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PUBLIC HEARING

before

SENATE LABOR, INDUSTRY AND PROFESSIONS COMMITTEE

SENATE BILL 2565

(Permits local governments to establish drug test policies for police and firemen)

SENATE BILL 2826

(Recognizes employers' rights to administer drug tests and authorizes Commissioner of Health to set test standards)

ASSEMBLY BILL 2850 (ACS)

(Establishes uniform standards and ground rules for employee drug tests and makes an appropriation)

April 9, 1987

Freeholder Meeting Room

Union County Administration Building

Elizabeth, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Senator Raymond Lesniak, Chairman

Senator Christopher J. Jackman, Vice Chairman

Senator Edward T. O'Connor, Jr.

Senator Gerald Cardinale

Senator Donald T. DiFrancesco

New Jersey State Library

ALSO PRESENT:

Dale C. Davis, Jr.

Office of Legislative Services

Aide, Senate Labor, Industry and Professions Committee

Jaci S. Goldrosen

Office of Legislative Services

Deputy Legislative Counsel

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Hearing Recorded and Transcribed by

Office of Legislative Services

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Hearing Unit

State House Annex

CN 068

Trenton, New Jersey 08625



## New Jersey State Legislature

RAYMOND LESNIAK  
*Chairman*

CHRISTOPHER J. JACKMAN  
*Vice-Chairman*

EDWARD T. O'CONNOR, JR.

GERALD CARDINALE

DONALD T. DiFRANCESCO

### SENATE LABOR, INDUSTRY AND PROFESSIONS COMMITTEE

STATE HOUSE ANNEX, CN-068

TRENTON, NEW JERSEY 08625

TELEPHONE: (609) 984-0445

### NOTICE OF PUBLIC HEARING

March 24, 1987

The Senate Labor, Industry and Professions Committee will hold a public hearing on Thursday, April 9, 1987, at 10:00 A.M., in the Freeholder Meeting Room, Union County Administration Building, Elizabeth, on the following bills:

S-2565      Permits local governments to establish drug test policies  
O'Connor      for police and firemen.

S-2826      Recognizes employers' rights to administer drug tests and  
Bassano      authorizes the Commissioner of Health to set test standards.

A-2850(ACS) Designated the "Preemployment and Employment Drug Testing  
Littell/      Standard Act."  
Foy

Anyone wishing to testify should contact Dale Davis, Committee Staff,  
at 609-984-0445.

SENATE, No. 2565

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STATE OF NEW JERSEY

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INTRODUCED SEPTEMBER 18, 1986

By Senators O'CONNOR, GRAVES and BUBBA

Referred to Committee on Law, Public Safety and Defense

AN ACT authorizing drug abuse tests for county and municipal police officers and firefighters in the State and supplementing Title 40A of the New Jersey Statutes.

1    BE IT ENACTED *by the Senate and General Assembly of the State*  
2    *of New Jersey:*

1    1. Any permanent or temporary member or officer of a paid or  
2    part-paid fire department and force or police department and  
3    force shall submit to drug abuse tests as required by the governing  
4    body that created the department and force. However, no member  
5    or officer shall be required to submit to a test unless the governing  
6    body adopts by resolution and issues in written form to each mem-  
7    ber or officer a drug testing policy that:

8    a. identifies the bases or grounds on which a member or officer  
9    may be tested;

10   b. explains in detail the procedures that will be used to acquire  
11   samples, test for the presence of illicit drugs, maintain the in-  
12   tegrity of samples in custody, conduct confirmatory tests, and  
13   assures the confidentiality of test results;

14   c. requires an initial screening test with an expected rate of  
15   error of less than .01% as determined by the Commissioner of  
16   Health and utilizes a laboratory approved by the Commissioner  
17   of Health;

18   d. requires confirmation tests for all positive results in an initial  
19   screening;

20   e. specifies the concentration levels at which a member or officer

21 will be deemed to have a controlled dangerous substance in his  
22 body;

23 f. mandates that members or officers, whose initial and con-  
24 firmatory test results are positive, shall be given a reasonable op-  
25 portunity to participate in a drug rehabilitation program or  
26 employee assistance program before dismissal can occur; and

27 g. stipulates that any dispute between a member or officer and  
28 supervisory personnel over the bases or grounds for the testing,  
29 the methodology of testing, or the use of test results, shall be sub-  
30 ject to arbitration.

1 2. Drug testing policies adopted and issued under this act may,  
2 at the request of the county or municipal governing body, be sub-  
3 mitted to the Attorney General and the Commissioner of Health  
4 for review and approval.

1 3. The Commissioner of Health shall promulgate all rules and  
2 regulations which he deems necessary for the proper administra-  
3 tion and enforcement of this act.

1 4. This act shall take effect immediately.

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### STATEMENT

This bill permits counties or municipalities with full-paid or part-paid police departments or fire companies to institute drug abuse testing for police and fire personnel under certain conditions. Police officers and firefighters are required to submit to drug tests only when the governing body of the municipality or county adopts and issues a policy on drug testing which contains provisions assuring the accuracy and confidentiality of test results and affords drug abusers a reasonable opportunity to participate in a rehabilitation program. Disputes between a police officer or firefighter and supervisory personnel would be subject to arbitration. In addition, the bill authorizes the Commissioner of Health to determine the expected error rate for drug tests and to approve drug test labs involved in drug testing police and fire personnel. Finally, municipalities and counties would be permitted under the bill to submit their policies to the Attorney General and the Commissioner of Health for review and approval.

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### LABOR RELATIONS AND EMPLOYMENT

Permits local govts. to establish drug test policies for police and firemen.

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**SENATE, No. 2826**  
**STATE OF NEW JERSEY**

INTRODUCED DECEMBER 8, 1986

By Senators BASSANO, EWING, DiFRANCESCO and BUBBA

Referred to Committee on Labor, Industry and Professions

AN ACT authorizing the Department of Health to establish uniform standards for the administration of drug tests in the workplace and the Department of Labor to regulate the use of these tests by employers.

1 WHEREAS, illegal drugs have become so pervasive in the workplace  
2 that they are used in almost every industry by blue and white  
3 collar workers alike; and

4 WHEREAS, their presence on the job is sapping the energy, honesty,  
5 reliability and safety of the American labor force; and

6 WHEREAS, the President's Commission on Organized Crime has  
7 declared that drug trafficking is the most serious problem in  
8 the nation today and that government, private companies and  
9 individuals can play a role in curbing the demand for illegal  
10 drugs; and

11 WHEREAS, federal law places the responsibility on employers to  
12 provide their employees with a safe and healthy work environ-  
13 ment, and to produce goods free of defects likely to cause injury  
14 to the consumer; and

15 WHEREAS, the Legislature finds and declares that:

16 It is the public policy of this State that employers have the  
17 right to screen their employees and job applicants for the use  
18 of illegal drugs; now, therefore,

1 BE IT ENACTED *by the Senate and General Assembly of the State*  
2 *of New Jersey:*

1 1. This act shall be known and may be cited as the "Workplace  
2 Drug Abuse Testing Act."

1 2. As used in this act:

2 a. "Controlled dangerous substance" means a drug, substance  
3 or immediate precursor as defined in Schedules I through V of  
4 Article 2 of the "New Jersey Controlled Dangerous Substances  
5 Act," P. L. 1970, c. 226 (C. 24:21-1 et seq.);

6 b. "Illegal drug" means any controlled dangerous substance,  
7 narcotic opiate, hallucinogenic or other mind-altering substance  
8 which is not legally obtainable or the distribution of which is  
9 controlled by law and no evidence, such as a prescription, can be  
10 produced that it was legally obtained;

11 c. "Drug test" includes any medical or chemical test which is  
12 capable of determining the presence or absence of detectable levels  
13 of drugs in body fluids;

14 d. "Employee" means any person who supplies a service for  
15 remuneration or for any contract for hire to an employer in this  
16 State;

17 e. "Applicant" means a prospective employee who has been  
18 made an offer of employment subject to passing a preemployment  
19 physical examination;

20 f. "Employer" means and includes any private individual or  
21 organization that is an employer under R. S. 43:21-19, any gov-  
22 ernmental authority that is a public employer under the "New  
23 Jersey Employer-Employee Relations Act," P. L. 1968, c. 303  
24 (C. 34:13A-1 et seq.), and any other individual or organization  
25 which the Commissioner of Labor designates, by regulation, as an  
26 employer under this act.

1 3. a. Employers who plan to engage in testing their employees  
2 and job applicants for illegal drug use shall adopt a drug testing  
3 policy and communicate this policy to all employees and job appli-  
4 cants.

5 b. Prior to administering a drug test upon an employee or appli-  
6 cant, an employer shall request the employee or applicant to sign  
7 a consent form.

8 c. Employers shall utilize a testing laboratory that only uses  
9 the uniform methodology and procedures approved by the Com-  
10 missioner of Health to evaluate the contents of the sample.

11 d. Testing laboratories shall use one-half of any specimen taken  
12 from an employee or applicant for the initial screening test and  
13 preserve the unused portion of a specimen and perform an ap-  
14 proved confirmation test when the initial test results in a positive  
15 finding. The employer shall inform the employee or applicant if  
16 the result of the drug test is positive. An employer may suspend

17 or temporarily reassign the employee pending the confirmation of  
18 the initial screening test result.

19 e. Employers shall have the right to discipline an employee, in  
20 accordance with company policy, when a sample provided by the  
21 employee produces a positive test result on a confirmation test.  
22 Employers shall also have the option of providing counseling,  
23 treatment, or rehabilitation and a leave of absence to employees.

24 f. Employers are authorized to conduct drug testing on a  
25 random or routine basis if:

26 (1) there are health and safety dangers;

27 (2) there is a compelling interest for the employers to admin-  
28 ister drug tests on a random or routine basis; or

29 (3) the drug tests are conducted as part of a periodic employee  
30 medical examination, in connection with a work-related accident  
31 or incident, or as part of an established preemployment procedure.

32 g. Employers shall ensure that any information concerning drug  
33 test results is not released to any person other than the employee,  
34 applicant, supervisory personnel designated by the employer, or  
35 counselors and medical personnel in a drug abuse counseling or  
36 rehabilitation program. If required to defend its interests in a  
37 legal proceeding, grievance procedure, arbitration, or in response  
38 to a state or federal agency, an employer may release information  
39 on a drug test.

40 h. An applicant who has a confirmed positive finding reported  
41 to an employer may be denied employment by that employer.

1 4. If an employer utilizes a laboratory for drug testing that is  
2 outside this State, that laboratory shall conform to all State  
3 standards for drug testing.

1 5. There is created an Advisory Committee on Employee Drug  
2 Testing. The committee shall consist of eight public members ap-  
3 pointed by the Commissioner of Health, who shall possess expertise  
4 in drug testing. The committee shall include two forensic toxicolo-  
5 gists; two medicinal chemists; two industrial physicians; and two  
6 pharmacologists. In the case of a vacancy, the commissioner shall  
7 appoint a replacement in the same manner as the original appoint-  
8 ments were made. The committee shall make a final report to the  
9 commissioner within six months following the appointment of the  
10 full committee, and shall dissolve upon rendering its final report.  
11 The commissioner shall serve as chairman of the committee.

12 The members of the advisory committee shall limit their recom-  
13 mendations to guidelines for the methodology and procedure used  
14 to evaluate the contents of samples and the safe keeping of samples.

15 The commissioner shall be bound by the recommendations of the  
16 advisory committee.

1 6. It shall be unlawful for any employer or his duly authorized  
2 agent to administer a drug test or a set of drug tests upon any  
3 employee or job applicant unless the test and test procedures  
4 conform with the provisions of this act and the rules and regula-  
5 tions promulgated thereunder.

1 7. The Commissioner of Health may adopt and from time to  
2 time supplement, alter or repeal rules and regulations concerning  
3 guidelines, methodology and procedures for testing laboratories  
4 that conduct drug tests for employers. Such rules and regulations  
5 shall establish standards for the acquisition of samples, the hand-  
6 ling, control, and disposition of samples, the methodology and pro-  
7 cedures used to evaluate the contents of samples, the statistical  
8 margins of error associated with a drug test, and the personnel  
9 who may be authorized to conduct drug tests. The commissioner  
10 shall promulgate regulations pursuant to this act only in consulta-  
11 tion with the Attorney General.

1 8. The Commissioner of Labor is designated to administer,  
2 implement, and enforce all provisions of this act, except those  
3 provisions which are administered by the Commissioner of Health  
4 pursuant to sections 3, 5 and 7 of this act. Any violation of the  
5 provisions of this act shall be punishable by a fine of not less than  
6 \$500.00 to be collected in a civil action by a summary proceeding  
7 under "the penalty enforcement law," N. J. S. 2A:58-1 et seq.

1 9. This act shall take effect immediately but shall not become  
2 operative until the 180th day after issuance of the report of the  
3 advisory committee pursuant to section 5 of this act which shall  
4 become effective immediately.

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#### STATEMENT

This bill authorizes the Commissioner of Health to issue regula-  
tions concerning drug tests for employees and job applicants.  
These regulations would serve as standards and guidelines for the  
acquisition of samples, the handling, control, and disposition of  
samples, the methodology and procedures used to evaluate the  
contents of samples, the statistical margins of error associated  
with a drug test, and the personnel who may be authorized to  
conduct a drug test.

In addition, the bill requires employers, public and private, who  
use drug tests on their employees to:

(1) develop a drug testing policy and communicate this to all  
employees and job applicants;

(2) utilize drug testing labs which use methods approved by the Commissioner of Health;

(3) conduct confirmation tests on samples that produce positive results on initial screening tests;

(4) inform the employee or job applicant of test results; and

(5) ensure the confidentiality of test results, except in court actions, grievance proceedings, arbitration hearings, or State or federal investigations or inquiries.

Further, the bill clarifies the employer's rights to:

(1) discipline employees whose specimens produce positive results on a confirmation test; and

(2) test employees on a random or routine basis where there are health and safety dangers, a compelling interest for the employer to test or a need to test employees as part of a medical exam, accident investigation, or a standard preemployment procedure.

Finally, the bill authorizes the Commissioner of Labor to enforce all provisions not directly related to test methods and procedures.

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#### LABOR RELATIONS AND EMPLOYMENT

Recognizes employers' rights to administer drug tests and authorizes Commissioner of Health to set test standards.

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ASSEMBLY COMMITTEE SUBSTITUTE FOR  
**ASSEMBLY, No. 2850**  
**STATE OF NEW JERSEY**

ADOPTED NOVEMBER 13, 1986

By Assemblymen LITTELL and FOY

AN ACT establishing uniform standards for preemployment and  
employment drug tests and making an appropriation.

1 BE IT ENACTED by the Senate and General Assembly of the State  
2 of New Jersey:

1 1. This act shall be known and may be cited as the "Preemploy-  
2 ment and Employment Drug Testing Standards Act."

1 2. Definitions. As used in this act:

2 a. "Compelling interest" is an interest that justifies the adminis-  
3 tration of a drug test for the protection of the employee affected  
4 by drug use, of other employees, or of the public.

5 b. "Confirmation test" means a drug test that utilizes a gas  
6 chromatography and mass spectrometry methodology or an equally  
7 or more reliable method designated by the Commissioner of Health  
8 and that is used, subsequent to an initial screening test, to verify  
9 the presence of an illegal drug or drug metabolite in a sample.

10 c. "Controlled substance analog" means a substance that has a  
11 chemical structure similar to that of a controlled dangerous sub-  
12 stance or that was specifically designed to produce an effect sub-  
13 stantially similar to that of a controlled dangerous substance, but  
14 does not include a substance manufactured or distributed in con-  
15 formance with the provisions of an approved new drug application  
16 or an exemption for investigational use within the meaning of  
17 section 505 of the "Federal Food, Drug, and Cosmetic Act," 52 Stat.  
18 1052 (21 U. S. C. § 355).

19 d. "Controlled dangerous substance" means a drug, substance or  
20 immediate precursor as defined in Schedules I through V of article  
21 2 of the "New Jersey Controlled Dangerous Substances Act," P. L.  
22 1970, c. 226 (C. 24:21-1 et seq.).

preferable

medical

author

human

23 e. "Illegal drug" means any substance, other than alcohol, that  
24 has known mind or function-altering effects on a human being and  
25-26 that is not a prescription or non-prescription medication and  
27 includes controlled dangerous substances and controlled substance  
28 analogs or volatile substances which produce the psychological and  
29 physiological effects of a controlled dangerous substance through  
30 deliberate inhalation.

31 f. "Drug test" means any test administered for the purpose of  
32 determining the presence or absence of an illegal drug in a person's  
33 body.

34 g. "Employee" means any person who supplies a service for  
35 remuneration or for any contract for hire to a private or public  
36 employer in this State.

37 h. "Employee assistance program" means a program of therapy,  
38 counseling and rehabilitation in which medical personnel, provided  
39 by the employer or through referrals by the employer, counsel and  
40 treat persons affected by substance abuse problems and evaluate  
41 their progress in recovering from or controlling those problems.

42 i. "High-risk occupation" means any occupation wherein the per-  
43 formance of a service directly and immediately affects the security  
44 and safety of the public and includes any occupation identified by  
45 the Commissioner of Labor pursuant to section 14 of this act.

46 j. "Initial screening test" means and includes, but is not limited  
47 to, any immunoassay, thin layer chromatography, or other type of  
48 drug test that is used, prior to a confirmation test, to assay a sample.

49 k. "Law enforcement officer" means any law enforcement officer  
50 who is responsible for the enforcement of the criminal laws of the  
51 State of New Jersey and who is authorized to carry a firearm  
52 pursuant to N. J. S. 2C:39-6.

53 l. "Medical facility" means a laboratory wherein drug tests are  
54 conducted on samples and which has been approved for this purpose  
55 by the Commissioner of Health.

56 m. "Medical personnel" means any medical practitioner,  
57 therapist, or counselor authorized by the Commissioner of Health  
58 to administer drug tests, to test samples, or to provide therapy,  
59 counseling, or medical treatment in an employee assistance pro-  
60 gram.

61 n. "Prescription or non-prescription medication" means a drug  
62 prescribed for use by a duly licensed physician, dentist, or other  
63 medical practitioner licensed to issue prescriptions or a drug that  
64 is authorized for general distribution and use in the treatment of  
65 human diseases, ailments, or injuries pursuant to the "Federal

66 Food, Drug, and Cosmetic Act," 52 Stat. 1040 (21 U. S. C. § 301  
67 et seq.).

68 o. "Private employer" means and includes any private indi-  
69 vidual or organization or nongovernmental entity that is an  
70 employer under R. S. 43:21-19 or that the Commissioner of Labor  
71 designates, by regulation, as a private employer for the purposes  
72 of this act.

73 p. "Public employer" means any public entity that is a public  
74 employer under P. L. 1968, c. 303 (C. 34:13A-1 et seq.).

75 q. "Sample" means a human body part or product medically or  
76 chemically capable of revealing the presence of an illegal drug  
77 in the human body.

### 1 3. Uniform Standards for Drug Tests During Employment.

2 a. Any drug test administered upon an employee in this State  
3 shall be in conformity with the standards established in this section.  
4 other applicable provisions of this act, and all applicable regula-  
5 tions promulgated pursuant to sections 14, 15 and 16 of this act.

6 b. Any employee required by a private or public employer to  
7 submit to a drug test shall be given, at least 30 days prior to the  
8 first drug test administered upon the employee, a written policy  
9 statement from the employer which contains:

10 (1) A general statement describing the employer's policy on em-  
11 ployee drug use and identifying both the grounds on which an em-  
12 ployee may be required to submit to a drug test and the actions the  
13 employer may take against an employee on the basis of a positive  
14 drug test result;

15 (2) An explanation of the guarantees of confidentiality provided  
16 by this act, the employer's policy, and any applicable collective  
17 bargaining agreement or contract;

18 (3) An indication of the supervisory or managerial personnel  
19 or consultants who an employee may contact regarding a drug abuse  
20 problem;

21 (4) A statement advising the employee of the existence of this  
22 act and providing the employee with a copy of the employer's policy;

23 (5) An identification of the kind of samples to be required from  
24 the employee and the types of drug tests, whether immunoassay,  
25 thin layer chromatography, spectrometry, or other equally reliable  
26 test methodology, that will be used in an initial screening test; and

27 (6) An instruction to the employee about the reporting opportu-  
28 nities for the employee's use of prescription or non-prescription  
29 medications.

30 This subsection shall not apply to any employee during his first  
31 30 days of employment.

32 c. Any employee required to submit to a drug test may be re-  
33 quested by the private or public employer to sign a statement  
34 indicating that he has read and understands the employer's drug  
35 testing policy, but an employee's refusal to sign a statement shall  
36 not invalidate the objective results of a test or bar the employer  
37 from administering the test or taking disciplinary action, provided  
38 that the action is consistent with the terms of any applicable collec-  
39 tive bargaining agreement.

40 d. An employee shall be given by the private or public employer  
41 the written result of any drug test performed on a sample provided  
42 by the employee within two working days of the private or public  
43 employer's receipt of the drug test result from the medical facility  
44 which conducted the test. If the employee is unavailable, the em-  
45 ployer shall send the results to the employee's permanent address  
46 by certified mail.

47 e. A private or public employer shall not release to any person  
48 other than the employee, medical personnel, supervisory personnel,  
49 or other personnel of the employer as designated by the employer  
50 on a need-to-know basis any information related to drug test results  
51 unless:

52 (1) The employee has expressly granted permission for the em-  
53 ployer to release such information; or

54 (2) The information is released as material evidence upon a  
55 showing of good cause, in a filed action; or released, in compliance  
56 with federal and State laws and regulations, as part of the em-  
57 ployer's defense in a grievance proceeding, arbitration or admin-  
58 istrative hearing, or federal or State investigation or as part of  
59 the employer's internal grievance investigation of an employee's  
60 complaint.

61 f. Every sample which produces a positive result on a confirma-  
62 tion test shall be preserved by the medical facility which conducts  
63 the confirmation test for a period of 90 days during which the  
64 employee who provided the sample shall be permitted by the private  
65 or public employer to have a portion of any sample taken by the  
66 employer assayed by a confirmation test done independently, at  
67 the employee's expense, at a medical facility chosen by the employee  
68 or his representative and approved by the Commissioner of Health  
69 pursuant to section 15 of this act if:

70 (1) The employee's chosen medical facility assumes responsi-  
71 bility for the transfer of the portion of the sample and for the  
72 integrity of the chain of custody during the transfer; and

73 (2) The employee's chosen medical facility complies with all

74 chain of custody requirements established by this act and by the  
75 Commissioner of Health through regulations.

76 g. (1) A public employer shall provide, pursuant to Title 11A of  
77 the New Jersey Statutes and at the recommendation of a physician,  
78 to any employee whose sample shows the presence of an illegal  
79 drug in a confirmation test a temporary leave of absence so that  
80 the employee may enter a detoxification, rehabilitation, and counsel-  
81 ing program, except that no public employer shall be required to  
82 grant a temporary leave of absence for detoxification if a confirma-  
83 tion test, taken after the employee has had a reasonable opportunity  
84 to be detoxified and rehabilitated, shows the presence of an illegal  
85 drug in a sample provided by the employee.

86 (2) A private employer may provide to any employee whose  
87 sample shows the presence an illegal drug in a confirmation test  
88 a temporary leave of absence so that the employee may enter a  
89 detoxification, rehabilitation, or counseling program in accordance  
90 with the employer's policy.

91 h. Every private or public employer shall cooperate fully with  
92 the Department of Labor, The Department of Health, and the De-  
93 partment of Law and Public Safety in programs designed to educate  
94 employees about the dangers of drug abuse and about public and  
95 private services available to employees who have a drug abuse  
96 problem.

97 i. Before or at the time of the administration of a drug test upon  
98 an employee, the private or public employer shall inform the em-  
99 ployee to be tested of the opportunity to submit medical documenta-  
100 tion that may verify the employee's use of a prescription or non-  
101 prescription medication, but such verification shall not preclude  
102 the administration of the drug test.

103 j. Private or public employers shall conduct drug tests on samples  
104 only through medical facilities and by medical personnel approved  
105 for this purpose by the Commissioner of Health.

#### 1 4. Uniform Standards for Drug Testing in Preemployment.

2 a. Any drug test administered upon a job applicant in this State  
3 shall be in conformity with the standards established in this section,  
4 other applicable provisions of this act, and all applicable regula-  
5 tions promulgated pursuant to this act:

6 b. Each applicant shall be notified, prior to the collection of a  
7 sample for a drug test, that the sample will be tested for the pre-  
8 sence of an illegal drug or drugs; and

9 c. Any information obtained by the private or public employer  
10 through a drug test administered upon a job applicant shall not be



11 released to any person other than the persons authorized to receive  
12 such information pursuant to subsection e. of section 3 of this act.

1 5. Ground Rules for Drug Testing in Private Employment.

2 a. A private employer may require an employee to submit to a  
3 drug test if the private employer has reasonable suspicion that  
4 the employee's job performance is being or could reasonably be  
5 expected to be affected by the influence of a drug provided that  
6 there is no contrary provision in a collective bargaining agreement  
7 or contract applicable to the employee.

8 If a confirmation test on a sample provided by the employee  
9 produces a positive result, there shall be a rebuttable presumption  
10 that the employer had reasonable suspicion that the employee's job  
11 performance was being or could reasonably have been expected to  
12 have been affected by the influence of a drug.

13 b. A private employer may also require an employee to submit  
14 to a drug test on a random or routine basis if:

15 (1) The test is conducted as part of an employee assistance pro-  
16 gram, as defined in subsection h. of section 2 of this act, sponsored  
17 or authorized by the private employer;

18 (2) The employee serves in an occupation:

19 (a) which has been designated by the Commissioner of Labor  
20 as a high-risk occupation pursuant to section 14 of this act and  
21 for which there is no collective bargaining agreement or con-  
22 tract to the contrary; or

23 (b) for which the private employer has a compelling inter-  
24 est to administer a drug test upon the employee on a random or  
25 routine basis;

26 (3) The test is conducted as part of an investigation of personnel  
27 involved in an accident;

28 (4) The test is conducted as part of an employee medical exami-  
29 nation which is part of the employer's established policy and which  
30 is scheduled routinely for all members of an employment classifica-  
31 tion or group;

32 (5) The test is conducted in accordance with the terms of an  
33 applicable collective bargaining agreement or contract which may  
34 permit the private employer to administer drug tests on a random  
35 or routine basis.

36 c. This section shall not prohibit a private employer and a  
37 collective bargaining representative, association, or union from  
38 establishing in a collective bargaining agreement or contract,  
39 negotiated under the "Labor Management Relations Act, 1947"  
40 61 Stat. 136 (29 U. S. C. § 141 et seq.), procedural guidelines that

41 prohibit drug tests or permit drug tests on any basis as defined in  
 42 the agreement or contract for employees covered by the agreement  
 43 or contract or that identify the practices to be used in the adminis-  
 44 tration of drug tests.

45 d. An employer may take disciplinary action or discharge an  
 46 employee who refuses to submit to a drug test provided that the  
 47 disciplinary action or discharge is consistent with federal and State  
 48 laws and regulation, the provisions of this act, the employer's  
 49 policy, and any applicable collective bargaining agreement or con-  
 50 tract.

1 6. Ground Rules for Drug Testing in Public Employment.

2 a. A public employer may require an employee to submit to a  
 3 drug test if the employer has reasonable suspicion that the em-  
 4 ployee's job performance is being or could reasonably be expected  
 5 to be affected by the influence of a drug provided that there is no  
 6 contrary provision in a collective bargaining agreement or contract  
 7 applicable to the employee.

8 If a confirmation test on a sample provided by the employee  
 9 produces a positive result, there shall be a rebuttable presumption  
 10 that the employer had reasonable suspicion that the employee's job  
 11 performance was being or could reasonably have been expected to  
 12 have been affected by the influence of a drug.

13 b. A public employer may also require an employee to submit  
 14 to a drug test if:

15 (1) The test is conducted as part of an employee assistance pro-  
 16 gram, as defined in subsection h. of section 2 of this act, sponsored  
 17 or authorized by the public employer: or

18 (2) The test is conducted in accordance with the terms of any  
 19 applicable collective bargaining agreement or contract which may  
 20 permit the public employer to administer drug tests on any basis  
 21 as defined in the agreement or contract.

22 c. A public employer and a collective bargaining representative,  
 23 association, or union are authorized to establish as a term or con-  
 24 dition of employment in a collective bargaining agreement or con-  
 25 tract, developed in compliance with the "New Jersey Employer-  
 26 Employee Relations Act," P. L. 1968, c. 303 (C. 34:13A-1 et seq.),  
 27 procedural guidelines that prohibit drug tests or permit drug tests  
 28 on any basis for employees covered by the agreement or that  
 29 identify the practices to be used in the administration of drug tests.

30 d. An employer may take disciplinary action against or dis-  
 31 charge an employee who refuses to submit to a drug test provided  
 32 that the disciplinary action or discharge is consistent with federal

33 and State laws and regulations, the provisions of this act, the  
 34 employer's policy, and any applicable collective bargaining agree-  
 35 ment or contract.

1 7. Chain of Custody Protection. It shall be unlawful for any  
 2 person to intentionally and willfully alter, replace, or dispose of a  
 3 sample or to alter, remove, or replace the identification labels of a  
 4 sample taken as part of a drug test if the act or omission was in-  
 5 tended to produce an incorrect drug test result. Any person who  
 6 violates this section shall be guilty of a crime of the fourth degree.

1 8. Confirmation tests required.

2 a. It shall be unlawful for any private or public employer to  
 3 take any disciplinary action against an employee solely on the basis  
 4 of results from an initial screening test. Any such action against  
 5 an employee by an employer shall be based on the results of a  
 6 confirmation test. Any employer who violates this section shall be  
 7 fined \$250.00 for the first offense and \$1,000.00 for each subsequent  
 8 offense to be collected in a civil action by a summary proceeding.  
 9 brought by the Commissioner of Labor pursuant to "the penalty  
 10 enforcement law" (N. J. S. 2A:58-1 et seq.). However, the pro-  
 11 visions of this section shall not prevent an employer:

12 (1) From temporarily reassigning the employee to another  
 13 position, if one is available, pending the completion of a confirma-  
 14 tion test; or

15 (2) From temporarily suspending the employee, with or without  
 16 pay, pending completion of a confirmation test provided that any  
 17 employer who temporarily suspends an employee pending the com-  
 18 pletion of a confirmation test shall reinstate the employee with  
 19 full pay, benefits, and rights for the period of suspension and ex-  
 20 punge all references to the incident from the employee's personnel  
 21 record if the employee's sample produces a negative result on the  
 21a confirmation test.

22 b. For the purposes of this section, each disciplinary action taken  
 23 against an employee on the basis of drug test results without a  
 24 confirmation test shall constitute an additional and separate and  
 25 distinct offense. Any penalty recovered pursuant to this section  
 26 shall be paid into the General Fund.

1 9. Violations of Confidentiality. It shall be unlawful for any per-  
 2 son to release information obtained through a drug test except as  
 3 provided by federal law and subsection e. of section 3 of this act.  
 4 Any person who violates this section shall be guilty of a crime of  
 5 the fourth degree, in addition to any other penalties arising under  
 6 federal law, rules, and regulations.

1 10. Violations of Test Standards.

2 a. It shall be unlawful for any person to administer or conduct  
3 a drug test which, in its methodologies or procedures, violates the  
4 rules and regulations promulgated by the Commissioner of Health  
5 pursuant to section 15 of this act. Any person who violates this  
6 section shall be fined \$250.00 for the first offense and \$1,000.00 for  
7 each subsequent offense to be collected in a civil action by a summary  
8 proceeding brought by the Commissioner of Health pursuant to  
9 "the penalty enforcement law" (N. J. S. 2A:58-1 et seq.).

10 b. For the purposes of this section, a failure to use approved  
11 test methods or procedures on a single sample shall constitute an  
12 additional and separate and distinct offense. A penalty recovered  
13 for any violation of this section shall be paid into the General Fund.

1 11. This act shall not apply to:

2 a. Employers and employees regulated by the State Athletic  
3 Control Board pursuant to P. L. 1985, c. 83 (C. 5:2A-1) or the New  
4 Jersey Racing Commission pursuant to P. L. 1940, c. 17 (C. 5:5-22  
5 et seq.);

6 b. Professional sports organizations;

7 c. Employment of railroad workers covered by Federal Rail-  
8 road Administration regulations, persons assigned to or engaged  
9 in nuclear power activities, and air transportation personnel who  
10 are subject to medical evaluations pursuant to Federal Aviation  
11 Administration regulations;

12 d. Law enforcement officers, as defined in subsection k. of section  
13 2 of this act.

