assurance procedures greatly lessens the chance of false positives. The guidelines indicate that gas chromatography coupled with mass spectrometry is the "preferred" confirmation test, but that other methods such as gas chromatography or high performance liquid chromatography can be "acceptable."

Quality assurance includes analysis of "quality control samples," some drug-spiked and some "blank." While laboratories that participate in the blind proficiency-testing program run by the College of American Pathologists (CAP) are accredited, the high cost of subscribing to the voluntary program effectively limits accreditation to relatively large labs. Top NIDA officials have told us that they would like to see mandatory quality assurance programs in place, but that such programs have little chance in the current deregulatory climate. Thus, in the absence of any national oversight mechanism to monitor laboratory quality, NIDA recommended that companies interested in drug testing "get expert assistance" in finding a reliable laboratory. "There needs to be some assurance that the laboratories are up to speed," said Dr. Donald Ian Macdonald, acting assistant secretary for health in the Department of Health and Human Services. Technological advancements have led to highly accurate tests, but nevertheless these tests are "only as good as the people that run them," he said.

In releasing its draft consensus statement, which referred repeatedly to "the program," NIDA was not proposing a model drug program to be followed by private corporations, according to agency officials. Rather, the message was that "action must be taken"--with the specific action to be determined by individual companies. Dr. Macdonald told reporters that different situations call for different kinds of drug programs, but drug use is prevalent in American society, and must be addressed even if data on actual use is scant. "We really don't know exactly how many baseball players and how many people that work in the Department of HHS and people that work at IBM are involved in drugs," Dr. Macdonald said after the conference, adding "we just assume that there are some in all of those."

Calling drug abuse the "most common health hazard in the workplace today," Otis R. Bowen, Secretary of HHS, said in a written message to conference participants that "it is the responsibility of the workplace to assure a safe and healthy environment for its employees." Representatives of organized labor at the March 6-7 conference on workplace drug abuse did not participate in the consensus statement on drug testing. "They didn't object, they abstained," according to a NIDA official.

For a copy of Employee Drug Screening, written by J. Michael Walsh and Richard L. Hawks of NIDA, contact the National Clearinghouse for Drug Abuse Information, P.O. Box 416, Kensington MD 20795; telephone 301-443-6500.

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The New York Times

NEW YORK, SATURDAY, MARCH 1, 1986

Baseball Orders Suspension of 11 Drug Users

By MICHAEL GOODWIN

Baseball Commissioner Peter Ueberroth yesterday suspended for one year Keith Hernandez of the Mets, Dale Berra of the Yankees and five other major league players for cocaine use. However, Mr. Ueberroth offered to lift the suspensions if the players agreed to certain conditions, including contributing 10 percent of their salaries this year to drug-prevention programs and submitting to drug tests for the remainder of their careers.

Four other players were suspended for 60 days, with the term to be lifted if they give 5 percent of their salaries to drug programs and agree to testing.

The commissioner also said he would require 10 other players to undergo testing for the remainder of their careers because of past use of cocaine. These 10 are not to be punished.

Reason for Suspensions

Any of the players involved who have positive tests for cocaine, marijuana, morphine or heroin would, automatically be subject to the suspension, Mr. Ueberroth said. Similarly, those who refuse to be tested will be subject to the suspensions, which would be effective opening day. Those suspended would not be paid.

The one-year suspensions were handed out to those players who Mr. Ueberroth said had not only used drugs themselves but also had "in some fashion facilitated the distribution of drugs in baseball." He said these players had shared drugs with teammates and in some cases introduced players to drug dealers.

The four players given 60-day suspensions, including Al Holland of the Yankees, were, according to Mr. Ueberroth, those "who engaged in a more limited use of or involvement with drugs but as to whom insufficient

Continued on Page 45, Column 5

Continued From Page A1

evidence exists linking them to facilitation."

To avoid the suspensions, the 11 players would also have to contribute up to 300 hours of community service in the next two years and to participate in drug-prevention programs established by baseball.

"It's their choice," Mr. Ueberroth said. "They don't need to play. That's a choice they're going to have to make."

The group for whom only testing was required encompasses those about whom less evidence exists regarding drug use or whose cases have already been resolved, Mr. Ueberroth said.

"I am obviously not pleased in having to make these decisions," Mr. Ueberroth said at a midtown news conference. Later, he added: "But this is an emergency time for baseball. The seriousness of the transgressions demands the actions I have taken."