1 12. a. Upon a violation, except de minimis violations, of the pro-  
2 visions of this act and the exhaustion of any employer-employee  
3 internal administrative remedies that may be available, an ag-  
4 grieved employee or former employee may institute a civil action  
5 in a court of competent jurisdiction, within six months of the  
6 alleged violation or the exhaustion of any internal administrative  
7 remedies available to the employee, for the following relief which  
8 may include, and which the court may order:

9 (1) An injunction to restrain continued violation of this act;

10 (2) The reinstatement of the employee to the same position held  
11 before the unlawful disciplinary action or to an equivalent position;

12 (3) The reinstatement of full fringe benefits and seniority rights;

13 (4) The compensation for lost wages, benefits and other remu-  
14 nation;

15 (5) The payment by the employer of reasonable costs and  
16 attorney's fees: or

17 (6) Such other remedies at law or in equity as the court may  
18 determine appropriate under the circumstances.

19 b. Any claim made by an employee within an internal administra-  
20 tive process available to the employee shall not affect the status  
21 of a subsequent action filed by the employee pursuant to this section.

22 c. Any employer who complies with the provisions of this act  
23 shall be without liability from all civil actions that may arise from  
24 any such testing or procedure performed in compliance with this  
25 act.

1 13. A court, upon notice of motion in accordance with the Rules  
2 Governing the Courts of the State of New Jersey, may also order  
3 that reasonable attorney's fees and court costs be awarded to an  
4 employer if the court determines that an action brought by an  
5 employee under this act was without basis in law or fact and in  
6 bad faith.

1 14. The Commissioner of Labor shall promulgate, within 180  
2 days of the enactment date of this act, rules and regulations, in  
3 accordance with the "Administrative Procedure Act," P. L. 1968,  
4 c. 410 (C. 52:14B-1 et seq.), to:

5 a. Determine which categories of employees in the private sector  
6 are serving in high-risk occupations as defined in subsection i. of  
7 section 2 of this act and identify these categories according to their  
8 title under the United States Department of Commerce Standard  
9 Occupational Classification Manual or other standard occupational  
10 manuals;

11 b. Monitor employer and employee compliance with this act in  
12 the public and private sectors; and

13 c. Enforce sections 3 through 9 of this act.

1 15. The Commissioner of Health shall promulgate, within 180  
2 days of enactment date of this act, rules and regulations, in accor-  
3 dance with the "Administrative Procedure Act," P. L. 1963, c. 410  
4 (C. 52:14B-1 et seq.), to:

5 a. Approve medical facilities and medical personnel who may be  
6 used by employers to conduct or administer drug tests;

7 b. Establish procedural and methodological standards for all  
8 technical aspects of drug tests including but not limited to rules  
9 for the acquisition of samples, procedural guidelines to ensure the  
10 integrity of the chain of custody, methodological and technical  
11 standards for initial screening tests and confirmation tests, accept-  
12 ability limits for the margins of error associated with particular  
13 drug tests, and volume thresholds at which a drug test result may  
14 be deemed a positive test result for a specific illegal drug.



15 c. Monitor the performance of medical facilities and personnel  
16 to assure compliance with this act and regulations promulgated  
17 under this section; and

18 d. Enforce section 10 of this act.

1 16. The Commissioner of Personnel shall promulgate, within 180  
2 days of the enactment date of this act, rules and regulations, in  
3 accordance with the "Administrative Procedure Act," P. L. 1968,  
4 c. 410 (C. 52:14B-1 et seq.), to establish a drug testing policy in  
5 accordance with the provisions of sections 2, 3, 4 and 6 of this act  
6 for employees and job applicants of the State, except law enforce-  
7 ment officers as defined in subsection k. of section 2 of this act.

1 17. a. There is created in, but not of, the Department of Labor,  
2 an Advisory Committee on Employee Drug Testing. The committee  
3 shall solicit information and recommendations from experts in the  
4 field of drug testing, develop proposals and recommend guidelines  
5 for drug test regulations, identify high-risk occupations, and per-  
6 form other related tasks as the Commissioner of Labor and Com-  
7 missioner of Health deem necessary.

8 b. The committee shall consist of 12 members, all of whom shall  
9 be residents of this State. One representative from each of the  
10 following shall be ex officio members: the Department of Health;  
11 the Department of Labor; the Department of Law and Public  
12 Safety; and the Department of Personnel. Eight members shall be  
13 appointed by the Governor and shall include: two representatives  
14 of business trade associations; two representatives of organized  
15 labor; a representative of a public employee association or union;  
16 a representative of the New Jersey State Bar Association; a repre-  
17 sentative of the New Jersey Chapter of the American Civil Liber-  
18 ties Union; and one medical doctor who has expertise in the areas of  
19 drug abuse and drug testing and who also is licensed to practice  
20 medicine and surgery in this State or an expert in medicinal chem-  
21 istry and toxicology.

22 c. Each appointive member shall serve for a term of one year  
23 or, if he is unable to complete his term, until his successor is  
24 appointed. Members of the committee shall serve without compen-  
25 sation but shall be entitled to reimbursement for expenses incurred  
26 in performance of their duties. Vacancies in the committee shall be  
27 filled for the unexpired term.

28 d. The Governor shall appoint a chairman of the committee within  
29 20 days of the enactment date of this act.

30 e. The committee shall use the personnel and resources of the  
31 Department of Labor and Department of Health in performing its

32 duties and may request assistance from other departments and  
33 agencies of the State as the committee deems necessary.

34 f. The committee shall make a formal report to the Commissioner  
35 of Labor and Commissioner of Health within six month of the en-  
36 actment date of this act.

1 18. Interim Arrangements.

2 Prior to the adoption of rules and regulations by the Commis-  
3 sioner of Health, the Commissioner of Labor, and the Commissioner  
4 of Personnel pursuant to sections 14 through 16 of this act, a pub-  
5 lic or private employer shall notify the Commissioner of Labor  
6 that the employer's employees or job applicants are or will be re-  
7 quired to submit to drug tests. The commissioner shall use the  
8 information obtained through these notifications to develop regu-  
9 lations for drug testing and to develop administrative practices  
10 that will permit the enforcement of this act. Any private or public  
11 employer requiring employees or job applicants to submit to a drug  
12 test prior to the adoption of the rules and regulations shall:

13 a. Provide each employee with a written statement of the em-  
14 ployer's drug testing policy in compliance with subsection b. of  
15 section 3 of this act and each job applicant with notice as required  
16 by subsection b. of section 4 of this act.

17 b. Conduct a confirmation test on a sample which is determined  
18 to be positive through an initial screening test before any disci-  
19 plinary action is taken against an employee:

20 c. Notify an employee, within two working days of the employer's  
21 receipt of a drug test result, after the employee's sample generates  
22 a positive result on any drug test: and

23 d. Provide, in public employment, a temporary leave of absence,  
24 as required by paragraph (1) and subsection (g) of section 3 of  
25 this act, for any employee whose sample produces a positive result  
26 on a confirmation test.

1 19. There is appropriated from the General Fund to the Depart-  
2 ment of Labor \$40,000.00. to the Department of Health \$40,000.00.  
3 and to the Department of Personnel \$9,000.00 to effectuate the pur-  
4 poses of sections 16 and 17 of this act.

1 20. This act shall take effect immediately, but sections 2 through  
2 13 shall remain inoperative until the 180th day after the enactment  
3 and section 17 shall expire on the 365th day after enactment.

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**LABOR RELATIONS AND EMPLOYMENT**

Establishes uniform standards and ground rules for employee drug  
tests and makes an appropriation.

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SENATOR RAYMOND LESNIAK (Chairman): Today's hearing of the Senate Labor, Industry and Professions Committee will be held on three specific pieces of legislation: S-2565, sponsored by Senator O'Connor, which permits local governments to establish drug test policies for police and firemen; S-2826, sponsored by Senator Bassano, which recognizes employers' rights to administer drug tests and authorizes the Commissioner of Health to set test standards; and A-2850 (ACS), sponsored by Assemblyman Littell and Assemblyman Foy, which is designated the "Preemployment and Employment Drug Testing Standard Act."

Senator DiFrancesco is here from the Committee, along with me, and we expect the other Senators to be here throughout the course of today's public hearing.

We have some 31 people who have notified the Committee Aide, Dale Davis, that they would like to be heard today. It is unlikely that we will reach all 31. We will break for lunch at approximately 12:30. I expect we will have to have another hearing, especially since there are no representatives from the Department of Labor, nor the Department of Commerce, who have also asked to testify. Dale, I would like to request their testimony at our next public hearing.

We do have representatives from the Department of Health, the Department of Personnel, and the Attorney General's office. Normally, I would call them first; however, we have three emergencies: two people who have flights to catch, and one person who has to teach a class. We don't want any students at Rutgers Medical School to miss out. Is Assemblyman Littell here as well? (affirmative response) Bob, we have two people who have to catch flights. May I ask you to step aside just for a few moments?

A S S E M B L Y M A N   R O B E R T   E .   L I T T E L L:  
Whatever you want.

SENATOR LESNIAK: Thank you. Senator, do you have anything to add?



SENATOR DiFRANCESCO: No, not really.

SENATOR LESNIAK: Okay, let's go. Tom Fricano, from the Industrial Union Council, AFL-CIO? Is Tom Fricano here? (affirmative response) Good morning, Tom. Are you going to San Antonio?

**T H O M A S   M .   F R I C A N O :** Wherever duty calls, Senator.

Good morning. My name is Thomas M. Fricano. I am appearing here today on behalf of the New Jersey Industrial Union Council, AFL-CIO, of which I am Secretary-Treasurer, and Archer Cole, President, who is out of the State on a longstanding job assignment.

Accompanying me is Rick Engler, Assistant to the IUC President.

In addition to my IUC officership, I am Assistant Director of Region 9 of the United Auto Workers, AFL-CIO. Archer Cole is also Director of Organization for the International Union of Electronics and Electrical Workers.

We have a number of copies of this, Ray, and if you would like us to submit it and get into questions, because our basic position, from the IUC, is that we ban the testing-- I would like to try to take some excerpts from it, without taking the time of the total group, because I know there are a number who want to get on the program.

In New Jersey, IUC affiliates represent the views of over 200,000 industrial and public sector employees whose opinions have been solicited over a period of months, and whose unions are unanimously opposed to A-2850, the Drug Testing Bill, which passed the Assembly by a single vote, of course which you are all aware of.

We of the IUC do not understand why the New Jersey Assembly had to rush to be number one in seeking to impose drug testing on our more than 3.5 million working men and women, when no other industrial state has moved as fast or as far as ours.

From the President of the United States to Congress to the courts, to our communities and families, to the colleges and schools, and to the entertainment and sports world, the problem of drugs has proved to be extremely complex and controversial, with no clear direction or solutions emerging.

Yet, the New Jersey Assembly has taken on itself to enact simplistic and flawed solutions in A-2850, which violate the principles of practically every union in the United States in regard to substance abuse. Since you have the copies, Ray, I am going to jump and, as I say, not try to read through this whole thing.

We will turn over to such a New Jersey Senate Commission the report of the Commission to Examine Chemical Testing of Employees in the State of Maine, whose findings resulted in the proposed passage of legislation prohibiting "substance abuse testing in the workplace."

Assembly Bill 2850 permits employers to conduct random and routine drug tests on the vast majority of employees who have never used drugs.

Under A-2850, Article 5, random and routine testing can take place whenever the employer claims to have a "compelling interest" to make such tests and with the decision of what constitutes a compelling interest left entirely to the employer.

Random and routine testing, under A-2850, is also permitted in the following five circumstances:

If the test is conducted as part of an investigation of employees involved in an accident, although the preponderance of industrial accidents have nothing to do with drug use;

If the test is conducted as part of an Employee Assistance Program, although practically every EAP program adopted by management and union does not require testing, but stresses rehabilitation and employee counseling to enable the worker to return to the job drug free;

If the test is conducted as part of an employee medical examination required by the employer. This means that an employee returning to work after breaking his arm would be subject to drug testing, although such a test would be totally irrelevant to the injury;

If the test involves individuals in high risk occupations. This will lead to endless litigation as to what is high risk, even though the Department of Labor is given the responsibility of drawing up a list of such high risk occupations. Furthermore, "high risk" has been preempted by Federal law in transportation and nuclear industries -- and a little correction, if it hasn't been put in, in your copy -- and we understand that separate regulations may be issued by Attorney General Edwards for law enforcement personnel; and,

If the test is conducted in accordance with the terms of the collective bargaining agreements which permit private employers to administer random and routine drug tests, a provision which will give employers the opportunity, in negotiations with the union, to press for demands for such testing with no safeguards whatsoever.

Assembly Bill 2850 would permit employers to discharge, at will, employees who test positive, which proves that its outlook is punitive, rather than corrective.

It would deny employees in the private sector the right to a program of detoxification, rehabilitation, and counseling, which has been at the foundation of Employee Assistance Programs in operation in numerous industries and unions.

It falls short in providing proper confidentiality which is the key to employee cooperation, crucial to the success of attacking substance abuse on the job, whether involving alcohol or drugs. In this connection, it is noteworthy that A-2850 excludes our collective bargaining agents from any role in assisting the individual employee in

the entire test procedure, to reinforce the employee in his need for confidentiality, as well as support.

Jumping a couple of paragraphs, speaking about education, it is appropriate to note that President Reagan, who, with great fanfare, went before the American people on the problem of drugs in the United States a year ago, has submitted his 1988 budget to Congress with a reduction of at least \$500 million to combat drugs, including \$200 million for education on drug abuse.

In calling for rejection of A-2850 and the establishment of a Senate Study Commission, the IUC submits the following statement of principles:

"It is recognized throughout the nation that to deal realistically and effectively with the problem of illegal drug use, it is necessary to expend efforts and resources in the direction of education and rehabilitation, in order to discourage the use of drugs, rehabilitate those who are drug users and, in the workplace, seek to keep employees drug-free and gainfully employed."

Any program for drug testing must be non-punitive and is to be implemented only when there is probable cause that an employee's job performance is being impaired by the use of an illegal substance. Such a program shall involve all levels of management.

Such a program shall eliminate random and routine testing in the workplace, which violates citizens' rights, and shall establish the role of collective bargaining in any drug testing program where union representation exists, including the right of unions and management to ban drug testing in favor of mutually agreed on Employee Assistance Programs, whose purpose it shall be to educate and rehabilitate and keep employees productive and self-supporting.

What good does it do to enact legislation whose end product it is to discharge workers, to abandon employees, many

of them in the infancy of their work careers, leaving them without jobs, with destructive references, and with little outlook for future employment? We do not need additional welfare recipients and broken lives.

We need an approach to substance abuse which will help solve societal problems. We must be compassionate and deliberate in our solutions, and not act out of frustration, panic, or political pressure.

As I say, I jumped over some of those things to save time, Senator. We would also like to enter in, if you do not already have it in your possession, "The Drug Testing Debate: Remedy or Reaction? -- An Employer's Perspective," that was presented by Lewis L. Maltby, Vice President, Drexelbrook Controls, Inc., a company located in Horsham, Pennsylvania. This is very strong testimony on behalf of employers, saying that they know there is a drug problem, just as the unions do, but testing is not going to be the proper way to handle that problem.

SENATOR LESNIAK: That will be entered into the record.

MR. FRICANO: If there are any questions myself or Mr. Engler could answer, we would gladly do that.

SENATOR LESNIAK: Tom, I just have one: Don't you think a program of rehabilitation -- a requirement of rehabilitation -- could serve a good purpose, from the workers' standpoint, the employers' standpoint, and society's standpoint, and that if we combine the rehabilitative program with a drug testing program we will all be better off?

MR. FRICANO: Well, let me say this, Senator: We, in the UAW particularly, and I will speak from that segment, rather than my IUC position at this point-- In the UAW, we put Employee Assistance Programs into place with many employers, particularly General Motors, back in 1973, in our contracts. There has not been one person tested for drugs or alcohol, or, for that matter, anything else, in the 14 years that those

programs have been in place. We have saved tens of thousands of lives with that system over the years by recognizing the problem. If someone has a problem with alcohol or drug abuse, it shows up in their work record at some point or other. If it doesn't show up in the work record, then an employer doesn't have any business going after the employee in his private life. That is really a major part of this.

When we spoke with Assemblyman Foy -- Rick and myself and Archer called, and a couple of others from CWA-- We met with Tom Foy a couple of months back. A very simple example is, I said, "If your son" -- if you have a son -- "happens to be out on Saturday night and has some marijuana, that allegedly stays in his system for a week. Now, Wednesday, if there is nothing wrong with his job performance, but we have some random testing, and that shows up in his system, is he supposed to be fired or sent to rehabilitation because he had some marijuana on Saturday night?"

I am not in favor of drugs, never have been, and have never used them, outside of taking an aspirin about twice a year, if that can be considered some form of drug. But, I think the main thing, Ray, I am trying to point out, is that we have never tested one person in General Motors, in Ford, in Chrysler, in our whole aerospace segment of the UAW, and we represent over one million workers in this country. We have attacked the drug problem in the proper way, by recognizing that some workers had a problem on the job when it surfaced and, if it was due to alcohol or drug abuse, we then applied the method of rehabilitation to get those workers back into a productive place in the work force.

SENATOR LESNIAK: Thank you.

At this time, I would like to welcome Vice Chairman Chris Jackman to the hearing, Senator O'Connor, and Senator Cardinale.

Are there any questions from the members? Senator Cardinale?

SENATOR CARDINALE: With respect to the answer you have just given, in terms of job performance, I understand you would be most concerned about how it affects job performance. But, taking the same example you gave of that young person on a Saturday night who went out and had some marijuana, don't you think there is a societal benefit if we have deterrents available to us through things that happen at work, or through the possibility that there might be a negative impact on your job status if you use illegal substances? Now, you didn't talk about alcohol, which is legal, you talked about marijuana, which is illegal.

It seems to me that we have an overall very dramatic societal problem in the use of various types of illegal drugs. It has troubled me a bit that people seem reluctant-- They are looking at this, I think, only from the point of view of, does it affect the job? But, it affects that person's life, doesn't it?

MR. FRICANO: It sure does, and it is a societal problem. There is no question about that, Senator. One of the things you are looking at with drug testing-- It is not anywhere near being a decent percentage of being correct on the findings. You look at the improper negative findings. You look at numerous negative positive findings. In the Center for Disease Control, which has looked into various laboratories which have handled drug testing, figures are available which show how wrong those tests are. Even if they were 95% correct, would you like to be in the 5% that loses their jobs over an issue of drug testing? You really open the floodgates when you--

If we had a bad history in the UAW over the last 14 or 15 years of our EAP programs, I would say, "Yes, maybe we ought to be looking at something different. Maybe it takes drug testing." But, it doesn't. When you have a committed union, when you have an committed employer, and where there isn't a

union if you have a committed employer-- I don't know if this Drexelbrook Controls out of Horsham, Pennsylvania is a union shop or not. But, even where there is no union, when you have an enlightened management, they can handle the problem of abuse.

On January 7, I was heading back from the airport on Route 9 in Old Bridge, and a drunk driver shot across Route 9 and hit me head-on. Fortunately, I had my seat belt on, or I might not be here to testify today. I am not in favor of unguided missiles being out on the highway, but the drug test, or any other kind of testing, would not have prevented that from happening to me on January 7.

As I say, history is what you have to look at. When we start talking about legislation-- As I said in my testimony, why do we have to be first? Rick Engler has done a tremendous job on behalf of the IUC. He has done a lot of research on this. We have met with a lot of other unions. We brought in experiences from the various employers we all deal with. There is nothing to indicate that by New Jersey having a law on the books which says we ought to now have drug testing, that that is going to solve society's problem, or an employer's problem. We just haven't found that to be true from all of the documentation we have looked at and from all of the actual evidence.

Rick might want to chime in.

R I C K E N G L E R: What was striking about the Assembly hearings was that, in my opinion, not one shred of scientific credible government or independent evidence was presented indicating what the epidemiology is; what the patterns of drug use were in society and in the workplace. There were some statistics submitted by individual corporations that were unverified by objective university or government research. What was interesting was, I think we all agree with you that drug abuse is a problem in society. The question then becomes, why is the workplace the focus of control? Why are workers --



productive workers -- in settings where they are employed, necessarily the focal point?

We do not think that employers should have the power to essentially provide economic capital punishment to workers which judges don't have in society at large. The types of penalties where people lose their jobs, lose their livelihoods, that could be imposed by a deputized, private employer, essentially a vigilante, that would be legitimated by this very dangerous legislation, are far greater than what judges have to impose when sentencing. For instance, if you look at what the sentences are for marijuana possession, they are minimal compared to what an employer could do under the terms of A-2850.

To just comment on Senator Lesniak's question, again, we don't think that if you add rehabilitation to a drug testing program, that that is the right approach. We don't think the tests work, even with the confirmatory tests. If you predict 99% accuracy, and you project out to what the 1% is according to the number of so-called high-risk workers that the Labor Department suggested, you still have the possibility of 6000 workers losing their jobs in this State, based on inaccurate tests of just high-risk occupations.

SENATOR LESNIAK: How is that? If we have a rehabilitation program in effect, and if that 1% are, in fact, not using drugs, they won't lose their jobs.

MR. ENGLER: In other words, they will have to go into a rehabilitation program, even if they are not using drugs.

SENATOR LESNIAK: Well, do we have to have 100% accuracy before we do anything as a society?

MR. ENGLER: Well, I would suggest that--

SENATOR LESNIAK: This isn't the death penalty.

MR. ENGLER: Right.

SENATOR LESNIAK: And we do have the death penalty -- right or wrong.

MR. ENGLER: Well, losing one's job may not be the death penalty, but it is a severe--

SENATOR LESNIAK: Losing one's job can be, but we are not talking-- If there is a rehabilitation program-- We are talking about going into a rehabilitation program, when you ought not to have to. That is what we are talking about.

I am just asking you, is that that great a burden, when you are talking about only 1% inaccuracy?

MR. ENGLER: I think it is, just projecting it based on four job occupations indicated by the Department of Labor in their testimony before the Assembly committee as to what might be covered, if you just look at those four occupations and say there is a 1% error rate. The other point is--

SENATOR LESNIAK: Would you balance that-- Would you say it is more important that those 1% be kept out of a rehabilitation program that they don't need, than the 99% be offered the opportunity for a rehabilitation program that they obviously need?

MR. ENGLER: We are in favor of rehabilitation. If this Committee recommended that Employee Assistance Programs were made mandatory for every employer in the State, we would wholeheartedly support that. We would also support a mandatory program for drug abuse counseling and education. We would support better supervisory training and the recognition of people whose work performance is impaired, and better counseling so they could get into an EAP program. We would wholeheartedly support that.

The problem is, the drug tests are unnecessary to that type of procedure; meaning that if supervision is doing its job as Tom Fricano pointed out through reference to the employer testimony we are submitting-- That individual would have liked to have been here today, except that he is speaking on why he is against drug testing somewhere in Pennsylvania today. If management is doing its job, it can recognize when people are impaired. If they want to use a test -- a visual acuity -- some type of test that is much more like a Breathalyzer, that

has some relationship to job performance, we can't argue with that. Certainly employers have a right to expect people to be unimpaired on the job. But, if employers--

SENATOR LESNIAK: Do you recognize that there are some occupations where it is important to know beforehand -- before any outward manifestation that drug problems exist; that there are certain jobs that involve public safety, and threats to other workers or the public?

MR. ENGLER: But the problem, again, is that these types of tests do not indicate performance. If someone on his own time, in his own, you know, personal setting -- I am not advocating this -- is at a party, and there is passive inhalation of marijuana smoke, and then he is tested in a routine way -- forget random way -- in a routine way, even if he is in a high-risk -- a so-called high-risk occupation -- which we challenge anyone to define in a meaningful way -- and it doesn't have any indication on job performance-- If a test is performed on an airline pilot -- and that is the example that is often used -- before he is about to fly, or even some amount of time earlier, it again doesn't indicate anything.

We would support a test that would tell us -- and there are such tests, and protocols could be suggested by neurologists and other qualified medical practitioners -- if the pilot could fly. We have no problem with that whatsoever. We do have a problem with drug tests which we think do not work. They are inaccurate, do not indicate work performance, and are invasive of personal privacy and people's dignity.

SENATOR LESNIAK: Do you recognize the fact that drug use can affect job performance?

MR. ENGLER: I don't think there is any question about that.

SENATOR LESNIAK: Okay. Do you also recognize the fact that it is important in certain jobs that involve threats to the public or to other workers, in terms of the performance

of those jobs, that if someone is using drugs it is possible that his use of drugs can endanger other people's lives?

MR. ENGLER: Again, we have studied the Maine Commission Report. The Maine Commission Report is a 90-page report. They have looked at that question, and with one exception -- which was nuclear power operations -- they called for a ban on substance abuse testing, because it doesn't work.

SENATOR LESNIAK: With all due respect to the State of Maine, I think I would rather rely on the State of New Jersey's expertise.

Senator Jackman?

SENATOR JACKMAN: A question just came to my mind. You mentioned that marijuana shows up a couple of days -- three to four days later -- and may not have any effect. What would happen if an individual was picked up -- an employee on the outside was carrying cocaine, and he is arrested? Would you think the employer, before this employee was put back to work, would have a right to have him tested?

MR. ENGLER: There certainly is a right, as I understand it, to make mandatory a referral to an Employee Assistance Program or a doctor to evaluate that person's health.

MR. FRICANO: I think what we are doing, Senator Jackman, is taking law enforcement dealing with -- on your question -- somebody who was possibly selling cocaine on the outside.

SENATOR JACKMAN: Not selling, just had it in his possession.

MR. FRICANO: Maybe he just had it in his possession.

SENATOR JACKMAN: Now, having it in your possession-- If he was picked up and arrested for possession of cocaine, do you think the employer would have a right to say, "I want that man tested before he comes back to work"?

MR. FRICANO: No, I don't think he would. I think if you violate--

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SENATOR JACKMAN: You don't think he would?

MR. FRICANO: I think if he violated the law on the outside, if he was caught in possession of cocaine, our law enforcement system would take care of that.

SENATOR JACKMAN: No, wait, wait, wait. Is there anything in the law that says he can be tested by anyone in law enforcement for possession of cocaine?

MR. FRICANO: No.

SENATOR JACKMAN: No. The question I'm asking is, given the fact that he had cocaine in his possession, you would deny the employer the right to have him tested?

MR. FRICANO: Absolutely, why should he?

SENATOR JACKMAN: Okay. I just wanted to--

MR. ENGLER: In that setting, if the employer said, "You have to go to an Employee Assistance Program to have some kind of confirmation that you are not addicted," we think that is the employer's prerogative. In that context--

SENATOR JACKMAN: Now you're saying something different from what Mr. Fricano said.

MR. ENGLER: No, I don't think so. In the context of that, in the context of a privileged doctor/patient confidential relationship, where a drug test is simply one diagnostic tool, which does not entitle the employer to the rights of the drug test under the principles of the American Occupational Medical Association, under EAP principles, as we understand them, that becomes a diagnostic tool, like a chest x-ray or something like that would be. But, that information is not to be transmitted back to the employer. This type of legislation, in its current form, encourages testing willy-nilly by all kinds of people.

SENATOR JACKMAN: All right, stop there for a minute. Then, during the test by the private physician he is found to be addicted to cocaine. Do you still have the same feeling, that the company would have no right? Nobody would know other than the doctor himself.

MR. ENGLER: The doctor can say back to the company that this person does, in fact, have a medical disability, or can give a general characteristic that the person is not capable of working, which certainly corporate physicians are known, in their relationship to management, not to do.

SENATOR JACKMAN: No wait, wait. The reason I'm asking is, you know my position, don't you? I think you should know. I have 78,000 members in New York and New Jersey in my union, and I am interested in this subject matter. The reason I'm asking this question is because this question came up to me, and I want to get a reaction from you.

If a man was in possession of cocaine and was picked up and locked up, and the employer then insisted that he was going to be tested -- insisted that he was going to be tested -- and, if not, they were not going to hire him back-- What are my chances? I've got a case right now-- I'm in arbitration on it, so I don't know what the outcome is going to be. But, in the interim--

SENATOR LESNIAK: Give it to your attorney. Are you looking for free legal advice on it? (laughter)

SENATOR JACKMAN: That's smart. You know, that doesn't hurt.

But, the serious part that I want to get clear is that if I went to my own private doctor, my doctor is not going to convey that information to--

MR. FRICANO: Let me say this, Chris. Number one, that employer, because someone was arrested on the outside-- Now, if he couldn't show up for work because he was arrested, and they wanted to discharge him for absence without reasonable cause, that is another thing. But they sure as heck could not discharge a person because he was in possession of cocaine in Punxsutawney, Pennsylvania. It has nothing to do with the job performance at that point.

Furthermore, suppose that same employee-- Are we going to start writing in options A, B, C, and D? If that same employee had been in the employ of that company for 15 years, hadn't missed a day, and was an exemplary employee, but he got caught in Punxsutawney peddling cocaine, or with it just in his possession, what right does that employer have to even ask him to take a drug test for cocaine to get his job back? It has not a damned thing to do with job performance.

SENATOR JACKMAN: Nothing at all?

MR. FRICANO: Absolutely.

SENATOR JACKMAN: Okay.

MR. FRICANO: If he was caught in the plant with it, that's another thing, because being in possession of a substance in the plant--

SENATOR JACKMAN: Well, now, if he was caught in the plant with it-- What is the difference? Would he be able to be--

MR. FRICANO: A lot, because--

SENATOR JACKMAN: No. He has it in his pocket and he is caught with it. Would he be tested then?

MR. FRICANO: No, no.

MR. ENGLER: Why test? If he has it in his pocket, why do you need the test?

MR. FRICANO: Senator, the point is--

MR. ENGLER: You have discovered objective evidence of drugs. The employer doesn't need a drug test then.

MR. FRICANO: There is discipline for being in possession of something; there is discipline for being under the effects of it and for being caught using it.

SENATOR JACKMAN: The opposite to that is, I got on board a plane about two weeks ago, and there was an individual on the outside with a petition. He asked a question which you mentioned before: "Are you in favor of pilots being examined -- or being tested -- before they go on a flight?" I walked

past. I didn't get into any discussion with him. But, I would say that the average person-- I just made an inquiry: How many people do you think would be in favor of saying, "I want that guy tested before he flies me to California"? How many of the average public do you think would sign his or her name to have the pilot tested?

MR. FRICANO: Ninety-nine point nine, because 99.9 aren't pilots. If they were the pilots-- Now, if 99.9% were pilots, then it would be the reverse. You would get one-tenth.

SENATOR JACKMAN: All right, 99.9%. Now, wait--

MR. ENGLER: But, Chris, if we asked how many people were in favor of right-to-work laws, we might get a huge percentage, too. The fact of what public perception is right now doesn't mean that's right. We have an opportunity here in New Jersey to look at the situation and come out with an unrushed, rational position, and to try to shift -- as leaders, to shift public opinion on this issue.

SENATOR JACKMAN: Rehabilitation-wise-- You are in favor of rehabilitation?

MR. FRICANO: Absolutely.

SENATOR JACKMAN: If an individual is found to have drugs--

MR. FRICANO: Absolutely.

SENATOR JACKMAN: --you would advocate rehabilitation, and no loss of job.

MR. FRICANO: We spent 15 years plus prior to formal EAP programs, obviously, in the industries where we represent workers, Senator.

SENATOR JACKMAN: Yes.

MR. FRICANO: But the last 15 years of the formal programs-- We have people in this room who have been involved in those programs. Franny Dee (phonetic spelling), from our assembly plant in Linden, New Jersey--

SENATOR JACKMAN: Alcohol and drugs?



MR. FRICANO: --has saved hundreds of people in his own plant, to say nothing about the tens of thousands across our whole system. Not one person has been tested.

SENATOR JACKMAN: Okay, I gotcha.

SENATOR LESNTAK: I believe Senator O'Connor had a question.

SENATOR O'CONNOR: Thank you, Mr. Chairman. I came in a little late, so excuse me if I ask a question which has already been asked. But, in listening to you, Mr. Fricano, I initially thought that your objection, based upon the example you gave of the young man who uses marijuana on the weekend and gets tested mid-week and tests positively-- Based upon that example, I thought your objection was perhaps due to the fact that the test was done on a discriminatory basis, rather than there being some evidence of drug abuse.

MR. FRICANO: That example was referring to a random type of testing.

SENATOR O'CONNOR: But your objections across-the-board, even if there were a clear-cut-- There must be evidence of drug abuse before a test is administered. Correct?

MR. FRICANO: Absolutely, because they are so fallible, number one. The measure of tests that become correct, when you look at the-- As I mentioned before, Senator, the Center for Disease Control has checked numerous labs which give these tests, and the error rate, in some cases -- in some labs -- is almost 100%, be it on the negative side or the positive side.

SENATOR O'CONNOR: What about the provisions in the bills -- the various bills that provide for confirmatory tests, which can be done at a place of the employee's choosing?

MR. FRICANO: Even the confirmatory tests-- Those are not 100%. There is no test that is 100%, even on a confirmation basis.

SENATOR O'CONNOR: Am I correct, though, that the real heart of your objection is due to the fact that tests, even if they are 100%, do not necessarily show that the employee is not doing his job?

MR. FRICANO: Absolutely.

MR. ENGLER: Even if you cleaned up all of the technical issues, even if you could have 100% accuracy, we still do not know of any study that shows there is a correlation between the amount of any drug in the blood stream, or in the urine, to actual job performance. That is the second thing in addition to the technical problems.

SENATOR O'CONNOR: I just want to be sure I understand your position. Your position, Mr. Engler, is that--

MR. ENGLER: Our position.

SENATOR O'CONNOR: All right, your association's position is that you do not distinguish any situations such as those involving public safety?

MR. ENGLER: Well, we looked at that very carefully, because we looked at the high-risk definition in A-2850. Then, based on Department of Labor testimony as to what their suggestions were as to what is high risk, which were four occupations-- They suggested at the Assembly hearings: doctors, nurses, vehicle operators, and equipment operators. We looked up Department of Labor statistics to see how many people were in those job categories in New Jersey, and we found there were 600,000 people who would then be subject to random and routine testing. Those are by job categories.

We then thought, "What does this really mean? They might only be a few people in a chemical plant." I mean, it would be fascinating to hear the Chemical Industry Council come in for the purpose of this bill, for they have denied that their industries are high risk for right-to-know struggles and other issues, and to come in and suddenly say, "We are high risk; we have to have drug testing for everyone--" On a

practical basis, we see no way to define job categories or particular industries as far as what are high risk and what aren't.

The basic point, again, is that even if you could come to some definition of thousands of job categories as being more high risk than others, that testing would not tell you about job performance.

I would like to just comment on one other element. If people are worried about safety, if people are worried about public health, we can make a hundred suggestions -- and we've done it through collective bargaining with employers, through working for a stronger Occupational Safety and Health Act and Public Employee Occupational Safety and Health Act in this State -- for improving safety and health on the job, that has a direct impact on the public. We can talk about how there should be joint labor/management safety committees. We can talk about more capital investment in safe equipment and better controls and better emergency response procedures. We have been very active in that area. All we meet is employer resistance. And here is a situation where we are trying to protect public health through programs to prevent chemical explosions, to let the public know about what chemicals are in the community. All we encounter is employer opposition, by and large.

Here is a situation where this drug testing issue represents, in a sense, a counterattack on those issues, where suddenly our people are being blamed for possible safety and health problems. We think it is the wrong emphasis.

SENATOR LESNIAK: Rick, can we get down to the meat of what this Committee is faced with? The Appellate Division of the New Jersey Superior Court recently stated basically that you need a reasonable suspicion before you conduct drug testing. That was involving, I believe, police officers. Right now, as I understand it, based on that case, which is the

highest court so far to rule in this State, employers can, without-- Forget about the random and routine part of the statute for a second, okay? Just deal with the reasonable suspicion part of it. Employers can, without any of the safeguards in this bill, test when there is reasonable suspicion.

Would you have any objection -- forgetting about the other parts of this section -- to a bill that, since that is the law, would add additional safeguards for employees, as well as a mandatory rehabilitation program?

MR. ENGLER: I think, at this point, based on our evaluation of the Maine report, we do not think drug testing works. It does not impact on job performance.

SENATOR LESNIAK: That is not my question.

MR. ENGLER: I understand your question. Our position, to be candid, has shifted somewhat after extensive study and examination of the Maine report. Based on the principle of what we think is right, right now, both in developing an appropriate solution to drug abuse problems -- which is not contained in this bill -- and protection of the dignity and rights of workers, we think what is appropriate is a ban on substance abuse testing in the State of New Jersey.

SENATOR LESNIAK: Okay.

MR. ENGLER: If we are confronted by a political situation that seems otherwise down the road after there has been a full study, a full public debate, after scientific experts have testified on questions of a correlation between abuse -- substance abuse -- and testing and the effectiveness of those, we would look at that situation at that point.

SENATOR LESNIAK: Tom, with regard to a ban, though, don't we run into constitutional problems in terms of arbitrary action, because if there is reasonable suspicion, don't you think an employer has the right to require a test?

MR. FRICANO: If there is reasonable suspicion, the system allows them to take place. What is taking place-- The point I have been trying to make, Ray, is that--

SENATOR LESNIAK: Yeah, but not if we ban it, Tom; not if we ban it.

MR. ENGLER: But, you have severability clause you can put in, so that if there is preemption by other Federal laws, those will take precedence.

SENATOR LESNIAK: Preemption--

MR. FRICANO: We can ban it in our collective bargaining agreements, because we haven't agreed to allow it to take place. What they do when they hire somebody has been one thing, okay? We couldn't stop General Motors or Ford or Chrysler from screening someone when he came in, because it is none of our business at that point in time. It becomes our business in this kind of a hearing, because when they come in they are not members of the UAW at that point in time.

When there is reasonable suspicion-- When they have that problem, that is when we have directed them into the Employee Assistance Programs. If they have refused, or if they have gone once or twice or three times, and they have not been able to correct themselves, yeah, eventually-- We don't save everybody. Some people obviously do lose their jobs. But it wasn't because we had to recognize it by infringing on their rights, or saying, "Let's give them a drug test."

If we thought drug testing would cure the world of its ills in this terrible drug problem we have, we would probably sit here and say, "Put them in tomorrow." Obviously, anyone would do that. But it is not going to do it. It has not been proven to do it, and it won't do it. It will just be another infringement on someone's rights, and it isn't going after the problem in the proper sense.

SENATOR LESNIAK: Are there any other questions?

SENATOR CARDINALE: Yes, I would like to continue. We got off onto some other very interesting issues, but I want to continue. At one point, you mentioned--

SENATOR LESNIAK: Are you going to miss your flight?

MR. FRICANO: Well, I'll go about two minutes.

SENATOR CARDINALE: (continuing) --epidemiology. Do you have--

SENATOR LESNIAK: One last question, okay, Senator?

SENATOR CARDINALE: Well, I wanted to pursue the epidemiology. Do you have any information with respect to the percentages of people in the groups you represent who use illegal substances at any -- whether it is for recreation, whether they are chemically dependent, or whatever? Do you have any feel for that in any of the studies you have done?

SENATOR LESNIAK: Tom, do you want to leave because of your flight?

MR. FRICANO: I'll spend two minutes to just get into that. I don't have--

SENATOR LESNIAK: Usually when we get involved with Senator Cardinale it is no longer than two minutes.

MR. FRICANO: I don't have statistics with me. I don't know what Rick has had through other states, but I don't have any UAW statistics with me. What we have on behalf of the IUC-- I'll ask Rick if he has that with him.

MR. ENGLER: I don't have them with me. There is a range of things that have been done. Part of the problem is our questions about objectivity.

SENATOR CARDINALE: You have done some of those studies, though?

MR. ENGLER: Excuse me?

SENATOR CARDINALE: Your answer seems to indicate that you have -- maybe somewhere else -- some of that information.

MR. ENGLER: We will submit what we have. We are not convinced by it necessarily. We tried to obtain some

information that was mentioned at the Assembly hearing. A figure was thrown around. I forget, I think it was around 60% of industrial accidents are related to substance abuse. We tried to get that study, but we couldn't get it. We find no documentation. It is -- that it is a General Motors study.

SENATOR CARDINALE: That is not my question. I have no information with respect to that. But, the prevalence--

SENATOR LESNIAK: I told you it would be more than two minutes.

SENATOR CARDINALE: Prevalence of use is what I am talking about.

MR. ENGLER: Give me exactly the figures you are looking for, and we will make sure we get them to Senator Lesniak.

SENATOR CARDINALE: All right. I'll tell you why I asked the question. I have had occasion now to speak with some drug counselors in high schools. I am astounded by what they tell me. They tell me that high school students -- these are not people in the workplace-- Ten percent are chemically dependent. Only 20% never use illegal drugs, and the rest are somewhere in the range of becoming dependent or serious abuse or use drugs on a recreational basis. We are talking about illegal drugs.

Now, those kinds of numbers astound me, and point out to me-- I am talking about Bergen County, a limited area; northern Bergen County, a very limited area, where I have spoken to drug counselors in high schools. I see that as a very significant problem, and I want to know if you have done any kinds of similar studies with your own people? If you have, I would appreciate your sending them on to the Committee.

Now, I don't want to have you miss your plane.

MR. FRICANO: We have figures dealing with our major employers. I will get those figures for you through our EAP people, and submit them to Senator Lesniak.

There is no question that it is a huge problem. No one is denying it is a huge problem, particularly in the schools. And that is where it really comes from. Maybe we need a law on responsible parenting, I don't know. Kids are not in the workplace at that point in time, but that is where most of it starts -- in the high schools -- and we are concerned about that. But, obviously, this is a whole different arena we are talking about here, the one about testing in the workplace. We need education programs. That is what we have talked about. There has been massive education, and I refer--

SENATOR CARDINALE: Just one more thing: It occurred to me, when I heard those numbers, and when I saw you here, that there is a potential deterrent for high school kids to get involved. It is very difficult, once someone has established a life style of using drugs, to rehabilitate that person. The rehabilitation programs of 10 days or 20 days, or something like that, are probably not going to be extremely effective. There is going to be a very low rate of success.

Real drug rehabilitation takes years, and maybe a lifetime. But if high school kids know that, "If I get into this kind of a life style, I am liable to be tested when I go out to get a job, and I may not be able to get a job after I am tested. This is something that is going to be found out. It is not something that is going to be very private," maybe we can have an impact. I am not suggesting it would solve the whole problem, but I am suggesting that as one part of a solution, maybe it is something we ought to look at.

MR. FRICANO: Well, as I said, if there are responsible parties, where there is a union environment -- a good union, which most of us are -- and you are dealing with a good employer, you resolve the problem without ever having a drug test. Those kids who have started in the school system, who have learned to get their drugs in the lot next to the



school building, and who have found themselves in the plants and factories and other work sites around the country-- We recognize that problem, and we have done our job to correct most of them who got into the system. But we never had to use a drug test. Where you have to stop that is through the education process, and Reagan's budget takes \$200 million out of the education process. Yet, he is touting, "Let's do something about drug control." If we don't have the money to educate the kids, sure, they are going to be out there buying crack. You know, that is a big part of the problem.

Going the drug testing route is not, in our minds, really going to do the job a lot of people think it is. It's a good PR thing. A lot of people say, "Yeah, let's go ahead and do it. It sounds great. It is going to take care of our drug problem." Hogwash, it just won't.

SENATOR LESNIAK: Thank you, Mr. Fricano. Thank you, Mr. Engler.

MR. FRICANO: Thank you for the time. I appreciate getting on early so I could leave.

SENATOR LESNIAK: Have a good trip. Is Mayor John Robertson here, from Washington Township? (affirmative response) Mayor, come on up. The Mayor also has a flight to catch, or he's piloting his own plane, or something. Did you land at Linden Airport?

MAYOR JOHN W. ROBERTSON: No. As a matter of fact, I have to drive back to Washington Township and get a flight from there to D.C. for a drug conference. I certainly appreciate the Committee's patience in allowing me to take your time to offer testimony here. This is certainly an issue that has been, I guess, in the forefront of many of our minds since the President's announcement on August 4, 1986. As the Chief Executive of a very rapidly growing municipality in South Jersey, I recognize the need for some action, as most chief executives do, when it comes to the problems of drug abuse at the workplace and in my community.

On August 4, 1986, President Ronald Reagan called on every level of government to join a national effort to make drug use unacceptable behavior, and to develop plans to provide a drug-free workplace. The President said, "Employees who use illegal drugs on or off duty tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs." The President went on to say that the use of illegal drugs undermines public confidence and makes it more difficult for other employees to perform their jobs effectively.

The use of illegal drugs on or off duty can pose a serious health and safety threat to members of the public and to other employees. On August 5, 1986, I announced that Washington Township would begin a mandatory drug testing program for all municipal employees, myself included. Why? Because I firmly believe that as employees of the taxpayers, we have an obligation to show the way toward achieving a drug-free workplace. As public employees and public servants, we should set the example for our communities, our neighbors, and our children.

I believe we are held to a higher standard. Being in the public sector demands public inspection, and a public expectation that those of us who are responsible for directing public funds and services to prevent and to treat drug abuse are not, in fact, abusing drugs ourselves.

How do we do that? I am convinced that the only way this can be done is to successfully implement a drug testing program designed to offer the drug users a helping hand and, at the same time, demonstrate to the drug users and potential users that drugs will not be tolerated in or out of the workplace. Believe me when I tell you, this has not been an easy task. Since the announcement of my mandatory testing program, I have spent literally hundreds of hours on this issue. I have faced steel opposition, not only from my own

Municipal Town Council, but from the organized employee unions and non-union employees alike. The Town Council has gone on record opposing any testing plan, and has even tried, unsuccessfully, to prohibit legal expenses necessary to put a comprehensive plan on-line.

I have been in and out of the Federal courts more times than I care to mention. I have been interviewed, reviewed, scrutinized, chastised, and editorialized to the point that I wonder if I am standing all alone in this fight against the trend that I just cannot accept.

SENATOR LESNIAK: Mayor, do you believe that everyone should be tested if they are public employees, regardless of whether there is reasonable suspicion of their drug use or not?

MAYOR ROBERTSON: I will get to that, Senator, but--

SENATOR LESNIAK: Let's not get to it, let's get to it right now.

MAYOR ROBERTSON: Yes, I do.

SENATOR LESNIAK: You do? Do you believe that is violative of the United States Constitution and the Constitution of the State of New Jersey?

MAYOR ROBERTSON: No, I do not. I am happy to see that--

SENATOR LESNIAK: It is a clear decision of the Appellate Division that it is. Are you aware of that?

MAYOR ROBERTSON: Well, Senator, I am not involved in the State courts at this point. I am involved in the Federal court, and that issue is still -- as far as my plan is concerned -- being debated right now.

As I started to say, I am glad to see that I am not standing alone, as is evidenced today. But I stand firm in my position that there is no acceptable excuse for drug abuse. That is why I am still in the U.S. District Court in Camden, arguing for a comprehensive, mandatory, random testing program for all municipal employees.

Maybe you have noticed that the newspapers have stopped editorializing against drug testing. Now they are merely reporting on all of the test cases that have lost and the unreliability of the drug tests themselves. It seems to me that it is a classical case of the self-fulfilling prophecy.

On February 3, 1987, our employee drug testing program began. The employees tested were a combination of volunteers and all of those employees who had previously signed consent waivers to be tested as a condition of employment with the township. No random testing was to be done. It was unfortunate that the police union officials took it upon themselves to disrupt the testing program and, in so doing, caused embarrassment, humiliation, and anxiety to the employees who were scheduled to be tested that day. The conduct of the union officials was uncalled for, insensitive, and clearly unprofessional, making it a very disruptive day for all of us who were involved. Only six people were tested.

On February 5, 1987, I appeared in Federal court to discuss the various elements of our drug testing program. The court has agreed that the issue is a serious and sensitive one, and deserves prompt judicial review. As a result of that meeting in Federal court, I have represented to the court that no further drug testing would take place until such time as the judicial review is complete and the legal issues resolved.

I am sure you will agree that any drug testing plan must be comprehensive to be effective. It must include pre-employment testing; it must include annual physicals for all employees, with urinalysis testing included. Testing when there is reasonable suspicion must be in a comprehensive plan, and random testing, with confidentiality maintained, and privacy of the test and the test site as well. Initial screening and confirmation tests must be included; drug abuse education and counseling; a realistic drug testing advisory committee made up of the union employees, non-union employees,

and those administering the tests; and an Employee Assistance Program.

I believe that S-2565 is a necessary piece of legislation, and I support it fully. Assembly Bill 2850 is also an excellent start in addressing the needs of the employers and employees alike in establishing standards for drug testing. However, I noted with interest that the public employee provision of that did not allow for random testing.

Testing does not have to be viewed as a punitive measure. My plan does not reflect that. I want to keep my employees working, but if they have a problem with drugs, I want to offer a helping hand. If they refuse that hand, there isn't much more I can do for them.

SENATOR LESNIAK: Any questions? (no response) Thank you, Mayor.

Assemblyman Littell, you are welcome to testify right now. However, there is a professor from the Rutgers Medical School who has to teach a class at 11:30.

ASSEMBLYMAN LITTELL: Well, I have to go someplace, too, Senator.

SENATOR LESNIAK: Fine.

ASSEMBLYMAN LITTELL: You asked me for two, and I agree to two.

SENATOR LESNIAK: I said you were welcome to testify. I just want you to understand that you are denying those students--

ASSEMBLYMAN LITTELL: Well, I'm sorry for that, but I have a tough schedule myself today.

SENATOR JACKMAN: You're running for reelection.

ASSEMBLYMAN LITTELL: Today is a very important day.

SENATOR LESNIAK: It better be more important than those students' education.

ASSEMBLYMAN LITTELL: Good morning, Mr. Chairman and members of the Committee. Thank you for the opportunity to

appear before you today. Assemblyman Foy is on a legislative trip and unable to be here today, but I want you to know that this--

SENATOR LESNIAK: Where is that trip to?

ASSEMBLYMAN LITTELL: I think it is to China someplace.

SENATOR JACKMAN: China. He's checking the supply of drugs.

ASSEMBLYMAN LITTELL: I want to tell you that Assemblyman Foy and I have worked on this bill hand in hand and that this bill is, in fact, a bipartisan effort. It is balanced, it is fair, it is even-handed. It started out as a three-page bill when we introduced it in June of last year. When we held a hearing on it, we found that there was a substantial amount of input from the public and, as a result of that, we amended the bill. We met with people publicly and privately to attempt to work out the language in a way that would satisfy both management and labor. As you know, you can never satisfy everybody in the legislative process.

When we started out, I said this, and I still hold this to be true today: Drugs are a fact of life, and drug testing is a fact of life. There are no standards today. There is no protection for employees today. Therefore, it is the goal and objective of this legislation to establish a public policy that sets standards, so that the people who are doing the testing know, in fact, what their requirements are under the law and under the rules and regulations promulgated under those laws, and so that the employees have protection that they do not now have.

Let me say this to you: Make no mistake, the attorney's comment as he fled for his airplane had no relationship to this bill.

SENATOR LESNIAK: He is not an attorney. He's Tom Fricano, from the UAW.

ASSEMBLYMAN LITTELL: All right, well, the representative who was here. His comments have no relationship to this bill. This bill does not mandate drug testing, as he said it does. This bill provides standards where there are none, and it provides for protection where none exists. That is the goal and objective of the legislation we have put forth.

If you look at this bill-- I have given you written testimony, but I will not attempt to read it all to you, because I know you have many, many people who want to testify here today. But, if you go down the bill, you will find out that we have put definitions in here: "compelling interest, confirmation test, controlled substance analog, controlled dangerous substance, illegal drug, drug test, employee, employee assistance, high risk." It is pretty simple to understand this bill.

What we found out when we went through our hearings, was that there is a need to provide for protection in many categories. For instance, we decided that the bill should have in it that the labs should be regulated by the Department of Health, and the Department of Health concurs in that; that employees should be given a written notice by the employers -- written test policies -- 30 days prior to any testing. That doesn't exist now. There is no provision anyplace now that says you have to be notified 30 days in advance in writing as to what test will be administered regarding drug testing.

As a matter of fact, if your boss walks in tomorrow morning and says, "Chrisy, go take a drug test, because I said so," you have two options. You can take the drug test, or pick up your belongings and go home. That's it; you have no rights.

Now, the polls have told us that the public supports drug testing. The Eagleton Star-Ledger poll gave an overwhelming response to that question, when it was asked through their poll throughout this State. I think if you asked

the people in your districts whether they want to fly on a plane that might be piloted by someone under the influence of drugs, they would tell you no. I think if you asked your constituents if they wanted to ride on a train, or have their wives and children ride on a train that is operated by an engineer who is under the influence of drugs, they would say no. I think if you and your family were riding down the highway, and someone was driving a volatile load, like that load of butane that turned over and crashed and burned the other day, you would want to know that that driver was not under the influence of drugs, wouldn't you? I think the answer to all of those questions has to be yes.

I think you understand the feelings of the constituents we all represent. I think you know there are no easy questions in the legislative process in a situation like this. When I was at a panel the other day with Senator Graves, he got very emotional about the whole thing because of a personal situation of his, but he said, "I can tell you this: We are losing this fight." He said, "We're losing the war against drugs, and we have to double our effort to win it." And I think he is right. I think we have to do everything, whether it is this or all of the other programs we are talking about in the Legislature, or whether we are talking about having a society and a workplace that is free of drugs. That is the goal and objective of this bill.

Now, in my testimony, I address something that I will read, because I think it is important. When we reported this bill out of Committee in the Assembly, I said -- and Tom Foy said -- that we would address the need for rehabilitation. It has not been easy to find a solution to that problem. It is easy to talk about rehabilitation, but it is not easy to find it. May I read this to you, please?

As you know, there is considerable interest in establishing in this bill a requirement that would force any



employer with a drug testing policy to establish a drug rehabilitation program. When this bill was released by the Assembly Labor Committee, I promised to address the rehabilitation issue in follow-up legislation -- and so did Assemblyman Foy.

My inquiries into this issue have shown that there are many complex questions that need to be addressed before employers should be required to provide drug rehabilitation benefits in their employee insurance packages under any condition. First, if we require private sector employers to provide rehabilitation when rehabilitation slots are not available, would an employer be subject to civil action if he took disciplinary action against a drug abuser without providing rehabilitation, or would the employer be forced to employ people who are incapable of safely performing their jobs?

SENATOR LESNIAK: I don't understand that question.

ASSEMBLYMAN LITTELL: It's not a question.

SENATOR LESNIAK: It's not? I don't understand the statement, then. What are you saying?

ASSEMBLYMAN LITTELL: I am saying that--

SENATOR LESNIAK: I thought you said, "These are questions which have to be answered."

ASSEMBLYMAN LITTELL: Yes.

SENATOR LESNIAK: Okay. Well, I don't understand that question. Do you want to repeat it?

ASSEMBLYMAN LITTELL: Okay. First, if we require private sector employers to provide rehabilitation when rehabilitation slots are not available--

SENATOR LESNIAK: Stop.

ASSEMBLYMAN LITTELL: Okay.

SENATOR LESNIAK: I don't understand that.

ASSEMBLYMAN LITTELL: Okay. If rehabilitation slots are not available-- That means if there are not enough places

in rehabilitation centers to take care of the people we are talking about sending there.

SENATOR LESNIAK: Who says there are not, and why won't the market respond to that? Isn't there a simple--

ASSEMBLYMAN LITTELL: I didn't say it was a fact, Senator; I said it had to be addressed.

SENATOR LESNIAK: Well, I am answering that fact, Assemblyman. Isn't there a simple answer to that?

ASSEMBLYMAN LITTELL: There may be; there may be. Hear me out, if you would.

SENATOR LESNIAK: I try to address every issue as you raise them.

ASSEMBLYMAN LITTELL: Well, you have a copy of this. We can go back to it.

SENATOR LESNIAK: No, I prefer to address every issue as you raise them, Assemblyman.

ASSEMBLYMAN LITTELL: It has been estimated that there are approximately 150,000 people, many of whom are in the work force, in need of drug rehabilitation in New Jersey. Yet, there are less than 9000 in-state drug rehabilitation slots available for this population. Currently, employer provided health insurance programs provide some benefits for employees with drug addiction. Many workers suffer from poly-addiction, and are treated for drug addiction under their employer's health coverage for alcohol addiction. Poly-addiction is the use of drugs and alcohol together. So-called "creative coding" in hospitals also brings some drug addicts under the employer's health insurance plan. But the sad truth is that New Jersey lacks sufficient drug rehabilitation slots to cover the needs of its work force. Drug rehabilitation, therefore, must be treated as a supply problem before we can realistically link rehabilitation to drug testing.

Second, what will drug rehabilitation cost New Jersey's employers and, more importantly, will the cost be more than our medium-sized firms can bear?

SENATOR LESNIAK: Is that a factor?

ASSEMBLYMAN LITTELL: Is it a factor?

SENATOR LESNIAK: Don't we have a war out there -- a war against drugs?

ASSEMBLYMAN LITTELL: It is something I want to bring to your attention that we felt was a condition, which came up in our research. I thought that I--

SENATOR LESNIAK: See, Assemblyman, my concern--

ASSEMBLYMAN LITTELL: --owed it to you to tell you what we have found in our research.

SENATOR LESNIAK: Assemblyman, my concern -- and it is not only with you; it is obviously with Assemblyman Foy as well, and with all of the Assembly representatives who voted for this bill, regardless of their party affiliation -- is that you passed a bill on drug testing. You spent a lot of time on drug testing -- okay? -- but what have you done on the rehabilitation component?

ASSEMBLYMAN LITTELL: That is what I am telling you about now.

SENATOR LESNIAK: What have you done on it, Assemblyman?

ASSEMBLYMAN LITTELL: I am telling you right now what I have done, Senator.

SENATOR LESNIAK: What?

ASSEMBLYMAN LITTELL: Just be patient. I'm getting to it.

Blue Cross/Blue Shield estimates that the costs of alcohol rehabilitation increased fivefold between 1977 and 1981, from \$3 million for 458 clients in 1977, to \$15 million for 17,958 clients in 1981.

Now, let me just stop and make a point. The numbers might sound staggering, but it went from \$6000 per client down to less than \$900 per client.

SENATOR LESNIAK: Why?

ASSEMBLYMAN LITTELL: Because the supply and demand process caught up with it. I wanted to point out to you that although the cost increased substantially, the cost per client went down way more, and that was during a period of very high inflation in this country.

With drug rehabilitation a similar pattern of increasing costs may emerge. Fortunately, most large employers and many employers who conduct drug tests have Employee Assistance Programs in place. The New York Times reported on March 26, 1987, that over half of the Fortune 500 companies have EAPs for their employees. This is roughly the same number which have drug testing programs, according to the statistics. But what about the smaller employers -- companies with 100 or so employees -- who may need a very limited drug testing program? Where will they turn? Will they be able to absorb the costs of drug testing and rehabilitation insurance? I asked the State Department of Health to compile a list of costs for various kinds of drug rehabilitation services. According to the Department's estimates:

Employee Assistance Program costs range from \$22 to \$28 per employee per year. This includes evaluation, two or three counseling sessions, referral to treatment as necessary, and follow-up. The figure represents assistance for other problems beyond drug addiction, but it does not include detoxification or extended post-detoxification counseling and therapy.

Inpatient/hospital-based care for drug rehabilitation, with a New Jersey DRG rate imposed, will cost roughly \$6300. Inpatient/private psychiatric care will range from \$3000 to \$30,000.

Outpatient counseling costs will range from \$65 to \$75 per session, usually from four to ten weeks.

Outpatient follow-up costs vary from \$30 to \$35 per session, with one session per week.

Outpatient methadone maintenance costs fall in the area of \$65 for admission to the program and \$20 per week for treatment.

Simply put, drug rehabilitation can be expensive on a per-employee basis. It will almost certainly lead to increases in employer health insurance costs, increases which may be too much for some employers to bear without causing cutbacks in jobs or increases in the prices of their goods or services.

To ensure that drug rehabilitation is available for all workers who need and deserve it, I will -- when we return on May 18 -- be introducing legislation to establish a statewide Employee Assistance Program. The program would be administered by the Department of Health on a regional basis through hospitals or medical centers, which already exist. The program would provide evaluation, referral, and limited rehabilitation services for employees suffering from drug addiction. The services could be funded by a small increase in the Temporary Disability Benefits contributions of employers and employees. An increase of one-eighth of 1% would generate more than \$9 million per year for the program. State funding for community drug programs currently amounts to about \$8 million per year, with an additional \$10 million recommended for Fiscal Year 1988 for increased drug enforcement, education, and rehabilitation.

I think that in addition to the \$9 million, we should consider matching whatever money is raised through that tax, by a matching grant from the General Fund of the State Treasury.

Under the legislation, employers who establish their own EAPs, and their employees, could be exempt from contributions if their programs met certain standards approved by the Department of Health. An appropriation would be used to get the program under way, and user fees could be collected to offset sudden increases in operating costs. All employees who are not covered by an EAP would be eligible. Through such

a program, in-state rehabilitation slots would increase, and employer costs would be kept at a manageable level.

In closing, let me reiterate that A-2850 represents a solid public policy for dealing with drug testing in New Jersey. Policy makers in Washington and from many state capitals have used this bill as a backbone for drug testing legislation in their jurisdictions. Without doubt, it is the most comprehensive legislation on drug testing in the nation. It provides guarantees for employees and employers, and permits testing in accordance with uniform standards and ground rules. I urge you to approve this legislation, and thank you for the opportunity to speak here before you today.

SENATOR LESNIAK: Assemblyman, let me commend you for your Employee Assistance Program plan. You would not object to having this bill amended to be tied into the passage of that legislation, I presume?

ASSEMBLYMAN LITTELL: No, I would not. I am very sincere in telling you that I meant what I said.

SENATOR LESNIAK: The only other problem I guess I would have is, are you going to have a resolution introduced for this year's budget to cover that?

ASSEMBLYMAN LITTELL: Well, we would have to do it as a supplemental appropriation through the bill we introduce on the eighteenth.

SENATOR LESNIAK: Okay. So, it will be tied in through that?

ASSEMBLYMAN LITTELL: It will be tied in in the general appropriation, but it will be a supplemental. I think we can get the support for it, without any doubt.

SENATOR CARDINALE: Do you have any feel for the, you know, with all of the research you have done-- What is the percentage of success in the various rehabilitation programs? Are they getting any better? What have you been able to learn about that?

ASSEMBLYMAN LITTELL: Dr. Cardinale, I don't have any information like that here with me today, but I am sure we can provide it to you. My staff tells me that the Department of Health will be testifying later. They can probably give you that information.

SENATOR CARDINALE: Thank you.

SENATOR LESNIAK: Any other questions?

SENATOR JACKMAN: Mr. Chairman, through you, let me compliment Mr. Littell and Tom Foy for your references. There is no question in my mind but that you spent a lot of time on this bill. I compliment you on it. Of course, there are a few things still out there that some people are a little shaky on, but I think you are going in the right direction. Hopefully, we are going to be able to put everything together and get the kind of cooperation I think is important for the efforts of everybody in the State. My compliments.

ASSEMBLYMAN LITTELL: Thank you.

SENATOR LESNIAK: I am encouraged by the Employee Assistance Program. I hope the business community will support you on that, and I expect they will.

ASSEMBLYMAN LITTELL: I think we can work it out. We have had cooperation from both the labor unions and employers. The NJBIA is here to testify on the bill today. You can certainly ask them about it. I know they have some reservations about it, but I know they also represent companies which already have their own Employee Assistance Programs. If they are not going to be charged twice, so they don't have to pay for this and pay for the other one-- The reason you can't do it in health contracts is that some companies have health benefits that are paid for in full by the company, others have benefits which are half paid for by the company and half by the employee, and some don't have any at all. So, you really can't tie it to that. You have to tie it to some overall broad-based program that is available throughout the State. We already

have the hospitals and the health centers in place. We already have administration in place that can implement the programs. We already have poly-addiction, as I outlined in the report, which is the use of both alcohol and drugs. Some of those people are being treated under other programs.

SENATOR LESNIAK: I think it is a great idea. Are there any other questions? (no response) Thank you, Assemblyman.

ASSEMBLYMAN LITTELL: Thank you very much.

SENATOR LESNIAK: Now, let's see if Dr. Jim Mastrich is still here.

D R. J A M E S M A S T R I C H: Good morning.

SENATOR LESNIAK: Oh. I guess your students will have to make up their class some other time.

DR. MASTRICH: I do have some documents I would like to submit to the Committee.

SENATOR LESNIAK: Please do.