Donald Fehr, executive director of the Major League Baseball Players Association, had no immediate reaction to Mr. Ueberroth's decision, other than to say he was studying it.

However, based on the union's action in previous cases, there was a strong possibility that it would challenge the commissioner's decision through baseball's grievance procedure. If the association filed a grievance, it would be heard by baseball's impartial arbitrator, Tom Roberts of Los Angeles.

The commissioner's announcement stopped months of anticipation about how he would respond to publicized cocaine use among players. Most of those named yesterday either testified or were implicated last September in Pittsburgh during the investigations and trials of seven men charged with cocaine distribution.

Since last May, when the Pittsburgh indictments were announced, Mr. Ueberroth has battled with the players and their union over drug testing. After unsuccessful attempts to get players to agree to mandatory testing, he eventually ordered drug testing for all owners, office personnel and minor league players, some of whom are members of unions.

After the owners of the 26 baseball teams canceled their agreement with the players union that called for voluntary testing in selected cases, a number of teams began inserting testing clauses in new player contracts. Mr. Ueberroth estimated that half or more of the 600 major league players have such clauses. That number is far higher than any previously cited and could not be verified.

Mr. Ueberroth said yesterday that, from now on, all such tests would be conducted under the auspices of his office. He said urine samples would be collected by medical teams, with the test results confidential. He did not estimate the cost of the program or give further details on how it would work. Those who test positively will be offered help.

Although none of the seven in the Pittsburgh case was a player, virtually all the incriminating testimony, including that before Federal grand juries, came from present and former players. On the basis of that testimony, five of the seven men pleaded guilty and two others were convicted. They received prison sentences of two to 12 years. The players received immunity from prosecution.

Of the seven players suspended for a year, six testified to using and obtaining cocaine in the trial of Curtis Strong, a Philadelphia cook. They included Mr. Hernandez, the Mets' star first baseman, and Mr. Berra, a reserve infielder for the Yankees. The others were Enos Cabell, Jeff Leonard, Dave Parker and Lonnie Smith, as well as John Milner, a former player. All of the active players are prominent, with Mr. Smith a key member of the world champion Kansas City Royals and Mr. Parker, of the Cincinnati Reds, one of the leading hitters in the National League.

Joaquin Andujar, a pitcher recently traded from St. Louis to Oakland, was the only player to receive a year suspension and not testify in the trial. However, Mr. Andujar was named by several players as having used cocaine and by one, Mr. Smith, as having introduced him to a drug dealer in St. Louis. In a separate incident, Mr. Andujar was suspended for the first 10 days of the coming season for bumping an umpire in the World Series last year.

Those facing the 60-day suspensions, Mr. Holland, Lee Lacy, Larry Sorensen and Claudell Washington, can avoid the suspensions by agreeing to testing, contributing 5 percent of their 1986 salaries to drug-prevention programs and putting in 50 hours of community service work this year.

Mr. Holland, who only recently joined the Yankees, testified before the grand jury in Pittsburgh but was not called in either of the trials. However, several former teammates said he had used cocaine with them.

A fifth player, Mike Norris, a pitcher now out of the major leagues, might fall into that group, Mr. Ueberroth said, after a criminal charge of drug possession in California is resolved.

Rod Scurry, also a Yankee pitcher, was included in the third group. A former Pittsburgh Pirate, Mr. Scurry was treated for drug addiction several years ago and has been regularly tested by the Yankees since they obtained him last season.

Four other players in that group — Barry Bonds, Gary Matthews, Manny Sarmiento and Darrel Thomas — were mentioned in the trial by players as having used cocaine.

Five others — Dickie Noles, Vida Blue, Daryl Sconiers, Tim Raines and Alan Wiggins — all previously acknowledged cocaine use. Most were treated for addiction, and Mr. Blue served 90 days in a Federal prison for possession of cocaine in 1984 and was suspended for the 1985 season.

Finally, Mr. Ueberroth said he had considered then Willie Stargell, a former Pirate and now a coach with the Atlanta Braves, had done nothing improper. During the Pittsburgh trial, two players, Mr. Berra and Mr. Parker, had said Mr. Stargell and Bill Madlock, another former Pirate, had often distributed amphetamines to players.

However, Mr. Ueberroth, who previously cleared Mr. Madlock, said in response to a question that he did not believe the testimony of Mr. Berra and Mr. Parker regarding amphetamine distribution. He also said that his testing program did not cover amphetamines because they are legal when players have prescriptions.