DR. MASTRICH: The documents I am submitting-- One is called "The Cost-Impact of Employee Assistance Programs," which I co-authored with Bern Beidel, who runs the New Jersey State Police Employee Assistance Program, and who is the Chairman of the New Jersey Occupational Advisory Committee. The other is a paper I presented to the National Association of Manufacturers, entitled "EAPs and the Wellness Concept: The Interface of EAPs and Drug Testing." I think you will find them both helpful.

I think I will first just mention my credentials, so you will understand the basis on which I am speaking. I am a licensed psychologist in New Jersey. I hold certifications as a substance abuse counselor and as an alcoholism counselor. I am a member of the New Jersey Occupational Advisory Committee under the Division of Alcoholism, and I coordinate the Employee Assistance Program Services for the University of Medicine and Dentistry of New Jersey.



I was thinking originally that the impact of drug and alcohol abuse on business and industry was well agreed upon and documented, but what I have heard so far suggests that maybe I need to say a couple of things about that.

Briefly, a couple of things. Thirty billion dollars per year has been attributed to lost productivity due to chemical dependency. That is a 300% increase since the early 1970s. Compared to other workers, chemically dependent employees show significantly more sickness absenteeism. When they are absent, they are absent longer. They generate more sickness payment costs, and there are significantly more accidents on and off the job, as compared to other employees.

This translates to increased health insurance costs. The National Institute of Alcohol Abuse and Alcoholism estimated that 12% of all health expenditures are related to alcohol and drugs. Thirty percent of all hospital admissions are people suffering from complications due to chemical dependency. Twenty million Americans live in a family where one of the members is addicted to some alcohol or drug.

My comments from here on in focus exclusively on Employee Assistance Programs. It has been clear to me so far from what I have heard, that there are some misconceptions and general information about EAPs that warrant me to perhaps give a brief historical perspective, so we have a foundation of what they are.

In a nutshell, back in the '40s, due to a variety of circumstances, including military personnel returning to the labor force, business and industry felt compelled to address the problem of drug abuse in the workplace. The drug of choice which was prevalent was alcohol. They addressed the problem by developing occupational alcoholism programs, which were the forerunners of Employee Assistance Programs. Companies which developed these programs early on were duPont and Eastman Kodak, for instance.

Briefly stated, these occupational alcoholism programs were helpful, but they didn't maximize their effectiveness because of two things: Number one, in these programs, supervisors were trained to diagnose employees who had an alcohol problem so, as a result, we had many false positives showing up -- people who were accused who were, in fact, not alcoholics. The second problem was, the activity resembled a witch hunt, and many people who did have chemical dependency problems went underground. They learned to hide better.

As part of the effort to improve the effectiveness of occupational alcoholism programs, the Employee Assistance Program was developed. I will briefly define what it is. It is both an employee resource and a management tool. EAPs are prepaid, confidential assessment and referral services for company employees and their immediate family members. EAPs are not treatment; they are not treatment. They perhaps are a route to treatment, but they do not treat themselves. EAPs are free resources for employees, and are places to get help or assistance with any kind of a problem they may have.

Good Employee Assistance Programs are staffed by experienced professionals in some mental health discipline, who are also specialists in the diagnosis and treatment of chemical dependency. I am talking about alcohol and drugs. Typical EAPs offer a time-limited number of sessions to either help solve a problem or to serve as a bridge for whatever services are necessary to address the problem, be it a job problem, a legal problem, a medical problem, a financial problem, or a chemical dependency problem.

EAPs were developed specifically to reach the chemically dependent employee. Where the witch hunt mentality of the old occupational alcoholism program pushed chemically dependent employees into hiding, the EAP more effectively reaches them by offering professional assistance for a broad brush of problems beyond drugs and alcohol.

How does an Employee Assistance Program work? Very simply. Let's look at the referral process. There are usually five main routes of getting to an EAP -- of accessing an EAP. One is a self referral; a person just shows up. One is a family referral. The third is a union steward referral. All of those are generally what we would call self referrals. Management referrals have to do with the next two. One is, the medical department, as a result of a physical or a drug test, may refer an employee to an Employee Assistance Program. My position, and the position of many practitioners in EAPs, feel that if there is a drug program in existence, a positive test result should mandate an automatic referral to EAP. The last route of access to EAP is a supervisory or management referral. Supervisors are trained by Employee Assistance Program personnel to refer around job performance issues. When supervisors effectively refer around job performance issues, we find people who are chemically dependent, and we get them to whatever treatment is necessary. Again, I want to emphasize the position that a positive drug test should entail an automatic referral to an Employee Assistance Program.

Even if the employee does not present a chemical dependency problem -- for instance, if he came around a marital issue -- the employee assistance counselor is trained to be aware of chemical dependencies' problems, and intervene. Another way EAP reaches chemically dependent employees, is that he or she is forced to address the drug or alcohol problem only because the spouse came to the EAP for help. So, EAPs ought to extend to family members.

Further, EAPs reach chemically dependent employees by recognizing that drugs and alcohol are not the only problems that negatively affect job performance. Many other life stressers affect work and also may lead to chemical dependency problems, and chemical use as a means of coping. EAP is a prevention tool used to address all of these life stressers.

There is a question, I think, that is relevant, given the bill in question, which is, are EAPs viable for all companies? I take the position that they are. Basically, there are three options:

Number one, a company may choose to hire an EAP counselor as one of its own employees to develop their own EAP program. This, however, may be cost-prohibitive due to the size of the company.

Number two, a company may decide to contract with an external provider of EAP services for an EAP program. The typical cost, in my experience, ranges between \$18 and \$28 per employee per year. This includes all of the counseling -- assessment referral counseling for the employee and immediate family members -- supervisors' training, employer orientations, and unlimited supervisor consultation to the EAP to help around job performance issues.

The third possibility has to do with smaller companies -- the question of can they afford it? A group of companies may opt for a consortium model Employee Assistance Program. These companies may share either a common geographic area, like an industrial park, or perhaps a common similar business or industry, like hotels, manufacturing, restaurants, offices, etc. In a consortium EAP arrangement, all of the companies share the costs for the Employee Assistance Program, and receive the same full range of benefits that a large company would get, probably at a cheaper rate because they are all pooling their resources. Again, as was just mentioned by the Assemblyman, the prevalence of EAPs is growing. Clearly, well over 50% of Fortune 500 companies have them. That is well-documented.

So, I told you what EAPs cost, in terms of having one. The next question is-- Well, if you have an EAP, you know you are going to end up treating people, so what does treatment cost? I would like to differentiate four models of treatment for chemically dependent employees:

EAPs may assess and refer chemically dependent employees to: 1) Typically inpatient treatment programs. That has been the traditional route. These programs last 28 days, and the average is between \$6000 and \$9000 per employee for those 28 days, plus the cost of detox, which could be maybe \$1400 -- maybe up to \$1400. The next, which is an emerging trend in treatment of chemically dependent employees, is called an intensive outpatient program. These programs allow the employee to stay connected with his family, stay on the job, yet as soon as the person is off work, approximately four nights a week, attend an intensive counseling program, usually from about six o'clock to ten o'clock at night. It allows the employee who is able to maintain himself out in the community to still stay working and still stay with his family. These programs generally last between six to ten weeks of the intensive counseling, with some extended services afterwards. Their cost is between \$1800 and \$2500. So, obviously there is a need to differentiate between who needs inpatient treatment and who can handle intensive outpatient treatment. That will change what the cost is.

The next is just regular outpatient psychotherapy as done by a social worker or a psychologist, if the given chemically dependent employee is capable of handling that kind of treatment. Usually that occurs once or twice a week, and will probably last for a minimum of six months, at a cost probably between \$50 and \$70 an hour. If you look at over six months, it adds up to about \$1500.

And the last is detox. The average cost I have experienced is about \$1400. But, I want to emphasize that detox is not treatment. In the bill, it looks like it is, but detox is not treatment. It may be a part of treatment, but if we just detox people, we are just drying them out. When we send them out again, we are going to see them back again. It is not treatment; it is part of treatment. It usually lasts about five days.

The next question is, all right, do EAPs work? Do EAPs work in their assessment and referral, and does the treatment that people get stick? Does it work? Are they cost-effective? I will answer this in two parts, one to look at treatment success, and the other to look at, are they cost-effective?

In 30 seconds, I am going to say the results of four studies that took a look at chemically dependent employees referred for treatment through Employee Assistance Programs. These are generally the results. I will just run through them very quickly. After treatment -- we're talking a year or so after treatment, and in some cases two years after treatment -- there was less absenteeism, less disciplines, less grievances, less on-the-job accidents, less visits to medical. One study report showed an 80% improvement in job performance along several dimensions. Another study reported an 86% improvement in job performance. That same study also calculated costs -- estimated costs -- to replace a chemically dependent employee, if he needed to be fired, or if they lost him for some reason. It seemed to add up to approximately \$2100 per employee lost, either by firing, or death, or leaving for whatever the reason.

The last thing I will just mention is, there was a 75% abstinence rate reported in terms of chemical use after treatment -- we're talking about a year later -- and an 81% satisfactory job performance rate after treatment. These numbers suggest that EAPs work, and that treatment works. But the question is, is it worth it financially?

So, let's look at cost-effectiveness. I will give you some very general information about a couple of other studies that looked at the cost benefit derived from treatment. First of all, all the documented success rates of treatment suggest that getting healthy people back on the job is, in itself, a cost savings. Number one, generally there is a significant decrease in the amount paid in Workers' Comp, and number two--

Well, I will cite a study. One study compared the use of medical benefits of chemically dependent employees and family members one year before treatment and five years after treatment. The results found that five years after treatment, the employee and his or her family had a net reduction in health care utilization, as compared to a control group of non-chemically dependent people, and that the reduction of cost for the addicted employee and the family eventually was the same, or even less, than the normal population. We're talking five years after treatment.

Some specific examples: The average monthly inpatient costs at a general hospital before treatment-- The alcoholic, the drug abuser, and his or her family had incredibly higher rates of inpatient costs, as opposed to the general population. Remember, 30% of all hospital admissions are chemical related. Five years later, there was a net decrease in admissions.

Taking a look at the average medical care costs per individual-- Again, a dramatic difference before and after treatment. These people used an incredible amount of money for medical care. After treatment, there was again a significant reduction in costs and, in fact, family members of the chemically dependent employee were actually using medical treatment less than the control group. That goes on, but that sort of thing -- that trend -- continues.

A couple of other things to mention in terms of treatment cost savings just taking a look at the use of health care services before and after treatment-- This comes from another study. Of the individuals who came to EAPs for chemical dependency problems, 31% had medical hospitalizations before treatment. After treatment, only 11% did. While 20% of them before treatment had emergency room use, only 8% did after treatment. In terms of alcohol and drug dependency-related problems before and after treatment, 42% of the folks who came

to Employee Assistance Programs and who were referred for treatment used drugs and alcohol at work before treatment, and only 7% afterward. We are talking about a year afterward. Before treatment, these people had an average of 17 days absent per year due to illness, while only 6-1/2 days absent after treatment.

The last thing to mention in terms of problems before and after treatment is, there was a significant decrease in the number of days that the chemically dependent employee's spouse missed his or her work, and the children missed school, and that the family sought counseling. A dramatic difference after treatment. The conclusion here is that EAPs and treatment work. There is a high success rate and, as a result, there is an obvious humanitarian benefit to having an EAP and treatment. Research suggests that they are cost-effective and, therefore, a benefit to both the public and private employee and employer.

In summary, I would like to make a couple of statements particular to the bill in question. Number one, it strikes me as curious that alcohol is not included in this bill as an issue. It is a huge problem, and one that we don't talk about. It is as if it is okay. Alcohol is a drug. It just so happens it is legal. It may still affect job performance, but it is not mentioned in this bill.

Number two, I want to point out that Employee Assistance Programs are not staffed by medical personnel, as it says in the bill. GPs, psychiatrists--

SENATOR LESNIAK: I'm sorry, could you please repeat that?

DR. MASTRICH: Yes, sir. Employee Assistance Programs are not staffed by medical personnel.

SENATOR LESNIAK: As?

DR. MASTRICH: As?

SENATOR LESNIAK: As it--



DR. MASTRICH: As they currently exist.

SENATOR LESNIAK: You said something about this bill.

DR. MASTRICH: Yes.

SENATOR LESNIAK: You referred to the bill.

DR. MASTRICH: Oh, as referred to in the bill.

MR. DAVIS (Committee Aide): He said the bill says they are staffed by medical personnel, and he is saying that is not the case.

SENATOR LESNIAK: Where is that? (referring to the bill)

MR. DAVIS: "'Employee Assistance Program' means a program of therapy, counseling and rehabilitation in which medical personnel, provided by the employer or through referrals by the employer, counsel and treat persons affected by substance abuse problems and evaluate their progress in recovering from or controlling those problems." That's page 2, section h.

SENATOR LESNIAK: Also, "'Medical personnel' means any medical practitioner, therapist, or counselor authorized by the Commissioner of Health to administer," etc., etc.

DR. MASTRICH: Let me spell out my point a little bit more. GPs, psychiatrists-- I am a licensed psychologist. Clearly, many people who are trained as I, are not necessarily trained or prepared to deal effectively with drug and alcohol issues. They do not get trained generally.

SENATOR LESNIAK: There would be, I guess, a separate licensing procedure in the Department of Health.

DR. MASTRICH: I will get to that as well. Generally, people who work in Employee Assistance Programs have mental health training; usually at least a master's in psychology, social work, or rehab counseling. Just about always, they have specialized training in chemical dependency issues, in the diagnosis and treatment of chemical dependency. Often, these people -- Employee Assistance Program people -- hold

certifications as alcoholism counselors or substance abuse counselors. I think we need to build that in here.

Eventually, Employee Assistance Program personnel will hold a certification as EAP professionals. Through the Association of Labor, Management, Administrators, and Consultants on Alcoholism, there is currently a certification process taking place. The first administration of a test for EAP certification is going to occur in May. That is the first standardization of people who work in EAPs, in addition to the drug and alcohol credentials.

My next point in relation to the bill is, Employee Assistance Programs do not do treatment. Now, while there are some exceptions, generally EAPs do not do treatment. We do assessment and referral for appropriate services.

The next is, EAPs do not do drug testing. This is crucial; this is absolutely crucial. It is necessary to separate out any drug testing from EAPs, because we need to eliminate the conflict between being a helpful source and being a source of discipline. You need to be mindful of the fact that, in my experience, and in the experience of many EAP professionals, the vast majority of the people we see are self referred; about 80% in my experience -- and we deal with about 30,000 employees -- are self referred, many for chemical dependency problems, many because the spouse came and got them in to deal with their drug problem, and many because an employer referred them due to a job performance problem.

SENATOR LESNIAK: Can you distinguish between the effectiveness of a program based on self referred or a mandatory referral?

DR. MASTRICH: Yeah. Basically, there is little or no difference between self referrals and supervisor referrals in terms of the success rate. Some of the documents I gave you will be clear about that.

I want to also make the point that a positive drug screening, at least the first time it occurs for a given employee, ought to require an automatic--

SENATOR CARDINALE: Excuse me. Let me ask you to clarify that last answer. I think perhaps I didn't understand it fully. I think you answered "supervised or self referred."

DR. MASTRICH: Yes.

SENATOR CARDINALE: I think the Chairman's question was-- Let me rephrase it.

SENATOR LESNIAK: I think he used supervised as meaning mandatory, that they had to go to it for some reason or another.

DR. MASTRICH: Correct.

SENATOR CARDINALE: So, someone is tested who has been a secret drug user--

DR. MASTRICH: No, no, we are not talking testing here. The Senator asked, "Is there a difference in success rates between individuals who come on their own -- self referred -- and individuals who are in some way told by management to come?"

SENATOR LESNIAK: Or in some way had to, whether it be-- It could be because of a drunk driving violation, or whatever--

DR. MASTRICH: Yeah. Oftentimes, it is some sort of--

SENATOR LESNIAK: Maybe criminal probation.

DR. MASTRICH: Okay. Typically, those folks do much worse. Those folks who are legally mandated do much worse.

SENATOR LESNIAK: Oh, well, that was my question.

SENATOR CARDINALE: That was his question, and I--

DR. MASTRICH: Well, I want to differentiate between management referral and legal mandate. There is a significant difference with those who come because the courts mandate it. Basically, they don't do as well as those who are self referred.

SENATOR LESNIAK: Well, what if they were mandated because of their employment, because they tested positive?

DR. MASTRICH: Then they do much better than if the court refers them. Then there is essentially no difference between them and the self referrals.

SENATOR LESNIAK: The employment nexus rather than the criminal nexus makes the significant difference.

DR. MASTRICH: Yeah, both have reasonably high success rates of -- you know, 75%, 80% success rates. Okay?

SENATOR CARDINALE: Yes, thank you.

DR. MASTRICH: Sure. The next point is that a positive drug screening, at least the first time someone shows positive -- that individual shows positive on a drug test -- should entail an automatic referral to EAP. I think it is crucial, crucial. Build it right in. We are not going to send people out who are going to end up being hired by someone else, which ties into the next -- the second and last point -- that I want to make.

If we require public employers to have-- If we require them if they do drug testing to have some sort of referral process for treatment, I suggest that the same be done for the private sector. There is a question of, should government interfere? I think it is beyond that. If government feels the need to regulate if you are going to do drug testing, well, let's round out the picture. If you are doing drug testing -- public or private sector -- it ought to be done in a way that is helpful to society at large.

SENATOR LESNIAK: Do you have any idea of the cost of such a program? I am not talking about the bottom line net cost after you net out the benefits, but the up-front costs.

DR. MASTRICH: Of a drug testing program, or an EAP program?

SENATOR LESNIAK: If, for instance, this bill were in effect with a mandatory referral, do you have any idea-- I did

some quick figures on Assemblyman Littell's \$18 million, and I guess we are talking about anywhere between 2000 and 6000 people in the State of New Jersey who would be covered by an \$18 million program.

DR. MASTRICH: Well, I am not quite sure where I am in relationship to having the State of New Jersey set up an Employee Assistance Program available for private sector employees. I am not saying that is good or bad.

SENATOR LESNIAK: That wasn't the question. Do you have any idea about how many workers -- and we're really only talking about drugs-- We all understand on this Committee that alcohol is probably a bigger problem, and that there are other problems, but we can't solve all the problems of society. This problem happens to be one that we feel -- especially with cocaine -- is growing in magnitude and reaching our younger people, and we want to try to attack it on all levels.

With regard to drug use, excluding alcohol, do you have any idea of how many people would be referred under such a program?

DR. MASTRICH: Well, first of all, the general statistics that are tossed around, that are fairly conservative, say that 8% of the working population in the United States--

SENATOR LESNIAK: Eight percent?

DR. MASTRICH: Eight to ten percent of the working population has some sort of chemical dependency problem. Typically, it is poly-addiction -- drugs and some booze. So, there is the number right there. You know the number of people in the State who are employed.

SENATOR LESNIAK: Does that include people who just have alcohol problems?

DR. MASTRICH: Typically, you don't find those folks so much. These days, the alcoholic who is only an alcoholic is

a rare bird. Usually, at this point, he is getting to be older and older, because the younger the population--

SENATOR LESNIAK: He's talking about us. (laughter)

SENATOR JACKMAN: What did he say?

SENATOR LESNIAK: About 8% to 10% of the working population.

SENATOR JACKMAN: Young lawyers? Who are you talking about?

SENATOR LESNIAK: You can't call me a young lawyer any more.

SENATOR JACKMAN: Why not? You are young. Well, I'm 71, so you've got to be young.

SENATOR LESNIAK: Go ahead, I'm sorry.

DR. MASTRICH: If we're talking about 8% to 10% of the working population having a chemical dependency problem, what EAPs try to do-- Every year, a good functioning EAP tries to reach about 7% of the employees. Okay? That is a lot of folks. The numbers I gave you earlier-- I wanted to suggest that EAPs can be affordable for both large and small employers, and that treatment does work, and that there are some real suggestions for return on the dollars spent.

The last point I want to make -- well, the second to last point; I talk a lot -- is that the bill refers to the Advisory Committee on Employee Drug Testing. I would suggest that an Employee Assistance Program professional also be a regular member of that committee.

Last, but not least, I think we need to remember that addiction is a disease. It doesn't just go away. As I read the bill now, if somebody in the private sector tests positive for drugs, and there is not encouragement as there is for the public sector to treat the person, well, what you fire, I might hire, and I might have to fire him, and somebody else will hire him, and we all bear the cost of that.

SENATOR LESNIAK: Are there any questions from the Committee? (no response) Doctor, I want to thank you very much for testifying. It was very informative.

The Department of Health, Dr. Jack Rutledge, Deputy Commissioner.

DEPUTY COMM. JOHN H. RUTLEDGE: Good morning. I would like to thank you for the privilege of testifying today. My name is Dr. Jack Rutledge. I am Deputy Commissioner of the Health Department for the public health sector. Included in my responsibilities are: the Division of Narcotics and Drug Abuse, the Division of Alcoholism, and the Division of Occupational Environmental Health, as well as several others.

I would like to commend the sponsors of the bills today, because it is obvious they do understand that if we are going to be testing, we must have some uniform standards and some procedures, and we must guarantee protection for the employees who are being tested. We have no basic objections to what has been proposed, but want to add some comments and suggestions we think might help to clarify the bill. I will be submitting written testimony to you summarizing these concerns we have.

First of all is our concern that any type of drug testing program should be aimed at rehabilitation, not firing, not retaliation, not punishing any of the employees.

SENATOR LESNIAK: Any -- with the emphasis on the any?

DEPUTY COMMISSIONER RUTLEDGE: Yes. Drug testing in the workplace, as you mentioned earlier, should be based on reasonable suspicion, or for cause; that is, based on the performance evaluation of the employee.

SENATOR LESNIAK: What about high-risk jobs, though?

DEPUTY COMMISSIONER RUTLEDGE: I don't believe that is addressed in this bill. That is addressed in the police and firemen bill. There may be some high-risk jobs that would be an exception to that. But, as a basic--

SENATOR LESNIAK: It is addressed in this bill.

DEPUTY COMMISSIONER RUTLEDGE: As a basic principle, our view is that any type of drug testing should be for cause. That means that the concept is that the worker's performance should be evaluated. If the performance shows there is a problem, such as absenteeism, such as any type of drunken driving record, etc., then it is reasonable cause to do some type of drug testing.

SENATOR LESNIAK: Doctor, are you from southern New Jersey? (referring to witness' southern accent)

DEPUTY COMMISSIONER RUTLEDGE: Very, although it is wearing off.

The third concern we have is confidentiality. I think we all share this, and it is mentioned in the bill. Our concern is that when drug testing is taking place, the results of that drug testing should be very confidential. They should be available to the individual employee; they should be available to the physician at the plant. The thing that should be told to the supervisor of the employee is not that the employee was found to have a positive drug screen, but that in the physician's opinion, that employee is temporarily disabled, so that only the physician, only the Employee Assistance Program personnel, and the individual employee would know exactly what was found in the screen, what type of drug, etc. It is legitimate for the physician to tell the supervisor that the employee is temporarily disabled, and that he recommends some type of Employee Assistance Plan.

The fourth concern we have -- and it is addressed in the bill, and we were very glad to see that -- is the signed consent form. Our concern is that if there is going to be any type of drug testing, an employee ought to know what his responsibility is, what the responsibilities of the employer are, what the protocol will be, and it must be a truly informed consent. I was very pleased to see that this written informed



consent is incorporated into the bill, because we think it is very important that an employee know what is going to be taking place, so he or she is not taken by surprise.

A fifth concern we have -- and it has been addressed numerous times today -- is that any type of drug testing, or any type of disability, should be tied in to an Employee Assistance Plan. This truly does make the reason for screening, rehabilitation. One of the things we have seen is that if an employee is just fired outright for any type of drug screening, etc., this many times is turning that employee from an employed working person with a possible minor drug problem, to a street addict. We should do anything we can in society to prevent that. That means that when we find someone who is in the early stage of a disability, we should provide the Employee Assistance Plan for them, and aim it at rehabilitation, trying to continue to make that person a functioning employee in society.

One other concern-- See, I am being brief today. One other concern is the laboratory costs. The State lab does not guarantee any type of chain of custody, and in most of these cases, the chain of custody may be very important; that is, if there is any type of legal action brought by the employer, etc. So, any type of testing for this will probably have to go to private labs which the State currently oversees, certifies, etc. But, any type of drug testing program will incur the cost of that chain of custody, and that means guaranteeing that the urine that that person provides -- that someone saw him provide it, and that there was chain of custody all the way to the lab. That can be very expensive. That is not a cost the Health Department will incur, obviously, but it is a societal cost, and one that we need to be aware of.

That concludes my remarks. We will be having written remarks and some minor suggestions and amendments turned in to you.

SENATOR LESNIAK: Doctor, I would just ask you to do one thing, if you can. Could you communicate and work with the Department of Labor and the Department of Commerce to develop some estimates with regard to how much the actual cost would be if we instituted a mandatory Employee Assistance Program on the private sector, as is currently under this legislation in the public sector? I think we all know that the cost to society would be a benefit, but, nevertheless, there is the initial outlay that someone is going to have to pay for.

DEPUTY COMMISSIONER RUTLEDGE: I will be glad to. We will get back to you in writing on that.

SENATOR LESNIAK: Thank you. Questions?

SENATOR CARDINALE: I have a question. You heard the testimony of the last witness. Would you concur that there is essentially very little difference between a self referral and a supervised referral in a non-criminal type of situation?

DEPUTY COMMISSIONER RUTLEDGE: I have not personally seen the studies on that, and my expertise is not in that. From talking to the people in our program, again, I do concur, the worse results are those that are legally mandated. We have seen somewhat better results on those who are self referred, rather than supervisor or management referred, but not nearly the difference as between legally mandated referrals and the other two categories. The best we have seen have been the self referrals.

SENATOR CARDINALE: What happens -- I think his figure was about 80% -- where the program is successful, and they remain drug free a year later, essentially-- What happens to the other 20%? Are they helped, or are they not helped at all by the program?

DEPUTY COMMISSIONER RUTLEDGE: Many of them, and this is something we have seen in the substance abuse area-- Many of them, the first time, may not be helped substantially. If nothing else, it may be a temporary relief. You know, they may

get off of the substance for a while, but they may have to go back into the program subsequently. With adequate follow-up -- not just an initial inpatient or outpatient and no follow-up -- but with adequate follow-up, many of them can be helped. There is still going to be a percentage, though, that have the problem. Frequently, these are the ones who ultimately we see falling out of the workplace and actually going on the streets, unemployment, etc.

SENATOR CARDINALE: Thank you.

SENATOR LESNIAK: Thank you, Doctor.

DEPUTY COMMISSIONER RUTLEDGE: Thank you. I appreciate it.

SENATOR LESNIAK: Sheree Rheinhardt, Assistant Director, Division of Criminal Justice. I am surprised Cary isn't here himself. She's much better.

SENATOR JACKMAN: You better believe it.

S H E R E E R H E I N H A R D T, E S Q.: I am not an Assistant Director. You just promoted me. I am a Deputy Attorney General.

SENATOR LESNIAK: Oh.

SENATOR JACKMAN: You are an Attorney General?

SENATOR LESNIAK: Some day.

MS. RHEINHARDT: A Deputy Attorney General.

SENATOR JACKMAN: You look better than he does, so don't even worry about it.

SENATOR LESNIAK: Yeah, but so do you look better than he does. Ms. Rheinhardt, you will be an Assistant Director.

MS. RHEINHARDT: Okay, I will start with Senate Bill 2565. The Attorney General opposes this bill--

SENATOR LESNIAK: Oh, do you hear that, Senator O'Connor?

SENATOR O'CONNOR: I'm listening.

SENATOR JACKMAN: Whose bill? Is that yours? (no response)

MS. RHEINHARDT: (continuing) --because it is directly contrary to the guidelines which the Attorney General issued.

SENATOR O'CONNOR: I'll tell you right now, I am willing to embrace the guidelines in that bill.

MS. RHEINHARDT: Okay. The Attorney General is currently writing a legislative initiative, which he would like--

SENATOR JACKMAN: You're going to embrace them?

SENATOR O'CONNOR: Yeah, you know--

SENATOR JACKMAN: You get me a little worried when you start embracing one another.

MS. RHEINHARDT: He is currently drafting a legislative initiative, which he would like to be introduced, which would implement the guidelines -- just follow the guidelines point by point, as--

SENATOR O'CONNOR: Okay. Well, we can help him out in that respect.

MS. RHEINHARDT: That was the basis of his opposition to S-2565. It is really the same for Senate Bill 2826. It is also applicable to law enforcement officers and contrary to the guidelines in specific areas. Because he is going to be writing a legislative initiative, he would like to oppose that bill, but submit something else. Essentially, S-2826 does not establish any specific standards, and the guidelines do.

Since Assembly Bill 2850 does not directly affect law enforcement interests, the Attorney General is neutral with respect to it. Nonetheless, he believes that regulation in this area is extremely important, to wit he is drafting a legislative initiative for law enforcement offices in particular. We would like to work with the sponsor, however, to suggest certain amendments on 2850, you know, upon reading it, technical problems with the bill.

That's really it.

SENATOR JACKMAN: Hasn't the Attorney General been in consultation with the sponsors of these bills before?

MS. RHEINHARDT: I don't believe he has been in consultation with Senator O'Connor on S-2865, or with Senator Bassano on S-2826.

SENATOR JACKMAN: What about Bob Littell's bill, A-2850?

MS. RHEINHARDT: With A-2850, he has worked with--

SENATOR JACKMAN: I thought he had input into that bill, didn't he?

MS. RHEINHARDT: Yes, he did, but there are still suggested amendments which the Attorney General would like to make and work with the sponsor.

SENATOR JACKMAN: Okay, thank you.

MS. RHEINHARDT: You're welcome.

SENATOR JACKMAN: Are there any questions? Doctor?

SENATOR CARDINALE: Yes. With respect to the March 26, 1987 decision -- the Appellate Division decision which was referred to earlier -- is that going to be appealed?

MS. RHEINHARDT: I am not aware of whether that is going to be appealed or not. I am assuming that it will be. However, if you note that opinion, it cited the Attorney General's guidelines with approval. The standards in that opinion are identical to the standards set forth in the guidelines, which is individualized reasonable suspicion. But I assume that that will probably be appealed to the Supreme Court. But, since I am not on the case, I cannot tell you for certain.

SENATOR LESNIAK: Did you resolve the differences on the O'Connor bill?

SENATOR JACKMAN: Yeah, they are going to be embraced. Yeah, it's all set.

SENATOR LESNIAK: Will the Attorney General then support the bill?

SENATOR O'CONNOR: He wants to draft his own legislative initiative.

SENATOR LESNIAK: Well, we know he always wants to do that.

SENATOR O'CONNOR: I told him we could help him out.

SENATOR LESNIAK: Okay. Thank you very much.

Do we have another department here? Oh, yes, Henry Maurer, Department of Personnel.

H E N R Y M A U R E R: Good morning. My name is Henry Maurer. I am Legislative Liaison for the Department of Personnel, formerly the Department of Civil Service, for those who remember the name for the past 78 years.

We previously submitted comments on A-2850, when that bill was before the Assembly Labor Committee. The Committee Substitute which was subsequently released by that Committee did address some of the concerns we expressed. However, the bill which is now before your Committee remains problematic in one key area. That is section 3. g. (1) of the bill, which requires a public employer, but not a private employer, to grant a leave of absence to any employee whose samples shows the presence of an illegal drug.

Now, the State of New Jersey, as well as local governments operating under Title 11A, are authorized to grant leaves of absence to employees for valid reasons, including treatment of physical illness, mental illness, and alcohol and drug abuse. However, the public employer's ability to leave open a position, and the length of time that position is left open, are limited by the particular agency's needs to provide public services.

While we understand the intent of the bill to emphasize treatment and rehabilitation, this must be balanced against the public employer's responsibility to maintain governmental functions. Further, inappropriate measures against employees are subject to appeal in the merit system.

If there is a determination to deny a leave of absence, that can be challenged by an employee.

SENATOR LESNIAK: On what grounds?

MR. MAURER: As an abuse of discretion. We have those appeals all the time.

SENATOR LESNIAK: What type of discretion do you think the public employer should have?

MR. MAURER: Well, I think the public employer does have the right to look at the past performance and disciplinary record of the employee.

SENATOR LESNIAK: We are not talking about job performance here; we are talking about a positive test for drugs.

MR. MAURER: Well, that's true, but the way the bill is worded right now, if you test positive for drugs--

SENATOR LESNIAK: Yes?

MR. MAURER: --you shall be granted a leave of absence.

SENATOR LESNIAK: What is your objection to that?

MR. MAURER: I'm saying that that gives more favored treatment to people who abuse drugs than people who have other problems which may need a leave of absence.

SENATOR LESNIAK: How is that related to that person's job performance?

MR. MAURER: How is what related?

SENATOR LESNIAK: The use of drugs. Do you want to just be able to fire someone? Is that what you're saying?

MR. MAURER: No, absolutely not.

SENATOR LESNIAK: Okay. When do you want to be able to fire? If their job performance-- Forget about their job performance. They take a test; you give them a test, and they come up positive.

MR. MAURER: Right.

SENATOR LESNIAK: Under what circumstances do you want them to be able to be fired, related to that test?

MR. MAURER: I don't think it would be primarily related to that positive test, except in a law enforcement setting.

SENATOR JACKMAN: Would you go back and use absenteeism? (no response)

SENATOR LESNIAK: On that basis would you not give them an opportunity to cure themselves?

SENATOR JACKMAN: Would absenteeism be a part--

SENATOR LESNIAK: Wait a minute. On what basis would you deny a person an opportunity to get treatment that is absolutely necessary, and instead throw him out on the street?

MR. MAURER: Well, we would look at-- When I say we, it is not really our Department; I am saying the public employer -- the State or the county or municipal government -- would really look at job performance, and pass disciplinary--

SENATOR LESNIAK: They could do that anytime, without regard to the drug test. What does the drug test have to do with it?

MR. MAURER: Because the wording of this bill says that no matter what the past job performance is, if they test positive to a drug, then they must be given a leave of absence. May I give you an example, Senator?

SENATOR LESNIAK: But, if you hadn't fired someone, or suspended someone, prior to that, how does the drug test affect that? If they didn't reach that level where you wanted to fire them, how would the drug test add to that? The drug test, in and of itself, only tells you that that person is using drugs.

MR. MAURER: Let me give you an example.

SENATOR LESNIAK: Okay.

MR. MAURER: I think this might answer that. Let's say we have a situation in a State hospital where two employees assault or abuse a patient, and their conduct is such that it raised reasonable suspicion that there may be drug use. So, they are both given a drug test. Employee A tests positive; employee B is negative. Employee A must, under this bill, be



given a leave of absence and rehabilitation. Employee B, who tested negative, gets disciplined up to -- or he may be discharged, depending upon other circumstances.

SENATOR LESNIAK: This does not prohibit discipline. This doesn't prohibit any discipline.

MR. MAURER: Well, you can't have a leave of absence and a discharge. I don't read it that way.

SENATOR JACKMAN: May I ask Mr. Maurer a question?  
(no response)

SENATOR CARDINALE: Isn't it true, though, that the philosophy of this bill is to treat the drug addiction as a disease? It seems to me rather logical that if you are treating it as a disease, you would provide treatment, rather than provide discipline. Are you taking issue with that philosophy?

MR. MAURER: I don't disagree with that philosophy, but the way the bill is worded now-- It says that if you test positive, you cannot go the disciplinary route, no matter what the other circumstances are.

SENATOR LESNIAK: What kind of language are you looking for? Basically, you want to restrict it to-- If under the circumstances an employee would be subject to disciplinary action for his or her actions, without regard to whether or not he was using drugs, then he would still be subject to it. Is that what you're talking about?

MR. MAURER: If you are asking for a preference, I would say--

SENATOR LESNIAK: No, no, I am not asking for a preference. I am asking, what do you want?

MR. MAURER: Okay. There is language right in Senate Bill 2826, section 3. of that bill. It talks about the option of granting a leave of absence, rather than mandating it.

SENATOR LESNIAK: No, no, that would give pure discretion to the public employer. Is that what you want? I

thought you were talking about limited circumstances, where you had an assault case. Now you're saying they are given an option in any case. What do you want?

MR. MAURER: That is what we are seeking -- an option. No difference--

SENATOR LESNIAK: Do you think that is good public policy?

MR. MAURER: We are recognizing, first of all, that the bill does grant that option to private employers.

SENATOR LESNIAK: As it exists before us, I don't think that is right either. Do you think that is good public policy?

MR. MAURER: To give that option?

SENATOR LESNIAK: Yes.

MR. MAURER: I think it is, because there is one big difference in our system.

SENATOR JACKMAN: Let me ask a question.

SENATOR LESNIAK: You may ask, but not in the middle of one of my questions.

SENATOR JACKMAN: Not in the middle of anybody's question.

SENATOR LESNIAK: Go ahead.

MR. MAURER: (continuing) There is one big difference in our system.

SENATOR JACKMAN: They get a little annoyed when a guy comes in and-- Let me ask you a question, a very simple question.

MR. MAURER: May I answer Senator Lesniak?

SENATOR JACKMAN: Let me ask you a question. Don't answer anyone's question.

SENATOR LESNIAK: I withdraw my question.

SENATOR JACKMAN: Do you mean to tell me that if an individual is found having drugs-- Let's use a hypothetical case, where a person has a bad record of absenteeism, and etc.

and etc. You don't want to give him a leave of absence because of his record? You want the right to fire him? Why the hell didn't you fire him when he had the bad record, before you got him into the drug program?

MR. MAURER: Well, first of all--

SENATOR JACKMAN: Answer that. Is that what you want to do?

SENATOR LESNIAK: Yes; the answer is yes.

MR. MAURER: No.

SENATOR JACKMAN: What do you mean "no"? You just got done saying "yes" before.

SENATOR LESNIAK: They want the option to do that.

SENATOR JACKMAN: You want the option to fire.

SENATOR LESNIAK: They want the option to do that. Okay, I don't want to hear any more. Any other questions? (no response)

MR. MAURER: I must make one point.

SENATOR JACKMAN: You have as much chance of getting that as the man in the moon. Go back and tell that to the Department you're working in.

MR. MAURER: I've got to make one point: There is one difference in our system. It is different from many of the private sector employees, especially non-union ones. Employees in our system have a right to appeal. They have the right to challenge a decision by a public employer.

SENATOR LESNIAK: Why put that burden on top of the drug problem? Aren't we trying to do something good, and doesn't everybody have to contribute to solving this problem, including your Department?

MR. MAURER: Our Department is contributing. We run the Employee Assistance Program for the State.

SENATOR LESNIAK: Then, why put that burden on top of their drug use? I mean, isn't that really a negative? Isn't that going to hurt what we are trying to accomplish? Isn't

that going to exacerbate the problem, instead of help to solve the problem?

SENATOR CARDINALE: You know, with all due respect, even to the philosophy I advanced in asking that question, drug use can be a disease. It can be a symptom, too. It can be a symptom of another kind of aberrant sort of behavior, which may exhibit itself in drug use, or may exhibit itself in a lot of behavior that we would consider to be antisocial.

What he is asking for is really not so unreasonable, if you consider it that way. This may be someone you don't want to continue in public employment in any event, and do we want to lock into the statute an absolute requirement that this individual go through this rehabilitative process, which may not get at the root problem at all?

SENATOR LESNIAK: Senator, with all due respect, I understand what you're saying. I offered the witness an opportunity to provide limited circumstances, as he did, with regard to the assault case, where that was a particular egregious occurrence. But that is not what he is asking for. He is asking for unlimited--

SENATOR CARDINALE: Well, let me suggest to you, Senator, that we could easily put language here that would say if there is particularly egregious conduct, in the opinion of the Merit Review Board--

SENATOR JACKMAN: In the opinion of whom?

SENATOR CARDINALE: In the opinion-- We now have a Board, which we just established in the Legislature a very short time ago -- a whole new-- I think we called it the Merit Review Board.

MR. MAURER: The Merit System Board.

SENATOR CARDINALE: The Merit System Board. If, in the opinion of that Board, the conduct was so egregious that they preferred to dismiss, in that limited circumstance, they would have that right.

SENATOR LESNIAK: Obviously, if there were an atrocious assault situation on a handicapped child, that would certainly be a situation where that person--

SENATOR JACKMAN: Yeah, I'd buy that.

SENATOR LESNIAK: --despite the fact that he may have a drug problem, ought to be dismissed, and not go back into that job. But that is a limited circumstance. We have to make sure that in order to cover that limited circumstance, we don't leave the door wide open to abuse.

SENATOR JACKMAN: Doc, the reason I asked the question-- If a man has a record of absenteeism, for example, and the company itself -- or the State itself -- didn't do anything about it, you know, made a note of it in his record, of course, and it continued, to a degree, and he was reprimanded on two or three or four occasions, and along they come and they find out that he is having a drug problem-- They feel that, automatically, plus his record, should be a criterion for firing. That is what I'm getting at.

SENATOR CARDINALE: That is not my suggestion.

SENATOR JACKMAN: No, that's his suggestion.

SENATOR LESNIAK: That is their suggestion.

SENATOR JACKMAN: That's their suggestion. I think--

SENATOR CARDINALE: But, there are some circumstances--

SENATOR JACKMAN: I would think that when a person has that kind of a problem, it would be more--

SENATOR LESNIAK: You bet.

SENATOR JACKMAN: To me, there should be more input from the State to try to rehabilitate that individual.

SENATOR LESNIAK: Okay, thank you very much.

MR. MAURER: I have written testimony, which I will leave with you.

SENATOR LESNIAK: Okay. Now, pulling from the hat, we have Pat Witmer, New Jersey State Chamber of Commerce. If anyone wants to object to the order of testimony now, blame Dale Davis, because he set it up.

P A T R I C K   J .   W I T M E R: Thank you, Mr. Chairman and members of the Committee, and good afternoon. I believe I distributed copies of my testimony earlier.

The State Chamber appreciates this opportunity to address legislation concerning the establishment of a uniform standard for the use of drug tests in New Jersey.

It is an unfortunate fact of life that so many employers have found that drug testing is needed to combat the problem of drug abuse at the workplace. But employers have made this decision with the overwhelming support of the public and our State's work force.

The Newark Star-Ledger reported on October 26, 1986, that based on a Star-Ledger Engleton Poll, nearly 80% of New Jersey's residents believed that illegal drug abuse is a very serious problem, and a substantial majority favors mandatory testing of all workers. Additionally, the poll showed that among residents currently employed, three out of four said they would be willing to be tested for drug use by their employer.

These findings coincide with the results of a survey conducted by the New Jersey State AFL/CIO. In January, 1987, the State AFL/CIO announced that their poll of over 1400 union members chosen at random across the State, indicated that more than two-thirds -- 68.7% -- "support drug testing in the workplace if uniform testing regulations are established and union workers are protected from arbitrary actions by employers." Eighty percent of the respondents from North Jersey responded favorably to this question. In addition, about one-third of those surveyed said drug abuse is the most important workplace issue today.

It is no wonder there is so much support for workplace drug testing. According to the National Institute of Drug Abuse, employees with drugs in their systems are one-third less productive and three times as likely to injure themselves or another person while on the job. The Institute's estimates

indicate the enormity of the problem: 65 percent of those persons entering the full-time work force for the first time have experience in illegal drug use. Six million Americans use cocaine on a regular basis, and 23 million Americans use marijuana on a regular basis. The annual cost to the business community of drug abuse is \$60 billion, \$35 billion of which is in lost productivity.

SENATOR LESNIAK: Do we have any figures just for New Jersey?

MR. WITMER: I have not seen any, Senator.

SENATOR LESNIAK: Is there any way we can make a guess, based on those nationwide figures, assuming, you know, that we are no different from anyone else?

MR. WITMER: There is a possibility that it could be extrapolated for New Jersey. I would not be in a position to do that, at this moment anyway.

SENATOR LESNIAK: We're talking big bucks, though?

MR. WITMER: It clearly indicates that business, and therefore consumers, are victims of this abuse.

SENATOR LESNIAK: It's got to be over \$100 million for New Jersey, if it is \$60 billion nationwide.

MR. WITMER: I would think so.

SENATOR LESNIAK: Sixty billion for 50 states. We are certainly bigger than the average state, in terms of the number of people, aren't we? Over a billion. It costs New Jersey businesses over a billion dollars, right?

MR. WITMER: I would say that is correct.

SENATOR LESNIAK: So, you should be willing to invest \$100 million to curb it.

MR. WITMER: Well, I'll get to that in a minute, Senator.

Proceeding with my testimony, the National Institute of Drug Abuse also found that substance abuse by employees harms businesses because of: 1) decreased productivity; 2)

increased absenteeism; 3) increased severity and occurrence of accidents and harmful exposures to toxic substances; 4) increased medical claims, and 5) increased employee theft from companies in order to support drug and alcohol dependency.

Some groups which oppose drug testing of any kind have argued that a drug test amounts to the kind of search and seizure prohibited by the Fourth Amendment to the Constitution. That amendment makes people secure in their persons from "unreasonable" searches and seizures from the government. Not only is there a clear distinction between the government and private business, but there is certainly nothing unreasonable, in our view, about the ground rules provided by A-2850 and S-2825 for drug testing in private employment.

The New Jersey State Chamber of Commerce does not oppose the establishment of uniform, reasonable drug testing standards for all workers in New Jersey. If a legislative standard is imposed, it should include a requirement for employers using drug tests to: Provide a written drug testing policy in advance of any testing; utilize testing techniques and labs approved by the Department of Health; issue a confirmation test after the initial screening before any disciplinary action is taken against an employee, and provide guidelines for when and under what conditions testing may occur.

In today's world, none of those requirements are required in the State of New Jersey.

The State Chamber will strongly oppose any standard for administering employee drug tests which interferes with the right of employers to strive for a productive, drug-free workplace.

I have not addressed rehabilitation in my prepared testimony because mandatory rehabilitation is not a part of the bills, but I will comment on it very briefly here. Most members of the State Chamber and employers in the State of New Jersey now provide some type of rehabilitation, whether it is



an EAP or some other program. It is a bottom-line decision because, Senator, as you pointed out, it is usually easier to rehabilitate a trained employee, in most cases, than it is to train a new employee.

SENATOR LESNIAK: But, isn't it more than a bottom-line decision? Doesn't the business community have a responsibility to join with all elements of society in the State of New Jersey to help fight this problem? Isn't it more than a bottom-line decision?

MR. WITMER: Yes, I think so. I think possibly it should be, but, so far, the primary reason most of these decisions are made-- They are bottom-line decisions. Yes, in most cases, we would hope that employers would care about their employees and would want to help them out in some circumstances. But, as it relates to their bottom line, that is how--

SENATOR LESNIAK: Is the Chamber of Commerce willing to work with this Committee, with the Assembly Committee, with the sponsors of the bills, the Department of Commerce, the Department of Labor, and the Department of Health, in bringing together and putting forth a program of rehabilitation in the private sector -- a better program than currently exists under current law? You're certainly willing to try to work with us, aren't you? Will you make that commitment?

MR. WITMER: Absolutely. We have already made that commitment, and we are willing to work with you toward any type of program. But, a major question we have -- and I will say it out right now -- is, who should be forced to pay for rehabilitation programs? Is it the victim of the crime?

SENATOR LESNIAK: Who will benefit from it?

MR. WITMER: Everyone -- the consumers, the public, and business.

SENATOR LESNIAK: Thank you.

MR. WITMER: At a conference in--

SENATOR LESNIAK: We have heard your testimony, at least I have. Are there any questions? (no response) Thank you very much.

MR. WITMER: You're welcome.

SENATOR LESNIAK: We are going to break now. We will be back at 1:30.

(RECESS)

AFTER RECESS:

SENATOR LESNIAK: We will now call on Robert Angelo, American Federation of State, County, and Municipal Employees.

R O B E R T   A N G E L O: Yeah, I appreciate being called first.

SENATOR LESNIAK: Thank Dale Davis.

MR. ANGELO: Thanks, Dale.

I really want to take the opportunity to respond to one thing that was said earlier by the representative from the Department of Personnel. Don't think for one minute, Senator, that they would hesitate to fire someone who was in the situation as described. They would not, even if this bill were to pass in its current form, stop the process and drug test somebody and send him to rehab.

We represent 10,000 people who work in State hospitals, and we would certainly support direct action against someone who was obviously guilty of such an assault. But there are protections built into the system for all employees. If one of them happens to be drug testing, I don't think the Department would be that concerned. I think they would just move and take action.

I really was unclear as to what he was testifying to, but maybe we can find out from his boss.

SENATOR LESNIAK: What is your position on this bill, though?

MR. ANGELO: We are totally opposed to it. We are opposed to drug testing in any form. The only circumstance under which we see it would have any kind of value, would be if an employee were in a rehab program, and as part of that program a clean urine specimen was a requirement. We could support it there.

SENATOR LESNIAK: But, under current law without this bill, a public employer with reasonable suspicion could test that employee. Isn't that correct?

MR. ANGELO: That is why we would much rather be supporting a ban on drug testing.

SENATOR LESNIAK: Okay, but we don't have a bill-- I don't know of any bill in place that has a sponsor that would ban drug testing. What you're saying is, you are still opposed to this bill, because you want another bill.

MR. ANGELO: That is correct. And we are opposed to the entire concept of drug testing. If I may add two situations that we faced-- Our union is 99% public employees, so we are somewhat unique in terms of legal protections. I think the body of law has yet to be decided. There was an interesting case, as you are probably aware, in the Newark Narcotics Bureau. We faced the issue in two jurisdictions.

SENATOR LESNIAK: Yeah. I think that is an Appellate Division case. That is the highest court in the State of New Jersey, so far, to have ruled on it.

MR. ANGELO: I think that decision -- and I am not an attorney -- was rather restrictive in when it is permissible to test someone.

SENATOR LESNIAK: Yeah, but I think this bill, other than the random and routine section of it, would comply with that decision.

MR. ANGELO: Well, I have not looked at it from that perspective.

Let me just say that if A-2850, in any form, after several amendments by your Committee, by the full Senate, by the Governor's office-- We are really concerned that if the weakest possible bill passes, it will be seized by employers as an opportunity to institute drug testing.

SENATOR LESNIAK: But, they have that opportunity now.

MR. ANGELO: But I don't think the impetus is there now that would be there is a bill is passed. I don't think people will read it carefully enough to see that "you may." I think they will begin to. I think we have already seen people jumping on the public bandwagon -- mayors, for example -- trying to institute what has been found to be unconstitutional drug programs.

SENATOR LESNIAK: Is there a 1983 suit pending -- I just thought about that -- against the Mayor? I wanted to ask him that, but I forgot.

MR. ANGELO: Let me just pick up on one other theme. I know you want to get through the hearing today. The State of New Jersey has 70,000 employees. It also has an EAP. That EAP, which covers 70,000 employees, is staffed by only five full-time counselors. Our experience with the EAP in New Jersey has been excellent. Many people who have admitted to having alcohol and drug abuse problems, have been referred to the EAP, either through the union or through a supervisor. They have received treatment, have been rehabilitated, and, while we do not have exact numbers -- and I am not sure if the State does -- I would say from our experience, that from 90% to 95% of the employees who returned to their jobs after treatment, have been successful, have stayed out of trouble, have proven to be productive employees.

I think another area, and certainly what the Department of Personnel should be asking for today, is additional funding to expand that EAP program, because I think it can be successful for the State work force.

SENATOR LESNIAK: Senator Cardinale?

SENATOR CARDINALE: Do you feel there are really no people who seek testing on their own, who have a drug problem?

MR. ANGELO: I think people seek treatment and rehabilitation. I don't know if they seek testing--

SENATOR CARDINALE: All right, well--

MR. ANGELO: --other than Dwight Gooden maybe. I am not sure.

SENATOR CARDINALE: But he didn't do that voluntarily.

SENATOR LESNIAK: Yes, he did.

MR. ANGELO: Yes, he did. He asked--

SENATOR CARDINALE: No, he accepted it, but the test was administered at the behest of management, as I understand it.

MR. ANGELO: In his contract there was a requirement for testing, and he asked that that requirement be implemented, I think.

SENATOR CARDINALE: Well, okay. I may be wrong about the details. But, it seems to me it is much more likely that there may be some individuals who have not submitted themselves to a program, than it is likely that there are no individuals who have not submitted themselves to a program, who are working in public employment. It also seems to me that there may be a good public need to identify some of those people. Some of them may only be doing harm to themselves, but many of them may be doing harm to others as well. I don't know-- I am trying to understand what it is that you are upholding, in seeking what seems to me to be to protect people who are really abusing something which is illegal. They are not only using, but they are probably abusing something that is illegal. And yet, as a group, you are trying to protect them from that being determined, thereby essentially keeping them from treatment.

MR. ANGELO: To the contrary, I think we are encouraging them to seek treatment. I think an active EAP,

with education and so forth, will attract most of the people who evidence a problem. At some point in everyone's addiction, they seek help. And, if those services are available, and a person thinks he can take advantage of those services without jeopardizing his job, I think he will do it. I think the drug tests, besides any constitutional question, just simply do not work. I am not convinced from everything I have heard here today, and at other hearings, that these darned things are really accurate enough to ask someone to participate in them.

SENATOR LESNIAK: I think the reliability of a second test has been established.

MR. ANGELO: To 99%, maybe.

SENATOR LESNIAK: Yeah, that is pretty damned reliable.

MR. ANGELO: I think the damage to someone -- and I don't care what protections are built in-- The damage of asking someone to submit to a drug test, in terms of personal abuse or harassment they can take on the job, is such a serious issue that until there is some kind of an absolute-- I am not even sure that then I would support it, because I think that every management, whether it be public or private sector, has a very simple way to deal with under-performance or non-productivity; that is, discipline someone based on his performance for just cause. That exists now. I don't see why we have to have a drug test to help to determine that.

SENATOR CARDINALE: The doctor from Rutgers testified. He said that sometimes these referrals come in through shop stewards. Does your organization do that? If a shop steward within your organization suspected that someone was using drugs, would he recommend that the person go to the program?

MR. ANGELO: In fact, you may have seen-- Last week, we got a pilot program between AFSCME and the Department of Human Services, where 50 of our top leaders went to two days of training on how to refer fellow employees to the State EAP, how

to get them treatment. We are now going to take that pilot program and expand it to all of the mental institutions and developmental centers. We will represent employees, and will train an additional 500 people on how to talk to a person who they think might have a problem. I would suggest that employees tend to have first evidence on someone who is using or abusing drugs on the job. I think the union is the vehicle to approach that person, to tell him, "Look, admit your problem. We can help you. We will take you to the EAP counselor. We will protect your job. Get the help you need, and come back and do a better service, not only for the employer, but with a better working condition for all of the employees."

People who work in those mental hospitals don't want to work next to someone who is drugged out. The job is too dangerous.

SENATOR CARDINALE: Let's pursue that just a little bit, because I really want to understand your objection. That shop steward is using some kind-- He isn't just making it up out of his head. He is observing something that tells him this is someone he should approach and say, "Hey, there is a program around here, and maybe it can help you."

Now, it seems to me that a drug test is just another diagnostic tool, if you will, that can be used by someone. Maybe management doing it is what you object to. If this were transposed so that the shop steward would administer the test-- He is doing something with his eyes, something with his senses, that is telling him that this person is on drugs.

MR. ANGELO: I think employees know employees better than supervisors know employees. But the problem with the test is, if you test a person, that may just say that they smoked a joint of marijuana two weeks ago; not that they are drugged out on the job; not that they are not performing. You know, there are too many notes that the test deals with. A Breathalyzer is

an accurate test of whether or not you are impaired due to alcohol. Okay? That test, right at that moment, says whether or not you are drunk. But a drug test tests for use of even the mildest form of either stimulants or depressants over a long period of time.

SENATOR CARDINALE: But even the Breathalyzer was under very severe attack until the court in New Jersey -- it is still under attack in other states -- just issued a fiat, and said, "This is okay," even though we know it is not always okay. The Breathalyzer is not 100% accurate as a scientific tool. You are willing to accept that, but you are not willing to accept--

MR. ANGELO: But it measures current impairment.

SENATOR CARDINALE: --as I hear it, even a confirmatory test, even when that confirmatory test is not going to be used as a basis for firing someone, but is going to be used as a basis of mandating that he receive treatment.

MR. ANGELO: That is correct, because I think -- even if it is 1%, as Senator Lesniak pointed out earlier -- the danger to that 1% of a mandatory referral to a rehabilitation program, when they don't even use drugs, is too dangerous.

SENATOR CARDINALE: You also indicated that you are sort of trying to protect the person who smokes some marijuana once every two weeks. Do you think that we have a societal interest in preventing the smoking of marijuana once every two weeks?

MR. ANGELO: Well, I don't think the union has taken a position on that, but I think the courts have. I think the criminal justice system has all but said that they're not going to prosecute someone who smokes one or two joints of marijuana.

SENATOR CARDINALE: Criminally. Do we have a societal interest -- that isn't my question -- in preventing people, or in eliminating--



MR. ANGELO: We probably do, but it's so far down the list of preventions that need to be addressed, starting with alcohol, that I don't think it's a major concern.

SENATOR CARDINALE: So, you think it's okay that they smoke marijuana once every two weeks?

MR. ANGELO: No, I wish they didn't. But I think it's--

SENATOR LESNIAK: He said it wasn't a major concern.

MR. ANGELO: It's not a major concern of mine. I think a lot of the prescription drugs are a lot more dangerous than marijuana.

SENATOR LESNIAK: Over-the-counter drugs, too. Okay, thank you, Senator.

Lester Kurtz? Is Lester here? (no response) Vincent Trivelli, you have your chance.

V I N C E N T   T R I V E L L I: Good afternoon, Senators. I don't want to repeat everything that's been said before, but the CWA has taken the position -- and I think the right one -- that we are opposed to the use of drug testing in the workplace, and we urge the Senate to take up a bill that bans drug testing in the workplace.

We do this because we feel that they are inaccurate. We feel they show nothing about impairment, and I think that's absolutely clear. There isn't an expert who will tell you that you can give a person a test and you can tell whether he is under the influence of drugs and is impaired in his workplace. We think that's the only legitimate question that an employer can ask; that is, "Can you do your job?" If you can do your job, then you should be left alone. If you can't do your job, then you can be pulled off, disciplined, sent to an Employee Assistance Program, or whatever. But the drug test, if a person is given a drug test, gives that employer no more information about his ability to do the job than he or she had before that.

And third, our objection is with regard to the invasion of privacy. We feel that it's a tremendous invasion to be asked to pee into a cup, and beyond that, the results of what an employer can find out about people when they've given urine, such as pregnancy or prescription medication for other emotional or physical problems, are the sorts of things which are none of the employer's business. Those are the things that an employer can find out about. And when we get to the question of whether a 1% accuracy rate is too high or too low, and whether sending 1% of the people to rehabilitation programs that they don't need is the problem, that's part of the problem. The other part of the problem is subjecting the general populace to drug tests. It would be invading their rights to get at the people who have a drug problem. It would be easier to catch criminals by going through everyone's house, but we would say that that's too much of an invasion. We believe that a drug test is that sort of an invasion, and therefore, we shouldn't permit it.

Also, if we say that just because you may have been associated with drugs sometime in the past, that you're in the suspect class, and that drug use, or that drug association is the employer's business, because you may be less likely to do your job sometime in the future, then we feel that that's a slippery slope, because there are employers out there who will say, "Well, because you're gay, you are less likely to do your job in the future -- be able to do your job." Or because you're a Republican you're less likely to do your job. Or because whatever their concern is, you are less likely to do your job in the future, and therefore, that's the business of the employer. We say that it is not the business of the employer. If you can come to work, and you can perform your job, then that's the only question that the employer has the right to ask about you.

SENATOR LESNIAK: The bill says "reasonable suspicion that the employee's job performance is being or could reasonably be expected to be affected..."

MR. TRIVELLI: And if that-- If a person has been unable to do the job, then pull him off the job. If you give a drug test, every expert will tell you, you find out no more information about his ability to do the job than you had before you gave the drug test. It tells you nothing about impairment.

SENATOR LESNIAK: Don't you think pulling them off the job, and giving them a chance for rehabilitation helps everyone?

MR. TRIVELLI: We would be totally in favor of pulling people off the job and referring them to an Employee Assistance Program, because they could be impaired for a lot of reasons: marital stress, financial stress, and all sorts of other stresses. You could refer them to an Employee Assistance Program so they could get their problems taken care of. You don't need to intercede with a drug test, which is invasive of their rights, and is inaccurate, and tells you nothing about the impairment. It makes us feel better, because maybe we think we've done something about the drug problem, but if it doesn't answer those fundamental questions about impairment and ability to do the job, and you're opening up a person's private life, drugs or any other things -- emotional problems, pregnancy, or whatever it be -- to employers, we feel that that's too much of an invasion.

If a person can't do the job, take him off the job, refer him to an Employee Assistance Program, and let them deal with the problem there. The drug test doesn't help that situation at all.

SENATOR LESNIAK: If you had to choose between the current law and this bill, without the-- You don't want to make that choice?

MR. TRIVELLI: I don't think we have to make that choice. I think the Legislature is elected to lead. If you say there's no bill introduced, well then introduce a bill on the ban--

SENATOR LESNIAK: I'm not in favor of it.

MR. TRIVELLI: Well, put it before the Legislature and let them discuss it.

SENATOR LESNIAK: I will post a bill that's introduced by any Senator on this Committee immediately.

MR. TRIVELLI: Fine. But the fact of the matter is, if we allow drug testing, we're getting no more information. They're inaccurate. The laboratories are tremendously inaccurate. The CDC studies have been discussed. There is also a study by the College of American Pathologists, which performed a nationwide blind study. They sent out 500 samples which were clean samples. Three hundred and fifty-eight labs found drugs in those samples that weren't there, using first screens, second screens, whatever screens the laboratory used. They found drugs that weren't there. To submit our people to those sorts of odds is unthinkable.

This 99% that people are talking about -- and expert after expert will tell you-- That's under controlled, perfect circumstances. If there's an error by the technician, a temperature change, or a million different things can affect that 99% rate and bring it down tremendously.

SENATOR CARDINALE: You know, there are many medical procedures where you have a general screening, and then you have a more particular test where you have an indication that you might have something going on. I don't see this as such a weird kind of situation where you would have a general test that would be administered to a wide group, and only where you picked up positives-- You know, I do this in my office all the time. We take an x-ray that goes around the patient's head, and that gives us, not peculiarized information, but we then go in and take little films.

MR. TRIVELLI: But that's dealing with a doctor/patient relationship. We're working with an employment relationship here. The only question that the employer has with regard to that person is whether he can do the job. We don't feel that they have any rights--

SENATOR CARDINALE: You don't see this as a public health measure?

MR. TRIVELLI: Drug testing?

SENATOR CARDINALE: Yes.

MR. TRIVELLI: No. I don't see drug testing as a public health measure at all. I feel that rehabilitation, referrals to an Employee Assistance Program, drug education -- they are public health measures. But subjecting people to inaccurate tests, which invade their rights-- How can that be a public health-- How can it be a benefit to the public health?

SENATOR CARDINALE: Well, I think you heard me say a little earlier, that I think we have such--

SENATOR LESNIAK: Who's asking the questions here? (laughter)

SENATOR CARDINALE: --an epidemic, that I see this, personally, public/private employment, everywhere, as a potential for a disincentive for people to begin to use drugs right off the bat, because they know their employment may, at some point, be affected.

MR. TRIVELLI: If strong drug laws saying that you're going to be locked away in jail for so many years, or whatever it is, is not a deterrent, then I think going to an employer and having a drug test is not going to be a deterrent either. You've got to do the education. You've got to learn about what the stresses of people are, and deal with those problems. If you push drug testing through, and we think we've done something, we will not have done anything about the drug problem.

SENATOR LESNIAK: Well, let's understand, we're not pushing drug testing through, if we just codify the current law. We're not pushing drug testing through.

MR. TRIVELLI: If you codify current law, but that doesn't mean that the Legislature can't lead and say, "In this State, we don't believe that just because it's permissible within the Constitution we will allow it."

SENATOR CARDINALE: I'm not clear about something, and maybe we should ask Dale this question. The bill that's before us, I see, frankly, as something that limits drug testing -- and I think that's what the Chairman has been talking about -- to a lesser degree of--

SENATOR LESNIAK: Yes and no.

SENATOR CARDINALE: --frequency than would be permissible now.

SENATOR LESNIAK: Okay, yes and no, at least as far as the Appellate Division in the State of New Jersey, as I read the decision. The reasonable suspicion part of the bill does limit it, in that it sets certain standards which an employer has to follow.

SENATOR CARDINALE: But that's not a final adjudication.