Mr. Ueberroth, who met during the winter with the players implicated in drug use, said there was no significance to the timing of his announcement. Training camps have already opened, with virtually all players in Florida and Arizona.

Similarly, Mr. Ueberroth said he had not been influenced by a recent case involving Michael Ray Richardson, a basketball player with the New Jersey Nets. On Tuesday, after Mr. Richardson tested positive for cocaine use, despite having been in four rehabilitation centers, basketball officials banned him for life. Mr. Richardson can request reinstatement in two years.

"That's a sad case," Mr. Ueberroth said, adding that it represented a "failure" for everyone involved.

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PM-BBO--Fehr-Union Meetings, Bjt,0602:
By KEN PETERS=
AP Sports Writer=

KAANAPALI, Hawaii (AP) _ The head of the players' union worries that major league baseball's move toward mandatory drug testing could mean that players will be forced for years to prove they aren't using drugs.

''For an industry that prides itself on traditional American values _ such as innocent until proven guilty and illegal search and seizure _ this would seem to be very strange behavior,'' Don Fehr said in an interview Monday.

Fehr, acting executive director of the Major League Baseball Players Association, was on the island of Maui for a meeting of the union's executive board.

Drug testing was expected to be a major topic of this week's meetings, which will include Fehr and his staff and player representatives from each of the 26 major league clubs.

''The way the clubs are putting it now, they're saying, 'I don't suspect you of anything, but unless you agree to take a test anytime I want, I'm not going to hire you,' '' Fehr said.

''If you're a 20-year-old kid, they're saying, 'We're going to test you for the next 20 years.' So you're going to have to prove them wrong again and again.''

Among the issues expected to be discussed at the union meetings are attempts by a number of clubs _ including the Los Angeles Dodgers, San Diego Padres, Baltimore Orioles and Texas Rangers _ to include a mandatory drug-testing clause in certain contracts.

Also expected to come up is Commissioner Peter Ueberroth's call for players to submit to voluntary drug tests, plus his intention to meet next month with the players implicated in the cocaine trials in Pittsburgh last summer.

While Ueberroth has said he underestimated the drug problem in baseball when he took the post last year, and that he doesn't ''want to be the commissioner of a sport that has an onus of drugs'' hanging over it, Fehr said the players think the problem has been exaggerated.

''They agree that some players have drug problems, but they don't think it's widespread,'' he said.

''If you're thinking in terms of cocaine, I think it's mostly a thing of the past. I think players realize now how dangerous it can be.

''It (drugs in baseball) is mostly a public relations problem, and I think it's been caused mostly by the clubs,'' he said. ''They've been screaming about it, but the public has still been going to the ballparks in record numbers.''

Fehr does not suggest that the drug problem be ignored. He does object to the way the clubs and Ueberroth are dealing with it, claiming they are circumventing the union.

The players' association has filed a complaint with the National Labor Relations Board, charging unfair labor practices by Ueberroth and the club owners for cancelling the Joint Drug Agreement negotiated by the players and owners in 1984.

That agreement provided for testing only of known drug users, and Fehr claims the owners terminated it because players refused to go along with Ueberroth's call for voluntary testing.

The New York Times
NEW YORK, SUNDAY, NOVEMBER 1, 1981

A Tougher Rule on Drinking and Drug Use Took Effect Last Week

Rail Safety Campaign Is No Longer Spinning Wheels

By REGINALD STUART

WASHINGTON — Three years ago this fall, a 104-car freight train laden with poisonous chemicals derailed as it sped through the hamlet of Livingston, La.

At the controls, investigators later determined, was a railroad office clerk who had taken over after the engineer had drunk too much liquor and dozed off.

The town's 1,500 residents fled as tank cars burst into flames and exploded. No one was killed in the accident, but the scare it sent through the railroad industry and the Government agencies concerned with transportation and safety has had a lasting effect.

Among other things, the accident revived a campaign, begun in the early 1970's, for a Federal alcohol and drug use rule for railroad workers. That rule finally took effect at midnight Thursday. A few hours later, a Federal judge in San Francisco, responding to complaints by rail labor unions about its constitutionality, temporarily barred the railroads from testing under the new regulation.

Judge Charles Legge, who said there was a "reasonable probability" that privacy rights would be violated by testing without requiring more evidence that a worker was intoxicated, said his order would remain in effect until a hearing Nov. 20.

Earlier in the month, the Department of Transportation revealed some disturbing statistics uncovered in its latest survey of the Government's transportation safety programs. The report said that railroad safety violations in 1981 were the highest since 1980, that the total for the first 10 months of fiscal 1982 was 26 percent higher than the 1981 total and that employee injuries and fatalities in 1981 were 14 percent higher than in 1980.

The report made no recommendations for solving the problem, an omission that angered Representative James J. Florio, the New Jersey Democrat who is a leading critic of the Administration's railroad safety record. "They have no specific recommendations and they oppose our recommendations," said Mr. Florio, chairman of the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce.

Mr. Florio said Federal transportation officials' efforts had been frustrated by the interest others in the Administration have in reducing the regulation of business. A measure of that attitude, he contends, was that it took the Office of Management and Budget two years to approve the new alcohol and drug rule, despite repeated pleas by the Transportation Department for quick action.

Officials of the National Transportation Safety Board, which investigates major transportation accidents and recommends safety improvements, say the new rule is one of several helpful steps that have been taken — and not all of them by the Government.

Rule G Replaced

Railroads have begun giving crews more detailed information about the chemicals they are hauling and what steps should be taken in case of a derailment. In many communities, safety board officials say, emergency service agencies have vastly improved their capabilities for dealing with chemical spills and other consequences of derailments.

The Federal rule replaces a largely ineffective industry regulation known as Rule G, which relied on workers to report colleagues whom they suspected of having alcohol or drug problems.

"The problem we had with Rule G was enforcement," said Richard E. Briggs, executive vice president of the Association of American Railroads. He called the new rule "an important step," adding that it complements other safety gains achieved through enhanced grade crossing protection and roadbed improvements. "I don't expect injuries and fatalities to take a big dive, but it's going to help," he said.

The rule requires pre-employment screening of prospective train crew members, dispatchers and workers who would install, repair or maintain the signal system.

It authorizes a supervisor to bar an employee from reporting for duty if a supervisor suspects the employee has had too much to drink and authorizes a supervisor to administer breath tests for alcohol when there is reasonable suspicion that an employee cannot do his job. When there is suspicion of impairment resulting from drug use, two supervisors, one trained in drug intoxication, must make the decision.

In accidents, the regulation requires that crew members submit to blood and urine tests conducted by independent medical facilities. Refusal to submit to a test leads to a nine-month suspension. Previously, the testing of crew members was voluntary.

The new rule was vigorously opposed by the railroads and leaders of rail workers' unions. The companies argued that it would limit their freedom of action; the unions contended that the regulation was vague and unconstitutional and would lead railroad management to abuse its new authority.

Their opposition prompted Republican and Democratic administrations alike to give the matter a low priority, stressing voluntary anti-drinking campaigns. The voluntary approach continued despite a mounting number of disturbing statistics. For example, a 1976 survey of 2,000 workers on six big rail lines found that 23 were "problem drinkers." It took the Livingston incident, most experts say, to push the safety debate out of the voluntarism arena.

Associated Press

The wreckage of two trains that collided in Wiggins, Colo., last year; a crewman on one train had been drinking, according to Federal officials.

The Washington Post

FRIDAY, JULY 27, 1984

New York Amtrak Wreck

Train Signal Operator Had Drug Traces in Blood

By Norman D. Atkins
Washington Post Staff Writer

Urinalysis shows that the signal operator on duty during Monday's Amtrak train collision in New York had traces of cocaine and another drug in his blood, a Senate Commerce, Science and Transportation subcommittee was told yesterday.

John Riley, head of the Federal Railroad Administration, testified that he would be surprised if the accident turned out to be drug-related, but after the hearing he said he would not rule out the possibility.

Amtrak President W. Graham Claytor later told the hearing that the operator has been suspended and faces a formal investigation into charges that he failed to set signals that would have prevented the two trains from using the same track simultaneously.

Riley was responding to questioning by Sen. John C. Danforth (R-Mo.), chairman of the Surface Transportation subcommittee, about the head-on collision that killed a Spanish diplomat and injured about 125 other persons.

Riley also read excerpts from a transcript of a taped conversation between the signal operator and the Penn Station dispatcher on duty at the time of the collision. He said the transcript indicates that "human error" may have caused the accident.