SENATOR LESNIAK: No. However, there is another part of the bill -- the random and routine part of it -- that is wide open in terms of its constitutionality.

MR. TRIVELLI: I think the problem there is that the private employers now have no guidelines at all. So they can do whatever they want. Okay? So if you put--

SENATOR LESNIAK: Within the Constitution.

MR. TRIVELLI: Within the Constitution. So you can put some kind of minimal regulations through, and that would be better than doing whatever they want, but it's not all the way to banning the test. Again, as the Senator said, and you said, it hasn't been finally adjudicated yet, and the courts are coming up with lots of different standards for when it can be done and when it can't be done.

SENATOR LESNIAK: We anxiously await that decision and the Baby M decision. Okay, thank you.

Lester Kurtz is here, and we'll hear from him. Go right ahead, Mr. Kurtz.

L E S T E R K U R T Z: Good afternoon. I might, at the outset, indicate that the New Jersey Business and Industry Association supports a uniform standard for drug abuse testing. We favor uniform guidelines for the taking of blood or urine samples, and the methodology and procedure used to evaluate the contents of samples. We support those guidelines.

SENATOR LESNIAK: Do you agree with everything that the representative from the Chamber of Commerce said?

MR. KURTZ: I don't know what he said. I don't think I heard him. He didn't have a chance to say too much.

SENATOR LESNIAK: Oh. I just want to make sure that we are not going to get too much repetitive testimony, because we are starting to get that.

MR. KURTZ: Mr. Witmer testified very briefly, and I did not get the gist of what he was saying.

SENATOR LESNIAK: But, we did.

MR. KURTZ: I don't believe we are testifying along the same line; I don't believe so.

SENATOR LESNIAK: Okay.

MR. KURTZ: I might point out that if business had a choice with respect to drug testing-- Before us today there are three choices: Senator Bassano's bill, Assemblyman Littell's bill, or no bill. Business would prefer no bill as its first preference.

SENATOR LESNIAK: Why is that?

MR. KURTZ: Because we see no problems right now, as far as I know, and from as much as I have heard from our members. Less than 5% of our members are doing drug testing. Drug testing is expensive. Employers who have made a conscientious decision to do drug testing are doing it very

cautiously. Drug testing can cost \$100 per employee for complete drug testing, so those employers who can afford it are doing it. Where they feel it is cost-effective within their own operation, they are doing it. They are not doing it haphazardly or indiscriminately. They are being very careful and selective as to when they do it.

We have heard a great deal of testimony this morning concerning the cost of drugs in the workplace, so I will not go through that, as far as my testimony is concerned. We do know that the use of drugs can cost lives, can reduce productivity, and can cause injury to the public.

I might point out that this bill -- A-2850 -- is the bill business would prefer as the most practical. Bassano's bill is something that business, as an ultimate, would like, but being practical, I don't think that is going to come about because it is not even-handed. An analysis of Assembly Bill 2850, as currently written, discloses a host of new employee benefits which offer protection to employees. They include the following: The employees are entitled to be covered under a published uniform policy. The employees are entitled to receive at least 30 days advance notice of a drug test policy. The employees are entitled to a confirm drug test before an employer can take disciplinary action. The employees are given the right to challenge the result of a confirmed positive drug test. The employees can only be required to undergo a drug test under limited and defined circumstances, as defined in the law and under an employer's policy. The employees are entitled to have the results of a drug test kept confidential. Employees are entitled to receive a written notice of a confirmed positive drug test.

Although our Association supports A-2850 as currently written, we would be opposed to any law or amendment which would in any way restrict an employer's right and obligation to determine when a job applicant or an employee may be requested



to submit to a drug test. We feel there should be no limitation, beyond the standards contained within the bill, on an employer's selection of employees to be tested. Drug abusers -- and I think this is important -- do not always exhibit visible evidence of erratic behavior. Business seeks a drug-free workplace to protect all working people and the public, and to increase the productivity of our economy.

One such amendment we are opposed to is mandatory health insurance benefits for drug abuse treatment, and that includes rehabilitation. In a recent study -- and this was a study in April of '86 conducted by the Center for Urban Policy Research in Princeton -- it was found that in those states with mandated health benefits -- and there are between 12 and 17 states which have this law -- there was an increase in health care costs, without providing an equal or offsetting benefit to business or society. The study showed, in summarizing, that states with drug abuse testing mandates experience higher facility expenditures per employee, show higher insurance costs per employee, and have the highest level of insurance contributions toward total costs.

SENATOR LESNIAK: Excuse me, are you referring to a study?

MR. KURTZ: Yes.

SENATOR LESNIAK: Do you have the name of that study?

MR. KURTZ: Yes. I have copies for the Committee.

SENATOR LESNIAK: May we have the copies now, please?  
(Mr. Kurtz complies with Senator Lesniak's request.)

MR. KURTZ: I might point out that I have only excerpted those chapters dealing with drug abuse. The study was much longer. They studied alcoholism and drug abuse. The study also showed that in those states that have this law, the presence of mandated benefits for drug abuse treatment is not significantly related to the level of the drug abuse problem.

Now, the estimated cost to an employer for drug abuse treatment can exceed \$30,000 and, in some cases, it has gone as high as \$40,000 in some of our clinics here in the State. That includes five days of detoxification and 28 days of inpatient hospitalization. While proponents of rehabilitation indicate that insurance premiums for this added benefit could cost approximately \$6 per year per employee, we do not agree with that figure as an ultimate cost. It might be the going-in cost. I might point out that when the legislation was enacted in '78 mandating treatment for alcoholism, we were told that the cost was very small. In the several years since that law has been on the books, New Jersey employers have spent nearly \$200 million -- since its passage -- for the treatment of alcoholism.

In conclusion, the corporate campaign against drugs may do more, however, than create a safer and more productive workplace. It may also begin to stem the plague of drug use in the United States. As more companies require job applicants to prove that they are drug free, it will become increasingly difficult to use drugs and make a living. Thus, perhaps, the economic deterrent may succeed where legal deterrents have failed. While it is still too early to measure the success of corporate war against drugs, some companies already cite impressive results. If companies can help employees to kick the drug habit, the effort will pay dividends to business and society that cannot be measured in dollars and cents. Enactment of A-2850 would support an employer's efforts to secure a drug-free workplace, and also the President's call for a drug-free workplace for all Americans, as part of a program in his national campaign against drug use.

NJBIA submits that because drug use by workers can result in shoddy, unsafe products and accidents in the workplace, individual rights must be subordinated to the broader welfare of fellow employees, customers, and the public. We strongly urge that you release A-2850.

Thank you.

SENATOR LESNIAK: Do you believe that any such program has to be applied equally to management and boards of directors of the companies -- and officers?

MR. KURTZ: I think so, yes. In most companies that have this program, they do that. Most responsible companies which have a drug testing program do require all levels of management to take the test. I don't think they administer the test indiscriminately.

SENATOR LESNIAK: This study -- "Mandated Health Care Benefits" -- which you supplied to the Committee-- What was your conclusion based on this study? I thought you said something about the benefits of--

MR. KURTZ: I did say the study found that in those states -- and there are either 12 or 17; I don't know the exact number -- with mandated health benefits for drug abuse treatment, there was an increase in health care costs, without providing an equal or offsetting benefit to business or society.

SENATOR LESNIAK: Okay. I don't find that--

MR. KURTZ: That is what the study-- I am just--

SENATOR LESNIAK: Okay, I just read it. I don't find that "without" in here at all. Maybe you can enlighten me.

MR. KURTZ: Thank you.

SENATOR LESNIAK: Toni Mullins, New Jersey School Boards Association?

T O N I M U L L I N S: Good afternoon, and thank you for hearing me. I am going to be very brief. I am not going to read from my position statement, which all of you have. I want to cover just a couple of issues which were brought up this morning, and highlight the main issue -- the main concern we have.

First of all, we are as concerned as everyone else about the drug problem in society and in the schools. We have been working very closely with the Department of Education and

the legislators on approximately 13 or more bills dealing with drug abuse in the school setting. For your information, since it was brought up this morning-- Yes, sorry--

SENATOR LESNIAK: No, I'm sorry. I am listening, but I was thinking.

MS. MULLINS: Oh, okay. Some of these bills deal with the whole revamping of the curriculum K through 12 for alcohol and drug abuse. A couple of the bills deal with parental involvement, teacher training, and stricter penalties for drug users in and around school environments. So, yes, the issue of drugs in the schools is being addressed, and, yes, parents are being involved, as is everyone else in the school system.

Secondly, we presently have, by court decision, the right to drug test under the standard of reasonable suspicion, students and also teachers. We may request a physical examination, which would include a urinalysis to detect the possibility of drugs, under the same standard of reasonable suspicion. That is one of the reasons why we like this bill, because it does, for the public sector, address the standard of reasonable suspicion.

We support the standards and procedures. We think these guidelines would protect us, the employer, and also our employees and our students. It could, in effect, really help our employers from our students, and vice versa. I know everyone is very concerned about the protection of our students, but you get into high school age, and we have to protect our employers also.

SENATOR LESNIAK: You mean employees?

MS. MULLINS: Employees, excuse me, but maybe employers, too. I don't know. But, yes, we have to protect all. We feel that having guidelines would assist us -- would give us useful guidance and would assist us in doing anything that would be risk taking or that would have to go into court. So, for those reasons, we support the bill.

There are a couple of minor things we are concerned about, but I do not need to address those now. They are in the position statement. The main concern we have is: Since you have heard testimony from those who do support the bill, and you heard Assemblyman Littell express what this bill is all about, and we agree, we cannot understand why there is a provision that this can become a negotiable item; that you can negotiate not to drug test at all. We cannot support that. It would take away any of the court decisions we now have to do such a thing. We feel that the interest of public policy is far greater than having this as a negotiable item.

We would agree to negotiating terms and conditions of drug testing, but not to having that possible effect taken away from us. Now, we were told over on the Assembly side, "Oh, what employer -- what school board would negotiate away its right to drug test?" Well, in the abstract, it seems that that would be a very foolish thing to do. In reality, negotiating is bargaining; it is give and take. There have already been a couple of instances that PERC reported where, indeed, that right was taken away. That was surprising to the board, because they were offering a much higher percentage of salary for drug testing, and the union took a lower percentage for not drug testing.

So, you know, it is just something we think is too important to be taken to the negotiating table. We would like your consideration in that matter.

Thank you.

SENATOR LESNIAK: Thank you very much. Raymond Peterson, New Jersey State Federation of Teachers? Ray, do you agree 100% with Toni Mullins?

RAYMOND PETERSON: Hardly ever.

SENATOR LESNIAK: I thought for sure you were going to say that.

MR. PETERSON: Thank you, Mr. Chairman and members of the Committee. We agree with those who say that drug and alcohol abuse are illnesses that can, and should, be prevented, as well as cured. Both diseases have ruined countless lives and have damaged the fabric of our society, as well as the economy. We applaud those who have taken thoughtful steps toward the eradication of these diseases.

Since the focus of this hearing is on one aspect of the drug problem, let me briefly say that we believe the total problem must be addressed at several levels. Parenthetically, I would like to add that the Governor signed a package of bills this morning that we supported when they came out of the Assembly Education Committee.

Those who profit from narcotics must be objects of vigorous law enforcement activity, so as to interdict the drug supply and imprison the suppliers. The demand for the products must be reduced by an expansive public education campaign in the schools, as well as in the news media, and those who have been victimized must be rehabilitated, so as to make them contributing members of society, and not outcasts, derelicts, burglars, muggers, or worse.

We commend the sponsors of this legislation for their patience throughout the Assembly Committee hearings, and for their efforts to create a bill which might deal with the subject in a humane and sensible way. Unfortunately, the bill that emerged in the General Assembly is flawed, in that it does not deal with the victims in the best way possible. The legislation before you needs further amendments which will protect the constitutional rights -- the civil liberties -- of the victims and, even more important, those who are innocent bystanders.

When George Orwell wrote the novel, "1984," he envisioned a government that could intrude into every aspect of a citizen's life. Thanks to Orwell, millions of Americans

guard against governmental intrusions into our lives and against any erosion of the protections guaranteed in the Bill of Rights. I am sure that others well-versed in constitutional law will raise issues here today that should be considered carefully when you act on this legislation. Orwell might have written a sequel entitled, "1987," in which our heroes are subjected to surveillance by an all-powerful employer. It is not too far-fetched when you think about it.

We have a number of concerns about the bill before you, but in view of the time constraints, I will focus on the most harmful elements in the current bill. First, the bill grants law enforcement authority to employers. It would enable an employer to cast out a dragnet that would turn up persons who apparently had, at some time or other, inhaled marijuana smoke or took what appeared to be a narcotic. It would do it through a screening test that is not always accurate. Thus, job applicants could lose employment opportunities, and perhaps their reputations, through passive inhalation of someone else's smoke, or through false readings in the testing procedure, or even by the consumption of rolls with poppy seeds on them. Such pervasive power exceeds the authority that is normally given to law enforcement officials, and for current employees, it would allow searches of bodily fluids, products, and parts for such reasons as "a compelling interest," whatever that means, and a reasonable suspicion that an employee is under the influence. We should note that bona fide law enforcement officers are held to a standard of probable cause, before they can search a suspect.

Another troubling aspect of this bill is the punitive tone of it. We believe there should be a strong emphasis on rehabilitation of the victims of drug addiction. The dread of firing may prove to be a sufficient disincentive to drug use in some cases, but if such usage is as widespread as some reports indicate, it seems to us that firing the victims can only serve

to create more burdens for the law enforcement authorities, more welfare cases, more crime, more incarcerations, more psychiatric care and, of course, more taxes for the rest of us.

There are two major issues which may embrace all the others: First, there are the constitutional rights of all workers, abusers and bystanders alike. That should be a major consideration in any legislation that is enacted on this subject. The other major component that needs attention is the recognition that drug abuse is an illness, and that the rehabilitation of victims should be a key element, whether the victims are public employees or members of the private sector.

I am sure that others will supply you with more specific and precise suggestions for amendments, and I suspect that most of those suggestions will fall within the two major areas with which we are concerned.

Thank you for your attention. I would be glad to answer any questions you may have.

SENATOR LESNIAK: Thank you, Mr. Peterson. Robert Polakowski, New Jersey Education Association?

ROBERT POLAKOWSKI: Thank you, Mr. Chairman. I believe the Committee, through the Committee Aide, has copies of our position statement. I will attempt, in the interest of time, not to go over things that have already been covered.

The NJEA opposes A-2850. While we appreciate what the sponsors have attempted to do in what they bill as an employee rights bill, we really feel they are trying to do too much in one piece of legislation. I will just enumerate some of our concerns.

First of all, as has already been testified by the School Boards Association, they already have the statutory right to require an annual physical exam if they have reasonable suspicion that there is a problem, or if some other incident occurs. What we find, frankly, from our field people who deal in our labor relations with the local school boards,



is that EAP programs and a cooperative interest in rehabilitation is what is going on, not demands for drug testing. We do not see, nor do we hear, public clamoring for drug testing of school employees. We see cooperative ventures, and we are working with those. We want them to continue.

For sure, there are going to be constitutional issues that are going to be raised. The courts are going to make determinations, at some point, at probably a tremendous cost to organizations, unions, and the taxpayers. I will let others deal with the constitutional issues.

We feel that the confidentiality -- which we think is a key problem to us -- is almost impossible in a school environment. Classic example: A person is requested to take a drug test. That test, on the initial screening, is positive. The bill talks about the suspension of that person, with or without pay, pending the confirmatory test. When the parents or the other people say, "Why was this person suspended?" the confidentiality is done. And, if that person tests negative with the confirmatory test, what does a school principal -- what does a teacher say? What does the teacher say to the parents who say, "There must have been a problem there, or why did they test this person? How do we know that the initial screening wasn't the true reading and they are just trying to mask it in some other way with this confirmatory test?"

SENATOR LESNIAK: You would be satisfied-- Unless the occupation were one where there was extreme danger to the public, you would wait until the second test beforehand, and then you wouldn't have that objection.

MR. POLAKOWSKI: We're saying that right now we don't see a demand for testing of school employees at all.

SENATOR LESNIAK: Yes, but this bill doesn't require testing.

MR. POLAKOWSKI: I understand that. What we're saying is, we have a system now which says if a school board wants to

proceed with testing, it can. What we are finding is that school boards are working cooperatively with EAPs.

SENATOR LESNIAK: Okay. You are happy with the system which currently exists?

MR. POLAKOWSKI: Yes.

SENATOR LESNIAK: And you don't think there is a need to change it?

MR. POLAKOWSKI: That is correct. I would say that if the other employee groups -- and there are many which support this legislation -- police, fire -- and there have been any number of abuses that have been cited in the private sector-- If there is a need, then I would suggest -- the organization would suggest -- that you proceed with legislation for police and fire. If they want that type of legislation, by all means proceed. If there are the abuses in the private sector, which have been enumerated at other committee hearings, proceed.

With respect to the collective bargaining aspect of the bill, some of us attended a hearing and a conference--

SENATOR LESNIAK: Do you agree with the School Boards Association?

MR. POLAKOWSKI: No, we don't. What I say is that the courts already have discernment on a number of other issues, and PERC, in a hearing recently with the New Jersey Bar Association-- We have no faith, frankly, in the New Jersey Supreme Court, or PERC, upholding the fact that we are going to be able to negotiate away, or any other terms, with respect to drug testing.

SENATOR LESNIAK: Even if it is in there?

MR. POLAKOWSKI: Even if it is in there. I mean, we have had other statutes that the courts have ruled were not going to hold up. Why should we have any faith that they will rule that we can negotiate away drug testing, or some other plan that is statutory?

SENATOR LESNIAK: Because it is specifically stated in here, I think.

MR. POLAKOWSKI: Well, again, we thought that in the past, and many members of this Committee have been through scope of negotiations debates here before. I think our bottom line recommendation is, with respect to school employees -- and again, we represent not only classroom teachers, but some 22,000 support staff people-- The EAP programs we have, and the rehabilitation efforts -- many of which are new -- appear to be working, and we don't see a clamor to do anything other than that. If and when there are serious problems with regard to drug testing of school employees, I am sure you know this organization will be back to you.

SENATOR LESNIAK: Nor do you see any particular need for protections for your members, because there aren't any current abuses that you are aware of.

MR. POLAKOWSKI: Right now I think we are happy with the situation the way it is, and this may open up more problems than we currently face.

SENATOR CARDINALE: Have you ever polled your members on this?

MR. POLAKOWSKI: Polled our members? No, we haven't. The only barometer I can give you is our Delegate Assembly, which is elected by the membership. They overwhelmingly took the position -- by overwhelmingly I mean 75% to 80% of that--

SENATOR LESNIAK: You are against I&R?

MR. POLAKOWSKI: Yes, and we are also against drug testing. Their second fall-back position on this issue is to immediately litigate. Again, that is the leadership's perspective.

SENATOR CARDINALE: The reason I ask that is, we have had some data submitted to us on polling that has been done of the general population. There is overwhelming support for drug testing in the general population. It occurs to me that with

all of the various employer groups that have been here, there must be at least a substantial number of people who are members of those groups who differ with the rather unified effort we are seeing from the leadership.

MR. POLAKOWSKI: Well, I would say this--

SENATOR CARDINALE: Otherwise, you couldn't get those numbers.

MR. POLAKOWSKI: I would say this: If the general public were to hear all of the testimony, particularly in the Assembly Labor Committee, from the pharmaceutical companies, with the problems related to the initial screening-- I know, based on what they testified, that because I use Advil for an inflammation problem in my knee, in an initial screening more than likely I would test positive. Now, put me in a classroom situation in Jersey City, where I taught before coming to NJEA, because I am an organization leader, that might be sufficient to try to remove me from a teaching situation.

I am just saying to you that in a classic situation, if the initial screening is positive, the cost that is involved in that-- Fine, let the school board, or whoever, pay for it. If that testing is positive, and that becomes public information under any circumstances, the career of that individual, as a classroom teacher in particular, is probably in jeopardy, whether the test ultimately comes out to be negative in the confirmatory or what.

What do we say to the parents? What does that school board, under tremendous pressure, say to those parents who say, "I don't want my child in a classroom with a drug user? There was a test, and the test said that this person was using drugs." And, it may be totally false. Do we end up then in a lawsuit and long-term litigation? That person's career, even if he or she tries to straighten it out, goes to court, or whatever, is probably ruined. There are any number of incidents that have occurred on other issues similar to that to make that point.

SENATOR LESNIAK: I think you are reading the statute wrong, though. The bill refers to a leave of absence with regard to the presence of an illegal drug in a confirmation test, not the original test.

MR. POLAKOWSKI: Our reading is -- at least in our discussions -- that it has been on the initial screening.

SENATOR LESNIAK: I don't think so.

MR. POLAKOWSKI: Suspension for initial screening. We are not talking about somebody being removed from his or her position.

SENATOR LESNIAK: Okay, suspension for initial screening.

MR. POLAKOWSKI: Right. In other words, if a person is suspended pending a confirmatory test, the confidentiality is down the drain.

SENATOR LESNIAK: Oh yeah, I know. I agree with that totally. I just wanted to find out where in the statute that is, so I can mark it up. All right, we'll find it. Thank you.

Mark Labos, Amalgamated Clothing and Textile Workers? (Mr. Labos not present) Roxanne McElroy, Epilepsy Foundation of New Jersey?

ROXANNE MCELROY: Hi. First, I would just like to say that I am the Director of Employment Services for the Epilepsy Foundation of New Jersey. We represent the interests of an estimated 105,000 citizens who have epilepsy. More than half of those people have achieved full seizure control, and another 30% have partial control as a result of prescribed medication.

Several of the leading anti-epileptic drugs have a barbituate base, and will yield a positive finding in even the simplest urinalysis. The Foundation, like everyone else, is concerned about the problem of drug abuse in society, especially because drug abuse can lead to seizures, and even epilepsy in susceptible individuals. But we are also concerned

about the adverse effect that drug testing may have on these individuals. Drug testing may unnecessarily and unjustifiably require the disclosure of a health condition that has no impact on the job performance of the individual. As a result of that disclosure, the individual's employment status may be affected, as well as the privacy and employment future, because of inappropriate and unregulated release of confidential medical records.

For example, a five-year employee of the United States postal system was promoted to a supervisory position. When her epilepsy was discovered, she was demoted for fear of not being able to handle additional stress. She handled the position with no problem for six months prior to the discovery of her epilepsy. Not only is disclosure of a health condition a problem, but results from drug tests, as we already know, may be unreliable, and without the appropriate confirmatory testing, could be subject to misinterpretation. We have gone through that.

Another example is the plight of a 10-year employee of a major airline, who had a perfect work record. He was forced to submit to a random drug test as a result of an accident that took place during his shift, but which did not involve him at all. Unfortunately, the drug test revealed the presence of marijuana, and resulted in his termination. Through careful investigation by both the Epilepsy Foundation and the Department of the Public Advocate, we have evidence that this man has never used alcohol, marijuana, or any other illegal drug. The drug in his system was Mysoline, an anti-epileptic drug. Unfortunately, Mysoline may show up as marijuana or cocaine in some of the less expensive tests.

So, our concerns are not based on theoretical possibilities, but rather on documentation of actual case histories. The increasing use of mandatory urine drug screening in the workplace is one approach to the devastating

problem, but it raises just as many problems as it seeks to cure. There are many methods currently used, and they vary in reliability.

We would like to see -- as the bill suggests -- any positive results confirmed whenever those results will be used as a basis of an employment decision. Unfortunately, not all employers wish to pay for the more expensive confirmation tests. The training and placement service exists because historically there has been a stigma attached to epilepsy, which has resulted in the unemployment rate being twice that of the national average. When surveyed, 93% of persons with epilepsy said that the number one cause of unemployment is discrimination.

We are especially concerned that pre-employment testing may perpetuate discrimination, without recourse. In New Jersey, certainly legal remedies exist for this kind of treatment; however, these remedies do not provide quick relief, and protracted litigation can be a serious hardship on a discrimination victim. It is not uncommon for these cases to take five years or more to move through the judicial processes.

So, people with epilepsy are faced with a difficult decision, first in filling out job applications. If they do not reveal their epilepsy on the application, and their condition is discovered, they face the possibility of being fired for application falsification, regardless of their ability. If the employer requires a drug test, results may label that individual as a drug abuser, and inappropriately so.

The Epilepsy Foundation strongly urges that if involuntary drug screening is going to be conducted -- and we are happy that the bill is moving toward this -- provisions should be made to carefully regulate such testing, and certainly protect the rights of persons who are taking medications for legitimate medical purpose. These provisions should include, at a minimum, protection of the confidentiality

of those medical records. They should prohibit employment discrimination in the private sector, and in the public sector, against persons with disabilities that are discovered as a result of those tests -- through Federal legislation, we hope -- and by requiring that no testing be done of a job applicant until only after he or she has been offered that job. They should protect individuals from the risk of being falsely identified as drug abusers by requiring in all circumstances that positive tests be confirmed. And, finally, that no one should be subjected to a drug test without probable cause that is directly related to the work performance.

That is where the Foundation stands, and I would be happy to answer any questions.

SENATOR LESNIAK: Thank you very much. Barbara McConnell, New Jersey Food Council?

B A R B A R A M c C O N N E L L: Thank you, Mr. Chairman. Our trade association represents the retail, wholesale, and manufacturing segments of the grocery industry. I am very happy to appear before this Committee to express our support for Assembly Bill 2850. This legislation does not require testing. It says that if you do test, you must meet certain standards and certain guidelines. We feel it is fair, it is firm, and that it upholds the principles of reasonable suspicion, and that there is protection for the employee, as well as flexibility for the employer.

I am not going to read my prepared testimony, because I know you have heard plenty of remarks today that have illustrated the ramifications of the expanding drug use throughout our society. The problem of drugs and alcohol in America is not just among our youth or among our star athletes, whom we have all been reading about recently, but also permeates every level of society, including corporate America.

The grocery industry in America has focused on this question for several reasons: First, because of the large



number of trucks and drivers utilized by our members, their concern for public highway safety mandates careful control over the individuals representing our industry on the roads; and second, our extensive warehousing operations prompt pressing safety concerns because of their reliance on forklifts and other potentially dangerous mechanical equipment, and because of certain items stored in those facilities, including aerosols and certain hazardous substances.

Third, our members have experienced workplace accidents, employee injuries, and property damage as a result of workplace involvement with drugs and alcohol. And, while we wish our industry were somehow spared the effects of the nationwide plague of drug use, we know that this has not been the case. The widespread use of drugs among our youth, professionals, and average citizens is frightening, and when we consider the effects of drugs on our society from both the physiological, moral, and economic standpoints, I think it is appropriate that the Legislature and government officials are addressing this issue.

By some estimates, drug abuse has been responsible for draining \$60 billion in disposable United States income and exerting close to a \$100 billion drag on American productivity. These estimates call out for a powerful, quick cure, and drug testing in the private sector may seem like the strongest medicine available. But, by itself, drug testing is no wonder drug. Forced testing can produce an Orwellian chill in the workplace, and poorly planned punitive programs risk wasting millions of dollars on shoddy urine labs, legal logjams, and wrongful dismissed settlements.

But, by carefully recognizing some of the legal pitfalls to drug testing, and by adhering strongly to the principles of firmness and fairness for the employee and supporting the principles of reasonable suspicion, we believe that drug testing in the workplace can be an effective tool in

helping employees to kick the drug habit, provide a safer workplace, and protect the public at large from drug-related dangers.

That is why we support A-2850 -- for the reasons I have stated earlier in my testimony. At the same time, we would be opposed to any proposal which would restrict an employer's right to determine when a job applicant or employee may be requested to submit to a drug test, and feel that there should be no limitation beyond the standards contained in this legislation.

SENATOR LESNIAK: Well, you just heard the testimony of the representative from the Epilepsy Foundation. Didn't she make a lot of sense?

MS. McCONNELL: Yes, she did.

SENATOR LESNIAK: But there are no protections in this legislation to cover the cases which she brought up.

MS. McCONNELL: I agree with you on that, yes.

SENATOR LESNIAK: Gerry?

SENATOR CARDINALE: No questions.

SENATOR LESNIAK: Thank you.

MS. McCONNELL: I would like to point out for the Committee's information, that the National Wholesale Grocers Association in Washington has just conducted a very in-depth study on the drug problem and the use of drug testing in the workplace. It has put together an outstanding model program, which they are recommending to the grocery industry throughout the country. It has become very popular. I don't know how much of it has been implemented among different companies at this juncture, but it is receiving a great deal of press attention and favorable consideration among companies and corporations within the grocery industry.

SENATOR LESNIAK: That's an Employee Assistance Program.

MS. McCONNELL: It is interesting that, especially in that particular segment of the wholesale industry, they do recommend under their model program an Employee Assistance Program, if drug testing is done. Now, as a representative of all segments of the food industry, I can't tell you that we would support a drug assistance program requirement in legislation at this point, but I did want to share that study with you, and say that the wholesale industry, at least, is recommending it under a model program.

SENATOR LESNIAK: Thanks very much. Dr. Janet Freedman, The Committee of Interns and Residents?

D R. J A N E T F R E E D M A N: Thank you. I have handed out a written statement, and I would like to read just parts of it.

I am a physician, and I am President of The Committee of Interns and Residents. We are a union representing 5000 resident physicians in New Jersey, New York, and the District of Columbia. Thank you for the opportunity to testify here today on Assembly Bill 2850.

I will focus my comments today on screening tests, confirmatory tests, the issue of medical confidentiality, and drug rehabilitation programs.

Much has been said here today about the inaccuracy of drug screening tests. Assembly Bill 2850 does put limitations on the use of screening tests, and such limitations are absolutely essential. I would like to emphasize, however, that I believe further limitation is needed. A screening test is a quick and relatively inexpensive method to evaluate a large population in order to identify a smaller population for further testing. A screening test, as has been said here many times already, is quite prone to incorrect results. There are many reasons for a positive drug screening test. As you already know, many medications, and even foods, may result in false positives. Another major source of error is laboratory

technique. I would like to detail from the study in the "Journal of the American Medical Association" -- which has been referred to already -- "The Crisis in Drug Testing." I have a copy here, if you are interested.

This study evaluated the actual performance of 13 laboratories which were serving methadone treatment centers. The CDC sent samples containing barbiturates, amphetamines, methadone, cocaine, and morphine to these labs. These were blind samples. The laboratories did not know the contents. The results are pretty shocking. False negatives ranged from 30% to 100% of samples. This means that the lab failed to identify a drug that was present in the sample. False positives were actually lower, but still up to 66% of samples tested positive for substances that were not in the samples.

Let me point out that these were ideal samples to be tested. They were prepared in the CDC laboratory from filtered urine. There were no contaminating other particles in this urine. The only present items were the drugs that had been put in there by the CDC. Even under these circumstances, these labs, which were approved methadone treatment testing labs, failed miserably on the screening tests.

For these reasons, the result of a screening test done as either a random test or as a scheduled routine test is virtually meaningless. There is no basis for even a temporary suspension of a worker on the basis of a positive screening test.

I would now like to turn to confirmatory tests. Confirmatory testing is now promoted as the solution to the problem with screening tests. I would like to dispel the belief that confirmatory testing is somehow infallible. I have heard here today the number 99% accuracy being used, and I doubt--

SENATOR LESNIAK: I don't know where I got that from.

DR. FREEDMAN: Yeah, I was going to ask that.

SENATOR LESNIAK: I got it from somewhere.

DR. FREEDMAN: Even if that is a number that has been published, I doubt that that is an actual condition. This study -- the CDC study -- tested the actual lab conditions. Most pharmaceutical companies that make screening tests admit a 10% to 20% failure rate, not a 66% to a 100% failure rate, because they are not testing actual laboratory conditions.

Between the bladder and the test results, many steps occur, and they all involve the possibility of error. There must be a foolproof chain of custody, which requires accurate collection of the sample -- which may mean observation of urination -- proper handling of the samples, proper labeling of the samples, proper transfer to the laboratory, proper technique of use of the test, and proper recording of the results.

Let me just say that at virtually every hospital I have worked in as a physician and as a student, I have seen errors occur in every step of lab testing.

Let me describe the confirmatory test, the gas chromatography mass spectrophotometer -- CG Mass Spec. I have done this test. This is how I worked my way through college -- in an organic chemistry lab. The test is done on very small amounts of a liquid specimen, usually just a few drops. The machine can give a graphic printout of the compounds present. It is a sensitive test; it can detect fairly small quantities. But errors can, and do, occur. The equipment is sophisticated and requires frequent repair and frequent calibration with known samples. If the testing equipment is dirty, either with grease from the fingers of the lab worker or improper cleaning from the last sample, the test may yield an incorrect result. This test requires meticulous technique in a quality laboratory.