The full transcript, which Riley released after the hearing, shows that the dispatcher told the signal operator to hold up the northbound train leaving Penn Station while a southbound train used his track, because the southbound track had been closed for repairs. The signal operator told the dispatcher he had received the message.

According to the transcript, at 10:48 a.m., immediately before the crash, the dispatcher said to the signal operator at the gate: "Where's [the northbound train] at now? Has he arrived up at Gate [the switching point near Hell Gate Bridge in Queens]? Get him on the radio. Ask him what's up."

"He's by Gate . . . ," the operator said.

"What do you mean, he's by Gate? Ahh, Christ."

Nearly three minutes later, after they learned by radio about the accident, the dispatcher asked the signal operator if he had let pass the northbound train that he was supposed to stop. The signal operator said, "Yeah."

One minute later, however, the dispatcher asked whether the operator gave the train the green light to pass. "No, I didn't give him a signal," he responded.

"It's an apparent contradiction," Riley said. "The issue is did [the train] run the signal or was it not not right."

By Andrea D.N. Johnston—The Washington Post

Federal Railroad Administration's Riley: "The issue is did [the train] run the signal or was it not not right."

Patricia Goldman, vice chairman of the National Transportation Safety Board, told reporters that the dispatcher's logbook indicates he had sent a written message to the signal operator to hold the northbound train, while the southbound train was told it should continue.

Goldman said she was troubled that the signal operator—who was hired July 2—had had only five hours of training for his job and had been at the post only a short time when the accident happened. She said he told investigators that he had asked his supervisors for more training before he began his job.

Goldman also said the signal operator had said in an interview that he "smoked a joint" at a party Friday night, but she did not say whether he mentioned cocaine or other drug use.

Riley said a report on the results of the urine tests and the accident's cause would be released next week.

Testifying before the committee, Sen. Alfonse M. D'Amato (R-N.Y.) called for spot checks of Amtrak personnel to determine whether they are under the influence of alcohol or drugs while on duty.

Riley said the Queens accident was unlike other recent Amtrak accidents. In those, he said Amtrak "was as much a victim as the passengers" because of bad weather and other factors beyond control.

He said the accidents at McBee, S.C., Williston, Vt., and Elgin, S.C., this month come at a time when Amtrak "offers one of the safest modes of transportation available."

The Washington Post

SATURDAY, JANUARY 4, 1986

2 Air Controllers Arrested for Drugs

Two air traffic controllers from the Leesburg Air Route Traffic Control Center have been arrested on drug charges in East Potomac Park, the U.S. Park Police said yesterday.

The Federal Aviation Administration said that both have been reassigned to positions that do not involve public safety.

A Park Police spokeswoman identified the two as Charles Michael Hobbs, 37, of 307 Reynolds St., Alexandria, and Lacy Jonathan Brown, 38, of 2408 Porter Ave., Suitland. They were arrested Wednesday and charged with possession of cocaine, marijuana and drug paraphernalia, she said. They were released pending a Jan. 10 court date, the spokeswoman said.

The FAA said it was investigating the matter and would take "whatever further action is necessary." An FAA spokesman added that agency officials "don't have any evidence of widespread drug or alcohol abuse among FAA employes."

The Washington Post

FRIDAY, AUGUST 9, 1985

Drug Probe Leads to Firings

FAA Disciplines Air Traffic Controllers

Associated Press

MIAMI, Aug. 8—Three air-traffic controllers were fired and six others put in a drug-rehabilitation program following a federal probe into allegations of cocaine and marijuana use by employes of an air-route center here, an official said today.

The two-month probe by the Federal Aviation Administration cleared three controllers of wrongdoing, said Jack Barker, an FAA spokesman in Atlanta.

The FAA's control center in Miami, which is separate from Miami International Airport, oversees 3,000 to 5,000 daily flights in south Florida and the Caribbean. It employs about 220 controllers and assistants.

Barker said the investigation was launched in early June after employe allegations of marijuana and cocaine use by some controllers during off-duty hours.

"There was never any indication of any use while on duty or under the effects of drugs on duty," Barker said. "This was all off-duty."

The three controllers who were fired last Friday had been found guilty of selling or possessing marijuana or cocaine on government property, Barker said.

Six others were found guilty of marijuana or cocaine use during off-duty hours, and all have entered a drug rehabilitation program that will last at least six months, he said.

As of last month, he said, the six started performing only administrative duties at the center.

The identities of the controllers were not released.