There is, to my knowledge, currently no method for certifying a laboratory's ability to do this test, or a screening test, for that matter. My concern is that with

increasing numbers of labs doing confirmatory testing, the quality of this testing will drop significantly. So, like the screening test, the GC Mass Spec does have a place in the treatment of substance abuse, but, as with the screening test, it is subject to error, it cannot differentiate between an occasional user or an abuser of a drug, it cannot determine impairment at the time of testing, and it actually cannot determine the frequency or amount of drug taken.

Let me now comment on medical confidentiality. Drug testing should be between a person and his or her own personal physician or drug treatment program. Co-workers, supervisors, and management have no business knowing the results of drug testing. Likewise, what medications a person is taking is confidential between patient and physician, and I think prior testimony eloquently addressed that. If there are medical contraindications to a certain job, that is the determination of an occupational physician, not an employer. A worker should not, under any circumstances, be forced to reveal what medications are being taken.

In addition, drug testing is not a recognized part of an annual medical exam or of any routine medical exam. There is really no medical justification to include drug testing in a routine exam. I believe the wording of this bill currently implies that that is an allowable test to include in a general medical exam. I really don't recognize it as such, and I don't believe that many physicians do.

How, then, would I approach the problem of substance abuse? Let me point out first -- as has been said before -- that the employer already has the ability to dismiss or discipline workers for chronic lateness, poor work performance, disruptive behavior, etc. Secondly, there are simple and effective ways to evaluate impairment. Except for tests of alcohol in the blood, there are no tests of either urine or blood that can indicate impairment from drugs. They can only

indicate that by-products or metabolites of those drugs are present. This does not mean impairment.

But, most abused substances do affect the nervous system, and the nervous system is one of the easiest systems in our body to test for impairment. A simple physical exam that focuses on the neurological system of an individual can tell far more than any drug test can. A physical exam can reveal actual impairment at the time of exam. If the interest is job performance or public safety, the exam is what is needed. Let me pick on the airline pilots again, since they were the example used today. I do not wish to see airline pilots tested for drugs. I really have no interest in that. I would like to see physical exams of airline pilots. I would feel secure if an airline pilot had a quick five- to ten-minute neurological exam before flying. If the airline pilot took amphetamines in the bathroom 15 minutes before a flight, that will not show up in a drug test. A quick test of the pupillary reflexes, the extraocular muscles of the eye, the fine motor coordination of the hands, the deep tendon reflexes, and a mental status exam for concentration and short-term memory would be far more reassuring to me than a drug test.

SENATOR LESNIAK: We're missing a point here, though. When you test for drugs, you aren't necessarily testing for impairment at that time. You are testing for the potential for impairment at either that time, in the past, or some other time because of drug use.

DR. FREEDMAN: Well, I think that what you want to know in the issue of public safety workers is impairment at the time of performing their work.

SENATOR LESNIAK: That is not the only thing you want to know, though, is it?

DR. FREEDMAN: Pardon?

SENATOR LESNIAK: That is not the only thing you want to know. Certainly that is more important to know--

DR. FREEDMAN: Right, that is the most important to know.

SENATOR LESNIAK: --but isn't it also important to know whether if some time in the future that person may be impaired because of drug dependency or drug use?

DR. FREEDMAN: I do not believe drug testing can do that. I really do not believe--

SENATOR LESNIAK: Why is that?

DR. FREEDMAN: --the technology of drug testing can tell me if this person is a person who is susceptible to impairment. There is a distinction between--

SENATOR LESNIAK: Well, it can't tell you that, but can't it indicate that? Isn't it more probable than not -- than if they are not using drugs?

DR. FREEDMAN: What can indicate that better and more accurately is an interview with a drug rehabilitation worker, who is trained to pick up the points that indicate susceptibility to drug abuse. There is a difference between a user and an abuser, and not all people who use drugs are really susceptible to becoming impaired by them.

SENATOR LESNIAK: Yeah, but we are not talking about all. When you are talking about public safety, it is not a question of all. It is a question of protecting the public. So, if we let a few people operate airplanes -- for instance -- who are subject to impairment, then we are endangering the public.

DR. FREEDMAN: If every airplane pilot had a neurological exam before his flight -- and I don't believe that would be difficult to do, because all flights take off from airports and all pilots are in airports, as are the air traffic controllers, who you could get at the same time -- that would really guarantee that all pilots were not impaired at the time of their flying.



SENATOR CARDINALE: What about all of the bus drivers? What about all of the school bus drivers? What about all of the people who drive trains?

DR. FREEDMAN: Once again, let me emphasize--

SENATOR CARDINALE: What about the people who do the switching of the signals on the trains? I mean, you can't subject each and every one-- I understand what you are saying, that there are better ways to test. Really, that is the bottom line.

DR. FREEDMAN: It is not only that there are better ways to test. I really do not believe that drug testing gives us any information. I really do not believe that. It has a limited use, which I would discuss in the continued treatment of someone already identified as an abuser, just like in Alcoholics Anonymous. The treatment for alcohol abuse is total abstinence; the treatment for drug abuse is total abstinence. And drug testing is used in treatment programs, as one of the ways to ensure that there is total abstinence.

SENATOR LESNIAK: Okay.

DR. FREEDMAN: As a prior identification method, I do not believe that drug screening is the way to do it. I do not believe it is accurate enough. I believe it is sort of a cheap excuse for doing protection of the public. It is really not going to result in what we want it to result in.

SENATOR CARDINALE: I think you are making a distinction between occasional use showing up in some of the screenings, as opposed to chemical dependency being identified. I think we are concerned about something a little more than that. I think as a public policy question here, what we are dealing with is-- I don't want someone who uses marijuana -- personally -- once a week or once a month to drive a bus that my school kids are going to be on. And I think the public shares that opinion.

Now, they may not be impaired. Maybe of 100 people you identify that way, 98 are never going to drive a bus impaired. But I think it is worth the safety factor to keep the other two out. I think that is where-- Am I wrong in drawing that distinction with your statement?

DR. FREEDMAN: Let me return to the CDC test, because there has been a lot of talk today about false positives and innocent people being accused. Let me point out that in these labs, up to 100% of samples were false negatives, meaning that samples with morphine, methadone, cocaine, codeine, and amphetamines came out negative.

SENATOR CARDINALE: Were those general run, or were those prepared samples?

DR. FREEDMAN: These were prepared by the CDC. They were sent as blind samples in with other samples.

SENATOR CARDINALE: Right. In your general run--

DR. FREEDMAN: One-hundred percent false negatives.

SENATOR CARDINALE: --what is going to be the percentage of false negatives?

DR. FREEDMAN: This. These were run through a lab.

SENATOR CARDINALE: No, no. I understand that those were run through your general run, but those were particularized samples that were sort of-- The lab was sort of set up, because the likelihood of error with respect to those particular samples -- as I understand it -- was very high. In the general run--

DR. FREEDMAN: I'm sorry. These are the labs that are doing these testings.

SENATOR CARDINALE: No, no. In the general run of samples--

DR. FREEDMAN: Yes?

SENATOR CARDINALE: --what is going to be the percentage of false positives?

DR. FREEDMAN: Of false positives?

SENATOR LESNIAK: Not that particular--

DR. FREEDMAN: I can't say.

SENATOR CARDINALE: You ran a controlled experiment there.

DR. FREEDMAN: I can only go by studies.

SENATOR CARDINALE: Well, someone has been doing some studies and someone has been doing some testing.

DR. FREEDMAN: Yes.

SENATOR CARDINALE: And they take a second test--

DR. FREEDMAN: A confirmatory test.

SENATOR CARDINALE: A confirmatory test. Now, what percentage of the initial tests are confirmed as positives?

DR. FREEDMAN: I don't know.

SENATOR CARDINALE: You don't know? Okay. I think that would be a more valid-- Maybe we can get that information if we don't have it. Do you understand the question, Dale?

MR. DAVIS (Committee Aide): I don't know of anyone who has run them in past problems.

DR. FREEDMAN: I understand the question, but I don't know those numbers. I don't know those numbers. I just know numbers that have been quoted by the manufacturers of the tests as to what they feel the sort of built-in error of the tests is, and then I know studies like this, which show what the sort of in-use error rates are. As far as if I sent 1000 samples to a lab what percentage would be positive/negative, this I do not know.

SENATOR CARDINALE: These are relatively new tests, all of them, and the labs doing them are certainly not as experienced as people doing normal serological kinds of examinations, are they?

DR. FREEDMAN: Well, that's true. This study, although I know you have objections to its use, took labs that have been functioning since 1973 or 1975. The tests were done in 1985, so these were labs with 10 years' experience.

SENATOR CARDINALE: Ten years' experience. However, what you were doing, again, was testing for something that you already knew. You knew that their methodology was going to pick up certain things that you added to the sample and give you a false reading. And you put those certain things into the sample -- if I am understanding correctly what you did -- and, therefore, you got the error you expected to get. That is why I said you set them up, because you knew that their methodology, in fact, was going to have errors with certain substances.

DR. FREEDMAN: These are the same substances that the public is looking to test. They did not send these and ask the lab, "Is there insulin in this test, or is there digitalis in this test?" These were tox screenings for these drugs only, and they failed to identify them, or they identified them when they weren't there. In other words, although this was a test, not a general run, it was a test for exactly what the general run is.

SENATOR CARDINALE: No, I understand all of that.

DR. FREEDMAN: In other words, they didn't send--

SENATOR CARDINALE: You know, you may take a different view toward it than I do, but I think we both understand what was done.

SENATOR LESNIAK: Okay.

DR. FREEDMAN: All right.

SENATOR LESNIAK: I think we all do. Are there any other--

SENATOR CARDINALE: Are you going to leave us a copy of that test?

DR. FREEDMAN: This test? I can give you this copy, sure.

SENATOR LESNIAK: Please.

DR. FREEDMAN: All right, the pilots. Let me just make a few summary comments about drug treatment, and I think

the testimony before me has been quite thorough. My belief is that drug testing plays a role -- as I explained a few minutes ago -- in the drug rehabilitation program, and that testing is not a mode to identify drug abusers. Identification of inappropriate behavior, as described in some parts of this bill, is an appropriate use for referral to the Employee Assistance Program, and that Employee Assistance Program can identify if substance abuse or chemical dependency is the root of the difficulty with the worker, or if it is another problem. As we have heard, family, economic, psychiatric illness, etc. can all cause the same behavioral problems which some people may lump into chemical dependency.

SENATOR CARDINALE: Would you feel more comfortable if the confirmatory testing included a neurological exam?

DR. FREEDMAN: I think the testing itself should be done under the guise of trained personnel in an Employee Assistance Program. The referral to the Employee Assistance Program should be step one; screening tests should not be step one. If there is concern about a worker, he should be referred to the Employee Assistance Program, where trained personnel can make the determination of what the impairment is and what the treatment should be. It should not occur in the hands of the supervisor of that worker, but in the Employee Assistance Program.

SENATOR CARDINALE: You seem to be making the same distinction that someone else made earlier--

SENATOR LESNIAK: She is making good sense.

SENATOR CARDINALE: --that your objection is to the method by which we are identifying the person who is going to be referred to the program.

DR. FREEDMAN: That is at least part of the objection.

SENATOR CARDINALE: You don't mind it being done by observation, but you do mind it being done by a chemical test.

DR. FREEDMAN: The chemical test, done in a random way, or as a routine test-- You're correct, I do object to that.

SENATOR CARDINALE: If the test were more accurate-- If we had a test, if it was developed tomorrow, you would still object to it?

DR. FREEDMAN: I would still object to it.

SENATOR LESNIAK: I'm sorry. You said that you would object to a test done in a random or a routine manner.

DR. FREEDMAN: Yes.

SENATOR LESNIAK: Okay, but part of this bill, as a matter of fact, a major part of this bill, deals with reasonable suspicion that an employee--

DR. FREEDMAN: Again, reasonable suspicion to trigger a referral to an Employee Assistance Program.

SENATOR LESNIAK: Where then the test would or would not occur.

DR. FREEDMAN: Right, where testing would be determined to be appropriate or inappropriate; where treatment of various sorts would be appropriate or inappropriate.

SENATOR LESNIAK: Thank you very much. Ed Marton, American Civil Liberties Union?

E D M A R T O N: Good afternoon.

SENATOR LESNIAK: By the way, I really want to try to give everyone an opportunity to be heard today. We are going to try to break at three o'clock. So, in the interest of brevity and non-cumulative in repetition, I would ask everyone to try to point out the highlights of their testimony.

MR. MARTON: You must have heard me testify before, Senator.

SENATOR LESNIAK: Are you submitting a book?

MR. MARTON: No. I was going to begin my comments by saying that a lot of what I was going to say has been stated already, and I will not repeat what has been said before -- not

intentionally anyway. I will highlight, just briefly, some of our main objections. Obviously, we object very strongly to not only A-2850, but to all three bills that are on the agenda today. I may include, by the way, the Attorney General's awful guidelines, because I understand from the main sponsor this morning that he is going to amend his proposal to encompass the Attorney General's suggested guidelines.

Primarily, our objection to all of the bills is that they legitimize an illegitimate, illicit, and illegal practice, namely urine testing. We believe that that violates the constitutional right of privacy by suggesting to someone that he or she must supply bodily fluid to either secure a job or to keep a job.

Assembly Bill 2850 is very poorly written and, in fact, it does just the opposite of what its title suggests and what Assemblymen Littell and Foy have suggested the bill does. The bill is entitled the "Preemployment and Employment Drug Testing Standards Act." It might more accurately be entitled the "Lab Technicians' Full Employment Act," because really lab technicians and labor lawyers are the only two groups in the State that will benefit by this bill. Everyone else--

SENATOR LESNIAK: Is Littell a leftist? I know Foy is a labor lawyer, but--

MR. MARTON: No, he isn't. He is into propane gas, as a matter of fact.

These bills are bad, really, for employers as well as employees. The one bill suggests that random urine testing would be disallowed; that there would be standards set. Then it goes on to list at least four exceptions, which are so wide that really everyone -- every employer certainly in the State -- could fall under one or under all four of those categories. I might draw a ridiculous analogy to suggest that if we had an Equal Rights Amendment before this Committee, and it said "You may not discriminate on the basis of sex," etc., etc., and then

in small print at the end of the bill, it said, "However, this bill does not apply to women," you would certainly not come here and call that a pro-women piece of legislation. That is really what this bill does, because it says: "You may not randomly urine test, unless you feel a compelling interest to randomly urine test." Further, "You may not randomly urine test, unless you can negotiate a random urine testing program with the union."

Well, first of all, about 82% of our work force are not members of a union, and very few of those who are, are in unions where they have been able to negotiate a urine testing ban as part of a labor contract. I also don't know of any other law in this State, certainly not dealing with labor, where we say that we will not, as the government's protection-- It is up to the unions to decide the law; it is up to the unions to negotiate protections. Examples I would use would be things like race discrimination, child labor, sweatshops. We don't say those things are banned unless the union negotiates for them. We say they are banned, and they are banned. If you can form a union, more power to you. If your union can negotiate additional protections, all power to the union. But we do not suggest that these are laws only and if the union decides to negotiate otherwise.

The other problem is, we can change the words "random urine testing." We can change the word "random" now to "routine," because rather than-- You may not again do urine testing, but if you want to routinely urine test employees as part of an annual or routine physical, you may do that. To me, there is no distinction between random and routine.

Another problem is, you may not do random urine testing unless you are in a high risk occupation. Attorney General Meese, two weeks ago, was asked, "What is a high risk occupation?" And he said, "Well, you know, like schoolteachers." So, there is some dispute as to what a high risk occupation is or isn't. I would submit--



SENATOR LESNIAK: Meese said that?

MR. MARTON: Meese said that. You act surprised. But, even if--

SENATOR CARDINALE: I have heard schoolteachers say that.

MR. MARTON: Even if we agreed on high risk occupations, I would submit to you that we cannot make a distinction between people's rights based on the occupation they have. As was clearly testified to better than I can by the doctor who preceded me, the test is not an impairment test. It is a test for presence. It really doesn't help the public to know that two weeks ago an airline pilot smoked a joint, or what the bus driver did last week on her vacation.

SENATOR LESNIAK: We do make distinctions in constitutional protections based on certain status. There is a--

MR. MARTON: Yeah, there has to be a degree of reasonableness.

SENATOR LESNIAK: Right.

MR. MARTON: I am suggesting that there is no reasonableness in this testing. I do not have any objection, for example, to saying that to be a fire fighter you have to pass a physical exam, but not to be a clerk typist. Or, to be a policeman, you may not own a liquor license. I certainly do not agree to saying it is reasonable that a clerk in the Seven-Eleven must have the same. So, I don't argue that there can be distinctions made in the law. I am just suggesting that there has to be a reasonable standard, and that this is not one of them.

One of the other major problems I have with the legislation -- and this covers all three, I might add -- is that the bill is not limited to urine testing. In fact, in section 2. q., it talks about "human body part or product." That would authorize, for example, blood screening and, indeed,

in the first two or three revisions of 2850, it specifically said, "hair analysis, Breathalyzer, blood screening, and urine testing." I don't really think that is what this Legislature wants to get involved with.

I am also suggesting that this bill, if it is adopted, would be illegal.

SENATOR LESNIAK: Does this bill cover newspaper reporters, by the way?

MR. MARTON: It ought to, really. I can't think of a higher risk occupation.

SENATOR LESNIAK: I can think of one right now who probably could use the test.

MR. MARTON: I am also suggesting that this bill, if adopted in this form, would violate both the Federal Rehabilitation Act of 1973, as well as existing New Jersey civil rights statutes, which preclude and, indeed, ban discrimination on the basis of a handicap, because those laws have clearly been indicated to show that drug dependency and alcohol dependency are considered handicaps. You cannot fire someone, or not hire him, or discriminate in any other way against him, as a result of him being drug dependent. And, of course, that leads to another irony, in that the people who will be hurt, are the people who are not covered by those laws, namely the casual user of things like marijuana. So, the heroin addict, for example, will enjoy the protections of those State and Federal laws, but the casual user of some of the recreational drugs, if you will, will not be equally protected.

SENATOR LESNIAK: Federal and State laws protect people who are drug addicts from being terminated or suspended from their employment?

MR. MARTON: That is correct. If you are my employer, for example, and you say, "I understand you are in a methadone program, and you're fired," I can file a discrimination complaint and probably be successful against you.

SENATOR LESNIAK: Do you have any case law on that? I would be interested in seeing it.

MR. MARTON: I can supply that very easily, yeah.

SENATOR LESNIAK: I think we should ask the Division on Civil Rights to--

MR. MARTON: I was just going to say you ought to ask the Division on Civil Rights. They handle numerous complaints.

SENATOR LESNIAK: We will ask the Division on Civil Rights to testify at our next hearing, along with the Department of Labor and the Department of Commerce.

MR. MARTON: I think if you ask the Division on Civil Rights whether or not drug and alcohol dependency is considered a handicap and, therefore, is covered by their statute, I think they will answer yes.

SENATOR LESNIAK: Well, by their statute is one thing, because we can change a State statute. Where it is covered by Federal law, we would be preempted from -- or Federal and State constitutional protections -- it would be a major concern.

MR. MARTON: Well, again, I am suggesting specifically the 1973 Federal Rehabilitation Act.

Again, I am editing as I go, because I do not want to repeat what has already been said. The other problem with the bill is that it creates a 180-day interim period. Different sections of this bill are enacted at different times. The part of the bill that allows an employer to test an employee goes into effect, and then 180 days later, the part about an employee suing for damages as a result of a violation of the statute goes into effect. I would suggest to you that that 180-day interim period during which the employer may violate the law--

SENATOR LESNIAK: I wonder what lobbyist won out on that provision?

MR. MARTON: I would suggest to you that that is nothing more than a free fire zone on employees, and that that certainly ought to be amended.

I would draw an analogy to a lie detector. In 1967, this Legislature passed a statute that you may not conduct, or even request, that an employee take a lie detector test, for various accuracy and privacy reasons. I think they were good reasons in 1967. They remain good reasons, and that is why you still have a ban on it. I am suggesting to you that for those same accuracy and privacy reasons, you ought to ban urine testing. As has been testified to earlier, it really doesn't give the employer any information that he or she needs to know. Even if you are going to suggest that you need a reasonable suspicion standard, the results of the tests, even if 100% accurate, won't give you anything more than a reasonable suspicion. So why do we want to give people a test when we have reasonable suspicion to find out whether or not we have reasonable suspicion seems irrelevant, to say the least.

At the very least, my suggestion is that the Legislature introduce a one-year moratorium, because of the fact that this Committee, and certainly the Assembly Labor Committee and, indeed, every member of the Legislature and the Governor are grappling with this issue. There has been no resolution of the problem at this point.

Also, there are a good number of cases in the State -- one or two of which were mentioned earlier-- All of them, by the way, are ACLU cases, and all of them, I am proud to say, have been successful in winning, either early on or on appeal. All of them are being appealed, however -- continue to be appealed -- and we really don't have any precedent-setting decisions from, say, the State Supreme Court. So, certainly while the courts are still dealing with the issue, and while the Legislature is still dealing with the issue of standards and restrictions, my suggestion is that we not allow any more employees to be hurt by random urine testing, and that we pass a one-year moratorium banning urine testing.

I might conclude one point by simply saying that I agree with my friend Lester Kurtz. Given a choice between A-2850 and no bill, I would prefer no bill. This bill is so bad, that all it does is codify the vulnerableness that every employee is under right now. Indeed, this is no panacea for employers either. This is not just a pro-employee or pro-union position, because the employers, of course, would have to anticipate the expense of screening and confirmatory tests, policy and test result notices, and confidential record keeping, not to mention the various litigation that this bill would invite, which is also going to be expensive, because of phrases like "compelling interest" and "high risk occupation, reasonable suspicion, need-to-know basis." These are all phrases which I suggest to you cry out for judicial interpretation.

Thank you.

SENATOR CARDINALE: Just to try to identify the position of your organization a little bit more, if we got over the hurdle of the accuracy of the test, and we could determine that someone was an occasional user of cocaine or marijuana or some other illegal substance, would it be your position that we should not be allowed to deny them the right to drive a school bus?

MR. MARTON: Well, the issue of the accuracy of the test is a debatable one, and I think you have heard sufficient enough evidence that they are not as--

SENATOR LESNIAK: This is assuming arguendo.

MR. MARTON: That's my prelude, but--

SENATOR CARDINALE: I want to get that issue out of the way and deal with the other issue.

MR. MARTON: --assuming, for conversation's sake, that they were 100% accurate, we would still oppose them. We are not suggesting they are unconstitutional -- unconstitutional invasions of privacy -- because they are inaccurate. We are

suggesting that the method itself is an unconstitutional violation, specifically, of Fourth Amendment protections against unreasonable search and seizure, certainly in the public sector.

SENATOR CARDINALE: But, that is not my question. My question is: Should we be able to identify those persons who are occasional users of some controlled dangerous substance?

MR. MARTON: No.

SENATOR LESNIAK: That answers your question, Senator Cardinale.

SENATOR CARDINALE: Yes, but I didn't ask it yet.

MR. MARTON: Oh.

SENATOR CARDINALE: Were we able to do this -- okay? -- were we able to identify the occasional user of a controlled dangerous substance, would your organization oppose denying those individuals the right to drive a school bus?

MR. MARTON: Well, certainly we would, because--

SENATOR CARDINALE: You've answered it.

MR. MARTON: Establishing that someone might be an occasional user of a recreational drug, as opposed to a harder drug, really would not indicate whether that person was capable of driving a bus or flying a plane or working in a nuclear power plant.

SENATOR CARDINALE: It is a difference in policy.

SENATOR LESNIAK: Okay, thank you very much. Ray Flood, Trustee of the Association of Criminal Defense Lawyers in New Jersey?

RAYMOND F. FLOOD, ESQ.: I will try to be brief so we can give a few of the other speakers a chance to speak this afternoon. My name is Ray Flood. I am a Trustee with the Association of Criminal Defense Lawyers in New Jersey. This is an organization that consists of approximately 350 lawyers who specialize in the practice of criminal law. We are located from Cape May to Bergen County. Many of the

members of this Association were former prosecutors prior to specializing in criminal law. Myself, for instance-- I was in the Bergen County Prosecutor's office for six years, where I was the First Assistant Prosecutor in the '70s. Prior to that, I was in the Marine Corps as a Judge Advocate, where I served as a prosecutor and a military judge for a couple of years.

At a recent meeting of our Board of Trustees, we passed a resolution opposing Assembly Bill 2850. Our opposition basically centers around some of the arguments that the other speakers have already advanced -- the invasion of privacy and the Fourth Amendment issue and the unreliability of the test, which I think has been addressed very adequately by Dr. Freedman.

With respect to the invasion of privacy issue, let me say that we think there are serious Fourth and Fifth Amendment problems with this, and that we find it offensive and unreasonable to give an employer, you know, the rights he would have in this bill to require individuals, the vast majority of whom do not use drugs on an occasional or regular basis, to give a urine sample. I would just emphasize that if you are going to obtain a urine sample that is accurate, where a person isn't going to go in and beat the test, they have to be carefully observed in the giving of the sample.

So, we find it offensive that men and women would be required to have someone observe them giving the sample. I think we would only be kidding ourselves to think that employers would be hiring medical personnel to be the observers or the collectors of these samples. I don't think in the real world that we are going to have doctors or nurses present to obtain the samples.

The additional reasons we are opposed to this are because of the unreliability--

SENATOR LESNIAK: Do you mean that someone is going to carry around with them a pure urine sample in the event they are asked to be tested?

MR. FLOOD: Well, I think--

SENATOR LESNIAK: I guess someone would.

MR. FLOOD: --in the real world, if you talk to some of the criminal defense attorneys--

SENATOR LESNIAK: You could start a business.

MR. FLOOD: --some individuals who know they are going to be tested will make an effort to bring in someone else's urine. So, if you are going to try to prevent that from happening, you are going to have a situation where you have to carefully observe someone giving the urine sample.

SENATOR LESNIAK: We know and we are concerned about the fact that there are going to be "X" amount of people who are going to try to beat the system, but that doesn't necessarily mean observation. Certainly we could preclude that, couldn't we?

MR. FLOOD: Perhaps that is something that should be addressed -- whether or not there would be observation of the--

SENATOR LESNIAK: By the way, this Committee is not stuck with this bill. We are free to make any amendments and deal with it in any way, shape, or form we want.

MR. FLOOD: Moving on to the reliability--

SENATOR CARDINALE: On that point, you said you were in the service. Didn't you take a physical exam when you--

MR. FLOOD: Yes.

SENATOR CARDINALE: Didn't you give a urine sample?

MR. FLOOD: Yes, and I can tell you, having--

SENATOR CARDINALE: Hasn't that been done-- I know it was done when I took that, probably a few years earlier than you did, and I am sure it has been done for many, many years by the Federal government. Has that ever been tested?

MR. FLOOD: I think the service is a different category of people. Let me just say that there have been instances of unreliability, you know, where I think the drug testing from any service was done down in Fort Benning,



Georgia, where the urine samples could have involved a chain of custody with as many as 10 or 12 individuals by the time the urine sample actually got down to the laboratory they have at Fort Benning in Georgia. I just say that the history of drug testing, especially if you talk to individuals who have specialized in criminal law, is-- You just see many examples of unreliability.

SENATOR LESNIAK: Do you think we could have those Marines tested for libido level? (laughter)

MR. FLOOD: Let me-- You know, it's--

SENATOR CARDINALE: Wait a minute; wait a minute. This bill is talking about a two-step testing procedure.

MR. FLOOD: That is correct.

SENATOR CARDINALE: So, you're doing a screening -- which is what you did in the service--

MR. FLOOD: Right.

SENATOR CARDINALE: --and I think when you came up with certain results in a normal, routine Selective Service physical, they did confirmatory tests of one or another type to determine if those results were read, at least in certain instances. You are speaking from a degree of expertise. Why do you object to that kind of a two-step process, which seems to be, and which people have reported as being, you know, far more accurate than the one-step process?

MR. FLOOD: I think the percentages you get as to the accuracy-- Those are percentages if the testing is done under ideal conditions.

SENATOR CARDINALE: Do you think the second test is going to be done under less than ideal conditions?

MR. FLOOD: I think the possibility definitely exists that it can be. Any time you have the--

SENATOR CARDINALE: Then, you are not happy with the right to challenge which is contained within this bill, so that there is really a third level available to someone who has hit positive twice.

MR. FLOOD: There is a right to challenge, but I suggest to you that in the real world, that when an employer gets his laboratory saying the test is positive, he will not accept a negative from another laboratory the employee chooses. He can attack with, "How do we know that the chain of custody is valid there? How do we know you didn't know someone in that particular laboratory?" and any other arguments he can make as to why he will not accept the employee's test.

SENATOR CARDINALE: So, you are going to have a question of fact, which may be adjudicated in some mutual forum at some point in time.

MR. FLOOD: Perhaps.

SENATOR CARDINALE: But isn't that what our whole system revolves around? You go into court and try to prove certain things not to be factual generally, that the prosecution is trying to prove factual.

MR. FLOOD: That is correct. Let me just make a few other comments.

We know that contact with Sudafed, a substance you can get over the counter for the treatment of colds and allergies, can test false positive for amphetamines. We know that cough medicine, such as Dextrose, can test false positive for morphine. We know that Amoxicillin, a prescription for antibiotics, can test false positive for cocaine. We know that urine testing does not tell you when the drugs were used or what quantity of drugs was used.

I will give you just one brief personal example of a case I was involved in last year in Bergen County, where Senator Cardinale comes from. I represented a young guy who was arrested for the possession of a small amount of cocaine. I got him on a probationary period, where he would report once, sometimes twice a week, down at the Probation Department to give a urine sample. He tested negative in 21 samples. In the twenty-second test, he tested positive. He had nine additional

tests after the twenty-second test where he tested negative. By the time the last test had been given, they had gotten the results back from the twenty-second test, and they told him he was going to be terminated from the program for first-time drug offenders. He swore up and down in my office that he had not taken any cocaine since he was placed on probation, and I believed him.

We then conducted a hearing to see why they tested the urine samples of people on this program in Bergen County. I remind you that this is a program where we supposedly have experts involved; where we have people who are involved in law enforcement, and with more training and background, I submit, than would be involved if you had testing pursuant to this Assembly bill. In addition, there must have been about seven or eight people involved in the chain of custody. It was determined that this particular urine sample was tested at the Bergen Pines laboratory sometime between midnight and seven o'clock in the morning. The person who was doing the testing at Bergen Pines last year held down a full-time position at MedPath during the day, and when she finished there, she went home, cooked dinner, put her children to sleep, and then went to Bergen Pines at night to participate in conducting the drug tests.

Now, I don't know if that is indicative of what goes on in other laboratories, but I would make this suggestion to this Committee: Shouldn't there be an exhaustive study of what the present conditions are in the laboratories in this State with respect to drug testing? Shouldn't you conduct this study and be able to report that this is the situation in terms of whether or not we think: 1) these laboratories, at the present time, can perform the tests in a dependable manner; and 2) what is likely to happen in terms of their dependability and accuracy if we now, you know, increase by thousands, perhaps even in excess of a million, potential people who are going to have their urine tested?

SENATOR LESNIAK: Does this bill increase testing?

MR. FLOOD: I think the message that will go out to employers-- I think employers will embrace this bill, and I think, at least in the initial period after it is enacted, there will be a vast increase in the number of tests.

SENATOR LESNIAK: Why? They can do the same testing -- eliminate the random and routine part of this bill. They can do that now, without any of the protections in this bill.

MR. FLOOD: I am primarily looking at the random--

SENATOR LESNIAK: At least based on the Appellate Division, assuming the Appellate Division is upheld. How would this increase testing at all?

MR. FLOOD: I think with respect to the random and routine part of it-- I think that is where you are going to have the testing.

SENATOR LESNIAK: That's the big problem.

MR. FLOOD: I say to this Committee: Go along with the moratorium. Wait for the Supreme Court to rule on the issues with respect to the reasonable suspicion. Why doesn't this Committee do some independent research? Perhaps this Committee could conduct a test, sending controlled samples to various laboratories throughout the State.

SENATOR LESNIAK: How about Dick Codey? (laughter)

MR. FLOOD: Something as Senator Codey did. Perhaps in cooperation with Dr. Freedman and her committee, some efforts could be made where you could then have this data, and then make a judgment, because what you are talking about is something that can affect the lives and the families of thousands and thousands of people in this State. I suggest--

SENATOR LESNIAK: We'll get Bob Missick (phonetic spelling) from The Star-Ledger to provide a sample, so we can guarantee a positive--

MR. FLOOD: I don't want to speak any longer. I have taken enough time, and I want to give a few other speakers an opportunity. Thank you.

SENATOR LESNIAK: Good suggestions. Thank you very much. Jon Bauer, Legal Action Center? Jon, I am starting to get very silly, so please--

J O N B A U E R, E S Q.: No problem. Thank you, Mr. Chairman. I am a staff attorney with the Legal Action Center, which is a public interest law firm that has been specializing for more than a decade in issues involving alcoholism and substance abuse. The Center works in New Jersey, New York, and in other states to address the issues raised by workplace substance abuse. We represent former alcoholics and former drug abusers who encounter discrimination in employment based on their past histories. We also provide legal assistance and advice to drug and alcohol treatment programs and to Employee Assistance Programs.

Since the issue was raised just a little while back, I would like to talk for a minute about the relevance of the Federal Rehabilitation Act and the New Jersey Civil Rights Law to drug testing. It was correctly pointed out that the Federal Rehabilitation Act does treat alcoholism and drug abuse as handicaps. The Federal law prohibits discrimination solely on the basis of handicap. But, at the same time, the Federal Rehabilitation Act makes it clear that if persons have an alcohol or drug abuse problem that is interfering with their job performance, they can be disciplined on the basis of their job performance problems.

So, under the Federal Rehabilitation Act, taking action against an employee solely because of a substance abuse problem is questionable, and perhaps illegal. However, taking action based on deficiencies in job performance is perfectly legitimate.

The New Jersey Civil Rights Law has not been definitively interpreted yet, but the Legal Action Center has gotten a ruling from the State's Civil Rights Division that alcoholism is a protected handicap under the New Jersey Civil

Rights Law, which also prohibits discrimination based on handicap. In that case, we were representing a person who was an active alcoholic, who had no problems on the job until he told his employer he was checking himself into treatment for his alcohol problem. Then the employee got fired. The New Jersey Civil Rights Division said, "Discriminating on the basis of the person's alcoholism, when there is no job performance problem, violates the law." That case is now before the New Jersey Supreme Court. It may very well be that the New Jersey Civil Rights Law will also be interpreted to prohibit discrimination based on a drug abuse problem, unless there are problems with a person's job performance.

SENATOR CARDINALE: Are you saying that the bus driver, who I keep using as an example -- that we could not prevent that person from being a bus driver until he got into an accident?

MR. BAUER: It wouldn't necessarily require an accident. There could be many other signs of a job-related problem -- absenteeism, observations of erratic behavior by a supervisor -- any of the things that would ordinarily lead someone to be referred to an Employee Assistance Program.

SENATOR CARDINALE: If we discovered that a bus driver was an occasional user of a controlled dangerous substance, under that Civil Rights Act of New Jersey, that person's job would be protected? Is that what you told me?

SENATOR LESNIAK: They are only protected if they are addicted, because it then becomes a handicap.

MR. BAUER: If they have a substance abuse problem and that is the sole basis for discipline.

SENATOR CARDINALE: Oh, so if a person is an occasional user, we can fire them--

SENATOR LESNIAK: Right -- well, not necessarily.

SENATOR CARDINALE: --but if he is a habitual user, we can't. Is that what you're telling me?

MR. BAUER: Well, I have to say there are many--

SENATOR CARDINALE: I am not an attorney, Jon.

MR. BAUER: --ambiguities in the law. Some of these issues have yet to be worked out.

SENATOR LESNIAK: But that is correct. You don't have the protections, possibly, under the New Jersey Civil Rights Act and the Federal Rehabilitation Act.

SENATOR CARDINALE: Dale -- just as an aside -- would you draft something to change that? (laughter)

SENATOR LESNIAK: You want the occasional user to be protected, too?

SENATOR CARDINALE: Yeah. I think we ought to be able to take them out of doing jobs where public safety is impacted.

SENATOR LESNIAK: You want the occasional user to be protected as well. Is that correct?

SENATOR CARDINALE: No, no.

MR. BAUER: Senator Cardinale, your concern may be unwarranted, because under the New Jersey Civil Rights Law, like the Rehabilitation Act, if the basis for the employer's action and concern is an impact on job safety, it is highly doubtful whether that person would be protected. But, if it is a case like the one I just mentioned, where someone has an alcohol problem or a drug problem, who has been doing fine and only gets disciplined when he voluntarily goes into treatment, those people are clearly protected under the law, and I think they should be.

SENATOR CARDINALE: And I happen to agree with you if they have sought out treatment. But I certainly do not agree with you if it happens to be discovered through a testing process such as we are talking about here, where they have not sought treatment.

SENATOR LESNIAK: Well, be that as it may--

MR. BAUER: I am going to skip over much of my testimony, because much of what I was going to say about

privacy rights, and about accuracy concerns, has already been well-covered by previous witnesses. I would like to say that the Legal Action Center believes that drug testing in employment can only be justified when there is a prior, well-grounded suspicion that a particular individual is impaired by drugs or using them on the job. With respect to the discrimination laws we have just been talking about, I would like to point out that requiring drug testing on that basis -- on the basis of a well-grounded suspicion of impairment on the job -- would pose no problems under the discrimination laws.

We feel that the drug testing bill that was recently passed by the Assembly permits testing in both the private and public sectors in far too many circumstances. The Fourth Amendment has been interpreted by courts to prohibit public employers from engaging in testing, unless the employer has, at a minimum, a reasonable suspicion that is based on specific objective facts and reasonable inferences drawn from those facts, that a particular person is impaired by, or using drugs on the job.

The Assembly bill goes beyond this constitutional limitation by permitting testing in the public sector not only when the employer has a reasonable suspicion that an employee's job performance is being affected by drug use, but also whenever performance -- and I quote from the bill -- "could reasonably be expected to be affected by the influence of the drug." I find it hard to fathom what that means -- "Performance could reasonably be expected to be affected by the influence of the drug." I think that phrase is so broad and big, that it could be used to justify testing just about any public employee. That, I believe, would be unconstitutional.

The bill also violates the Constitution by providing that if a public employee's sample produces a confirmed positive test result, it will be presumed that the employer had



reasonable suspicion to test in the first place. In Fourth Amendment cases, courts have consistently held that a search cannot be justified by its results. There has to be reasonable suspicion at the outset.

SENATOR LESNIAK: You're absolutely right.

MR. BAUER: The Assembly bill also gives private employers virtually unfettered discretion to require employees or applicants to submit to drug tests. There is some language in the bill that sounds like it is restrictive, but it really isn't. For reasons which previous witnesses have explained, if the bill, as it stands, is passed, a private employer can require someone to take a test whenever the private employer wants to.

Now, while the Fourth Amendment strictly applies only to governmental action, we believe that any legislation regulating drug testing should hold public and private employers to the same standard. The Fourth Amendment reflects values that are fundamental to all persons in our society, regardless of whether they work in the public or private sector.

Finally, I would like to point out that the Assembly bill, as it now stands, does not go far enough in encouraging treatment. One of the bill's good features is its requirement that public employers provide a temporary leave of absence to an employee with a substance abuse problem, so that the employee can obtain treatment. That requirement of a treatment option should apply to the private sector as well. Allowing employees who successfully overcome a substance abuse problem to return to work provides the best incentive for drug abusers to confront their problems and get treatment.

The written testimony that has previously been submitted to the Committee includes sample legislation that the Legal Action Center has prepared on the drug testing issue, and I would like to urge you to consider some of our suggestions as an alternative to some of the provisions in the Assembly bill.

Thank you.

SENATOR LESNIAK: Just one quick question: Under current law, private employers, unless they are in a highly regulated area of employment by the government, can test their employees even in the absence of reasonable suspicion?

MR. BAUER: That is correct. What we are suggesting is that the legislation expand that protection to the private sector, as well as to the public sector.

SENATOR LESNIAK: No, no, no. Current law would allow private employers to test -- the current one -- even in the absence of reasonable suspicion.

MR. BAUER: That is correct, although there may be restrictions on what an employer can do with the results. If the test is inaccurate, someone may be able to sue for defamation, but, by and large, there is no restriction. What I was trying to point out was, the bill, as currently drafted, does not really change that.

SENATOR LESNIAK: Doesn't really change it, right. Okay. Thank you. Jack Sabatino and Jack Arseneault, Robinson, Wayne, and others?

MR. DAVIS: I shortened it.

JACK ARSENEAULT, ESQ.: We will try to be real quick. Jack Sabatino will pass out what our testimony was supposed to be, plus an addendum.

By way of introduction, we are both private attorneys. We work here in New Jersey. We have both been fortunate enough to be co-counsel on some of the most -- on some of the major urine test cases in the district. We were plaintiff's counsel in the Capua vs. City of Plainfield case, where we represented 18 fire fighters and, more importantly, I think for this Committee, we were class counsel in a Federal class action lawsuit in 1983, where we represented every inmate in the State of New Jersey in overturning the standards by the Department of Corrections. I think that is what we can add to this Committee that no one else has added up to this point;

that is to point out to you what standards were established for inmates in the State of New Jersey.

As the state of the law is right now, it is my opinion that an inmate in the State of New Jersey has better protection against random urine testing than a person in private employment. The Denike opinion, which has been attached to our statement, I think will set forth the standards, and out of brevity, I will just skip over it.

SENATOR LESNIAK: That is not surprising.

MR. ARSENEAULT: It was surprising to me, Senator, when I first realized it, I'll tell you that.

We are here to kind of portray a middle-of-the-road approach. I am sure you have the Chamber of Commerce people saying, "We should be able to test at any time." I am sure you have Ed Marton saying, "There should be no test." We live in the real world, too. We are both civil libertarians by ideological philosophy; however, we recognize that drug testing is here. The middle-of-the-road approach we are attempting to put forward today is the fact that there has to be an individualized reasonable suspicion across-the-board. No exceptions. That standard has been carved out by the courts over 200 years of constitutional history. It is a standard that has weathered the times. It has weathered the test of times in Fourth Amendment law, and we contend -- at least in terms of the State of New Jersey right now -- that that is the standard that should be applied across-the-board.

Now, that reasonable suspicion standard we define as a reasonable belief, based upon objective facts that a particular employee has been impaired while in the performance of his job functions because of the effects of illegally ingested substances. The business about compelling interest, high risk, are loopholes that are going to make people like Jack Sabatino and I very wealthy, because you are inviting litigation. You are inviting questions; you are inviting attacks. It is not

going to accomplish the purpose that I believe this Committee is attempting to accomplish by this kind of legislation.

This is truly an issue of justice, which is why we kind of got involved and asked the Association of Criminal Defense Lawyers of New Jersey to get involved. This is an issue of justice, of treating people fairly. This system of justice we have in this country is founded on the proposition that you let nine guilty people go free to protect the one innocent person. That same kind of philosophical application is appropriate here.

SENATOR LESNIAK: Well, what if that-- I am thinking in terms of that one innocent person going out and killing 350 people in an airplane.

MR. ARSENEAULT: It is still the same standard. The same constitutional rights apply to Charles Manson as apply to my 70-year-old mother. Essentially, I know the argument is the airline pilot. Do you trample over the rights -- to use Senator Cardinale's example -- of the 1000 other bus drivers, who have no basis to be tested whatsoever -- a two-level privacy violation? The degradation of the observation of the urine voiding itself, and then the privacy violation of what is found in the urine. What if that bus driver is on mental health drugs, which have been controlling manic-depressiveness for 15 years, and has no other symptoms, no sign, does an effective job? What right does an employer -- be it State or private -- have to find that out about him? What if he is diabetic? What if a woman is pregnant?

SENATOR CARDINALE: I think you ought to ask the people who were killed on that Conrail train; I really do.

MR. ARSENEAULT: Senator, believe me, I understand. I am not here to take a radical position either to the left or to the right. I am here to say-- You're right, it was a tragedy. You're right, it could have been prevented. But, do you know what else? We could prevent a great deal of crime in

this country if we threw out the Fifth Amendment; if we would compel people to testify against themselves. Ollie North could have solved the Iran Contra affair if we pulled away his Fifth Amendment rights, and said, "You have to tell us." That is the analysis. What we are saying is, we recognize there is an argument to be made on both sides of this position, but 200 years of constitutional law, formed by our courts, have already set up the standard for us. That standard is reasonable suspicion tied to the individual, not tied to a status as to color of hair, color of eyes, job performance, color of skin -- whether or not you, individually, have demonstrated some series of facts that would lead someone to believe -- not probable cause, much less -- that you are somehow impaired. That is the standard we advocate today.

SENATOR LESNIAK: That standard would apply to both public and private employees.

MR. ARSENEAULT: Across-the-board -- equal protection.

SENATOR LESNIAK: Despite the fact that private employees have greater protections-- I mean, public employees have greater protections than private employees, and private employers do not have to have reasonable suspicion to test under current law.

JACK SABATINO, ESQ.: Senator, as a matter of policy, rather than a matter of constitutional law, we are here to support and urge the Senate, and later on the Assembly, to pass legislation to give some protection to private employees, who do not have it constitutionally now. That part of the legislation we encourage.

The only thing I might add is--

SENATOR LESNIAK: So, this bill isn't all bad.

MR. SABATINO: No, that's right, Judge. Sorry, I'm used to being in court.

SENATOR LESNIAK: Oh, no, not for a long, long time -- hopefully never.

MR. SABATINO: Just by way of analogy, the only thing I can suggest is that-- The analogy to the polygraph is a good one. You have an emerging technology here, which could create a vast amount of harm to innocent persons. One analogy I have also thought of is, if people have private diaries they collect, where they write down everything they have done on their vacation, or during the weekend, we do not allow the State, we do not allow outsiders to demand to read those diaries, because they might reveal that they were engaged in unlawful activity, that they might have been arrested for a traffic violation, that they might have done something illegal in the child custody area. The point is, we allow people certain domain of privacy, even though if we intruded that, we could possibly get a benefit and avoid some Conrail collisions. There are other independent ways to get that same information without trampling rights.

SENATOR LESNIAK: Okay. Thank you very much.

MR. ARSENEAULT: Thank you.

SENATOR LESNIAK: Walter Blusewicz -- I think -- Teamsters Local 877? You would think I would be able to pronounce your last name.

W A L T E R J. B L U S E W I C Z: That was close, Senator.

Good afternoon. My name is Walter Blusewicz. I am Recording Secretary--

SENATOR LESNIAK: No, I pronounced it right.

MR. BLUSEWICZ: --and Membership Assistance Committee Chairman for our local of approximately 1000 people. It is a pleasure to be here.

SENATOR LESNIAK: We are going to ask you to summarize your testimony at this point in time, if we may.

MR. BLUSEWICZ: All right. You have a copy of my testimony. Basically, I came here to testify that as a result of A-2850, a drug testing program has been instituted at the refinery as of March 1. I will get to the reason why--

SENATOR LESNIAK: As a result of a bill that hasn't even been released from Senate Committee?

MR. BLUSEWICZ: That is correct, sir. At the present time, our local has taken Exxon before the NLRB. We are awaiting the outcome of that case. But, in the grievance procedure -- the third step -- the refinery manager said-- We have a management clause in our contract, where they can put in policies that are reasonable and necessary. We asked the refinery manager why this policy was necessary? Before his employee relations spokesman could come to his aid, he said, "Pending legislation." There is a copy of the policy along with my testimony.

One of the things I wanted to point out is, they use reasonable suspicion for the basis of a test. This is defined as being seen as an unfit condition. Excuse me, I am very nervous. This is the first time I have ever done this.

SENATOR LESNIAK: That's okay. Relax, please. Gerry Cardinale is not that bad.

SENATOR CARDINALE: You know, the first time I sat in a chair like that and testified before a legislative committee, I was very nervous, too. I am sure the same thing happened to Ray. We're very human.

MR. BLUSEWICZ: Well, then, you know my feeling.

What they use as a definition of being unfit are mood changes, excessive absenteeism, lateness, inattentiveness. The definition is so broad, that it is basically random testing.

SENATOR LESNIAK: Walter, the problem, though, as we see it, is that under current law, Exxon-- I have no idea what protections your contract may give you, because I don't know your contract, but absent the contract protections, there is nothing to preclude Exxon from any random or routine testing, even without reasonable suspicion.

MR. BLUSEWICZ: Yes, but, Senator, the difference I see, is that I know and our bargaining committee knows, the

people in that yard. I think it should be up to us to sit down at the bargaining table -- sit across the table from the company, and have them prove to us something that we know is not needed in our yard.

SENATOR LESNIAK: I understand that, but what I am saying right now is, if we don't pass any law -- if we pass no law -- then Exxon will be able to give random and routine tests, unless precluded by your bargaining agreement. A lot of workers out there do not have a collective bargaining agreement to give them any protections.

MR. BLUSEWICZ: A good argument for unionism. It is against the right to work, too.

SENATOR LESNIAK: Sure it is; sure it is.

MR. BLUSEWICZ: I understand that, Senator, but I can only quote and state on my specific case. I am not an expert in the field of drug testing. I have been in the labor movement for about 15 years, and everything that we have ever had -- any benefit we have had to get from an employer, we had to fight for tooth and nail. It seems to me that the private employers are jumping on this left and right. I feel they are going to use it just to terminate people.

SENATOR CARDINALE: Is that really what you are afraid of? I was about to ask you what you are really afraid of. Are you afraid that this will be abused in such a way that people will be harassed? Is that what you are really getting at?

MR. BLUSEWICZ: Yes. I think they could be harassed by unscrupulous supervisors to perform a job unsafely to get it done expeditiously. I think the ultimate goal of some employers would be just to terminate a "troublemaker."

SENATOR CARDINALE: Now, if, in fact, the initial screening -- and I think we have all heard that the initial screening is inaccurate, and possibly can even be manipulated-- But the secondary testing, if it is done well, is only going to identify people who really have a problem.



Then, under this bill, those people aren't even going to be terminated. They are going to go forward in a program that is going to help them. Why would you want to substitute what we have today-- Or, why would you not want to substitute what this bill provides, which is that a person cannot be terminated; that if they are in trouble, they will be treated; and that there is at least a second step of reliable testing?

MR. BLUSEWICZ: We have that protection right now under the Federal Rehabilitation Act of 1974 and the New Jersey civil handicap laws.

SENATOR CARDINALE: Well, I think that is a little questionable. That is a little fuzzy from the things we have heard here today.

MR. BLUSEWICZ: In any of the cases I brought before arbitration -- I have been involved before in arbitration -- they have been protected.

SENATOR LESNIAK: Is there an Employee Assistance Program in effect at Exxon?

MR. BLUSEWICZ: Yes, there is. We fought very hard for that for over 10 years. We got it about two years ago. This drug test thing is going to send it right down the tubes, I think.

SENATOR CARDINALE: How many people have taken advantage of it? (no response)

SENATOR LESNIAK: Would you have any objection if drug testing were part of the Employee Assistance Program?

MR. BLUSEWICZ: It is.

SENATOR LESNIAK: It is?

MR. BLUSEWICZ: As part of rehabilitation after hospitalization.

SENATOR CARDINALE: How many people in your company have taken advantage of that?

MR. BLUSEWICZ: Out of the 1000, within the last five years, approximately eight.

SENATOR LESNIAK: Eight?

MR. BLUSEWICZ: We do not see a problem in our yard. I am a little suspicious about all the statistics that have come out; you know, the percentage of people using drugs, and this and that. I truly wonder how many of those people are employed. I think those figures might be inflated by the unemployed, or whatever.

SENATOR LESNIAK: Okay. Thank you very much. Nancy Miller, employee assistance professional?

N A N C Y M I L L E R: Thank you very much. I am a member of the New Jersey Occupational Advisory Committee, which was developed by the New Jersey Department of Health's Division of Alcoholism. I am testifying today because I must disagree with the spirit of the law -- A-2850 -- because you are not dealing with spirits. Public safety and security cannot be used as a reason for this bill in its current form, because of the omission of alcohol from the drug test. An employee under the influence of alcohol can be as great, if not a greater risk to safety as employees using other mood altering substances. The legal or illegal status of the drug has nothing to do with its potential danger to the workplace.

Further, conclusive research has shown that alcohol is the gateway drug in our culture, and almost 100% of people who use illegal substances began their use with legal beverage alcohol. If you want illegal drugs out of the workplace, you must also deal with legal drugs in a consistent manner. The current double standard about alcohol use is directly responsible for the current proliferation of illegal substances in our society, which has now naturally permeated the workplace.

My concern about drug testing, in general in the workplace, is also that it permeates a double standard of high-status people asking vulnerable low-status people to be exposed. I happen to have a case of a gentleman who was asked by his foreman -- who was drunk -- to help him do a job. He

helped him; the foreman dropped a piece of equipment, and he is now permanently unable to use his left arm. I submit that the current status of this bill would not have offered any protection for this gentleman in that workplace.

I further believe that the way this bill is worded sends a message to employees and employers that the martini lunch and a beer in the lunch pail are most appropriate, and if you have yourself in trouble with marijuana and cocaine, switch to something legal, which we have seen doctors help women do, transferring from alcohol to tranquillizers, for many years. I might also submit that the current research on the two most abused categories of substances in this country are, number one, legal beverage alcohol, and number two, prescription drugs. That this bill addresses neither of those problems, and at the same time purports to be a public interest, safety, general welfare issue, to me, does not fit.

I further wish to address several comments that were brought up today regarding costs. It was mentioned earlier by a Chamber of Commerce representative about the incredible costs of rehabilitation. I submit that if you have not received the study, "The Cost Impact of Employee Assistance Programs - October, 1985," that was put together by our Occupational Advisory Committee, submitted by the Division of Alcoholism, it will show that a five-year study of ethical EAP programs, and in union shops, where there is labor and management participation-- You will see that the costs, over five years, go down with EAP and rehabilitation. Obviously, if you start a program and many people go into treatment in a hurry, the costs will go up, but over time, there is a reduction in costs. Furthermore, the application of Employee Assistance Programs -- which I will not get into in detail, because I think Mr. Mastrich covered it -- offers another area where this bill, I think, interferes. The principle of an Employee Assistance Program is not only to help people who are currently in trouble

with alcohol or drugs, but to offer education for prevention. My experience as an Employee Assistance Counselor for the past six years, has been that in those companies and those unions which have instituted programs, the cultural acceptance of abusive drug use goes down, when they know that safe, ethical help is available, and when good ethical literature is presented.

I have been amazed that you repeatedly have commented on the public's view of drug testing. I have been teaching employee assistance courses to the public, shop stewards, supervisors, employees, with the goal of helping them refer -- formally or informally -- to EAP programs, since 1981. I can document many people, some of whom are still in our Legislature, who do not think that alcohol is a drug. So, I really think that falling back on public knowledge for a drug abuse bill will not fly.

Furthermore, I have talked to many corporate people and union people, and some of the companies have expressed a concern to me that if this bill becomes law, they will be forced by public pressure to institute drug testing, when they believe their current methods of EAP, good personnel practice, and good management are operating sufficiently. If you want to know the impact of a law, look at the situation with alcohol. It is legal, and the most abused substance we have. If you pass this law, you will definitely, automatically encourage drug testing.

I might also mention that many companies are making decisions on drug testing today because it hit the Fortune 500 report in "Forbes," and because it is in The New York Times, and I heard a labor relations executive say to me, "Well, if IBM is doing it, we better." So, I think we have to also be very much aware of the media coverage that is going on. This is a popular, quick fix for people who have problems with their fixes. I think this is the same kind of reaction -- this law,

this bill -- that we are trying to struggle with with employees who think they can deal with stress with a quick fix.

I might further add that there is conclusive evidence to show that the factor that causes people to use mood alterers in the first place is stress and anxiety. Initial research is indicating that the presence of random drug testing in a workplace does serious damage to morale, increases stress for management as well as labor, often discourages the normal, proper management documentation of impairment, because of the fear of the fallout from the humiliating testing procedure, and even discourages self referrals and EAPs, because the overall trust in the company is affected.

If EAPs can surface impaired workers, as they have proven to do, why institute procedures to drive them further underground, which seems to be the problem this bill intended to address in the first place? I submit for those companies which feel a compelling interest to drug test, that they have Employee Assistance Programs, and God forbid this bill should pass. Anyone doing drug testing should have to have an operating ethical EAP prior to the admission of tests.

Thank you for your time.

SENATOR LESNIAK: Thank you. Mr. Harold Gibson, Director, Department of Public Affairs and Safety for the City of Plainfield?

H A R O L D G I B S O N: Mr. Chairman, first of all, thank you for the opportunity to appear before the Committee. Understanding the time frame under which we are working, I will be approximately three minutes or less.

SENATOR LESNIAK: Thank you.

MR. GIBSON: One of the first things to deal with is the fact that A-2850 has within it at least one area that our city administration -- through Mayor Taylor -- would oppose. That is the portion which deals with an immediate disciplinary action upon an initial testing phase. I believe strongly in

the confirmatory process as being part of anything that should be considered in a piece of legislation. First of all, the confirmatory process is necessary to, in fact, indicate the presence of a substance.

But, I would like to go to S-2565, which is more closely related to the area in which my responsibility falls, and one in which we have had some actual experience, as opposed to information provided through studies. The City of Plainfield -- as most people in this room are probably aware -- conducted a drug testing of its police and fire personnel in May, 1986. Two-hundred, forty-four people were tested, of which 18 -- through the confirmatory process -- were deemed to have positive signs of controlled dangerous substances in their systems.

Now, whereas I would argue to strongly support anyone's constitutional rights, we ought to at least understand that the Constitution is not etched in stone. If it were, it would not have been necessary to amend it 22 times.

SENATOR LESNIAK: Yeah, but we can't amend that Constitution.

MR. GIBSON: Absolutely. I am only bringing that out as a factor to be dealt with as it relates to what is and what is not constitutional. It is something that is determined by the sitting Supreme Court at a given period of time in our history. The Supreme Court at one time, for instance, allowed me to be three-fifths of a person -- okay? -- and I think that should be understood. We ought to think in terms of what it means for public safety personnel to use drugs. The ultimate decision of the Legislature is either to accept drug addicts in the fire and police departments of the State, or reject them. That is really what the legislation is going to have to be about.

The argument about job performance-- Unfortunately, in our society, police are in the "buddy system." They most

often have partners. It is virtually a, "I'll lie and you swear to it" team. I don't care how anybody looks at that statement; it is the truth. You have to deal with the fact that if people who are carrying firearms are permitted to have mind-altering drugs in their systems, our system is doomed to failure. We can ignore it today in 1987. Ten years hence, when perhaps none of us are sitting in positions of authority, we will recognize that had we done something in 1987, we would not be dealing in 1997 with the kind of problem I see happening.

The reasonable suspicion thing-- Who determines reasonable suspicion? Can a captain in a police department look at a police officer and determine whether he is or is not under the influence of drugs? Two days ago, an off-duty police officer in a town in New Jersey had a cocaine party, and shot an individual at that party. How often does that have to happen before we stop looking at the cloak of the Constitution on drug testing, because that city is going to pay dearly. I think it is the liability we face for not testing that becomes the critical issue.

SENATOR LESNIAK: Well, right now, though, the highest judicial decision in New Jersey is the Appellate Division. They have said that you can't test unless there is reasonable suspicion. We can't do anything about that without changing the Constitution of the State of New Jersey.

SENATOR CARDINALE: We can do that, too.

SENATOR LESNIAK: That we can do.

MR. GIBSON: It is understood, Senator, that we cannot do anything about it without changing the Constitution. That is why-- Without going into my prepared remarks, you will see in there that I strongly suggest that there is, in fact, a compelling interest strong enough for such an interpretation of the Constitution to be made, whether it be the State or the Federal Constitution. I believe we are going to get to that point. Unfortunately, in this country, until something

disastrous happens to someone of importance or significance, we do not make too many changes.

SENATOR LESNIAK: I presume the Newark case is going to be appealed to the Supreme Court.

MR. GIBSON: I am not certain whether Newark can afford it, because I know we couldn't afford to take ours to the Supreme Court. But, what we are looking at is, again, whether or not-- First of all, drug testing is not the only answer to the drug abuse problem in the workplace. We should be looking at education and supply reduction as a part of the focus. But I believe drug testing of public safety personnel is an absolute necessity. That is why we support S-2565, because without it, there is absolutely no way--

SENATOR LESNIAK: Yeah, but-- Oh, okay, you support that part of the bill that deals with routine and random testing.

MR. GIBSON: Yes, we certainly do. Again, I know the time frame, and I will stop right here, because I think my basic position, and the position of our administration, is well-known.

SENATOR LESNIAK: Your written testimony will be entered into the record as well. Thank you very much. Thomas Nowelsky, Deputy Chief of Police, Township of Union? Has he left us?

MR. DAVIS: We have his testimony.

SENATOR LESNIAK: We have his testimony, and it will be entered into the record. Has anyone else signed up to testify? Is there anyone else here to testify?

K E V I N M A R A: I am not going to keep you long. I appreciate being able to say something here today.

My name is Kevin Mara. I work for Public Service Electric and Gas, although I am not representing them. I am a member of the union there, and I am a delegate to the Mercer County Central Labor Council.



We are truly worried. Drugs are rampant in our society. No one wants to grow up to be a drug abuser nor work with one, but these problems exist. One wonders, if we can put man in space, can we not overcome the drug problem? We are worried that the energies expended to combat drug abuse are being used with reckless abandon.

The employee is again used as the first line of defense. We support mandatory education -- not mandatory testing -- for educating the employee will have more far-reaching effects than disciplining, and many times with false accusations. As we have been educated today with testimony-- Public opinion would be so drug prone if they had all the facts that were presented here today. When one witnesses the testimony the Department of Personnel and the administration of Washington Township, who testified here today--

SENATOR LESNIAK: I don't think-- Well, from my perspective, I do not give bad testimony much credence.

MR. MARA: Okay. There are unfounded reasons for mandatory drug testing: I think the use of drugs is worse than I first thought. The words "bottom line" are used, instead of compassion. Senator, you pointed out that some jobs are high risk for testing before performing on the job, and several jobs are deemed critical for drug testing, yet one that was overlooked was the job of the legislator. Can you imagine the Senate peeing in a bottle, so to speak, before a session, for what job has more high risk results than making laws, with some of the bills that get through? Drug testing prior to a session may have shown some positive results.

SENATOR LESNIAK: Are you referring to the current bills before the Committee?

MR. MARA: Does this bill really restrict drug testing?

Many of the common concerns we have, have been mentioned already, so I will conclude. We are worried that

under the guise of fighting drug abuse, employee rights are going to be raked. Just where are our priorities? Assembly Bill 2850 was truly written in haste. Now, it is this Committee's responsibility to slow things down. With the performance of this Committee that I have seen so far today, I feel a little more at ease.

Thank you.

SENATOR LESNIAK: Thank you very much.

SENATOR CARDINALE: May I ask a question?

SENATOR LESNIAK: Sure.

SENATOR CARDINALE: You work for Public Service?

MR. MARA: Yes.

SENATOR CARDINALE: What procedures are currently being followed by Public Service with respect to people who are monitoring nuclear plants?

MR. MARA: Well, right at this point, it is a matter that was taken up with a different union. I am with the OPIU professional employees' union. They have, at this point, taken employees on their way to work and told them, "Okay, come on, you are going to take a drug test," and they have to submit to it. We are fighting in negotiations right at this point.

SENATOR CARDINALE: So, they have the right and they do, in fact, randomly test the operators of the nuclear plants?

MR. MARA: They have used the right to test, and electrical workers and linemen.

SENATOR CARDINALE: Would you like to see this continued? Is that the position you are taking? You would not like them to randomly test the operators of nuclear plants?

MR. MARA: Not when probable cause based on job performance--

SENATOR CARDINALE: I am talking about randomly testing the operators of the nuclear plants.

MR. MARA: No, no, I would not like to see random testing.

SENATOR CARDINALE: You don't want to see random testing?

MR. MARA: No.

SENATOR CARDINALE: You want to see something in their job performance fail, and then test them?

MR. MARA: Some sort of job performance to lead to testing.

SENATOR LESNIAK: A burn-down -- a melt-down.

SENATOR CARDINALE: Thank you.

SENATOR LESNIAK: Okay, thank you very much. Thank you, everybody. There will be another public hearing in the future.

(HEARING CONCLUDED)