



PROPOSED  
DRUG TESTING POLICY  
AND  
REPORT  
OF THE  
CABINET TASK FORCE  
ON  
DRUG TESTING IN THE WORKPLACE

*New Jersey State Library*

Proposed Policy  
and  
Report of the  
CABINET TASK FORCE  
On  
Drug Testing In The Workplace

October 1989

## FOREWORD

Substance abuse is a widespread problem that threatens the lives and safety of New Jersey's citizens and the productivity of its workforce. On August 11, 1988, Governor Thomas H. Kean, in Executive Order No. 191, described the problem of substance abuse as one of "epidemic proportions" and declared this State's "vital interest in promoting a safe and drug-free workplace and in ensuring our citizens that public safety employees do not threaten life and limb due to abuse of drugs or alcohol."

By Executive Order No. 191, Governor Kean established the Cabinet Task Force on Drug Testing in the Workplace. Recognizing the lack of uniform criteria for drug testing of State employees, the Governor directed the Task Force to recommend drug testing guidelines based on "a Statewide drug-testing policy for State employees that equitably balances employee rights with the State's vital interests in public safety and in promoting and maintaining a drug-free workplace."

After much study and debate we have developed a proposed policy for drug testing of State employees that we believe strikes an equitable balance of the interests at stake. The issues we resolved in developing this policy were complex, and while a majority of the Task Force supports each provision of the proposed policy, no member wholeheartedly supports every provision. In an effort to accurately convey the complexity of

the issues and the viewpoint of all members of the Task Force, we have described minority positions in our report. We hope that the policy we recommend will serve to reduce the illegal use of drugs by State employees: we recognize that it does not address the issue of abuse of legal substances.

We wish to express our sincere appreciation to the persons who gave of their time to address us and provide us with materials. Our deliberations were enriched by their efforts, and we have listed their names in Appendix A. We also thank the Narcotics Task Force of the Department of Law and Public Safety, which provided financial support for our meetings, and the various Cabinet Members who devoted staff and resources to permit completion of this project.

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DRUG TESTING IN THE WORKPLACE

CABINET TASK FORCE  
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## INTRODUCTION AND OVERVIEW

### The Problem

The enormity of the substance abuse problem in the United States is staggering. In 1988, according to the National Institute on Drug Abuse, over three and one-half million Americans were current users of cocaine, four million improperly used legal drugs, and over 12 million Americans used marijuana. Alcoholics numbered nine to twelve million people. President Bush remarked on September 5, 1989 in his speech on the new National Drug Control Strategy that, sadly, the number of cocaine users who use the drug frequently has doubled since 1985, to one million.

In New Jersey alone, Department of Health studies show drug treatment admissions increased by over 2,000 between 1985 and 1987; addictions to heroin and cocaine comprised the largest percentage of problems, with heroin addictions decreasing over the three-year period and cocaine increasing. In 1986, other DOH studies reveal, 31,949 adult alcoholics, comprising only 7.2% of all adult alcoholics in New Jersey, entered treatment programs.

The New Jersey Division of Narcotics and Drug Abuse Control reports that 50% of all crimes committed in New Jersey are drug-related. In 1986, 17,038 of all arrests were related to cocaine, a nearly three-fold increase since 1981. The Attorney General's 1988 Uniform Crime Report shows that 1988 saw a 29% increase of drug-related arrests over the numbers for 1987 with a total of 65,317 arrests; on average, over two-thirds of all such arrests were related to opium or cocaine and their derivatives. Also, in

1988, arrests for liquor law violations accounted for 16,497 of all arrests.

Substance abuse is, as one may imagine, pervasive in the workplace as well as in society at large. One in eight American workers have or are developing a drug or alcohol problem, according to Business and Legal Reports. Of 3,902 New Jersey State employees who received assistance from the Employee Advisory Service (EAS) in Fiscal Year 1989, 18.5% had problems with drugs and 11.5% with alcohol. Nationwide, substance abuse has been found at the highest levels of management and among manual laborers, professional and clerical employees and law enforcement officers.

The cost of our national substance abuse problem is expensive and multifaceted. Studies have shown that a loss of productivity in the workplace results from substance abuse. An employee will perform at only 55% to 66% of his or her capacity and may be chronically absent from work.

A substance abusing employee threatens workplace safety. He or she is four times more likely than a healthy employee to be involved in a workplace accident. Both private and public employers must pay the price of employee theft which may result from substance abuse. In addition, evidence exists that workers' compensation premiums are substantially higher because of substance abusing employees.

The use of illegal drugs, while only part of the problem, is of particular concern. A drug is classified as an illegal controlled dangerous substances on the basis of its addictive

properties: drugs are illegal because their use is dangerous and likely to lead to debilitating dependence. Further, use of illegal drugs increases demand for these substances and fuels the criminal organizations that supply drugs. Persons who are employed while they use illegal drugs are most likely to encourage others to use drugs. At the same time, the employed user is most likely to respond to legal and social sanctions and to treatment for illegal use of drugs. The State has a responsibility to provide a workforce that is effective and efficient: it must maintain the public trust. The State cannot condone criminal conduct by its workforce that contributes to the epidemic problem of substance abuse and its devastating effects.

Executive Order No. 191

Governor Thomas H. Kean established the Cabinet Task Force on Drug Testing in the Workplace in recognition of the problem of substance abuse and its adverse affects on safety and the effectiveness and efficiency of State employees. In Executive Order No. 191, Governor Kean explained that "abuse of drugs and alcohol in the workplace, among other things, reduces job efficiency, increases absenteeism and sick leave, and, most importantly, jeopardizes the lives and safety of fellow employees and citizens." The Governor called attention to the lack of a "uniform drug-testing policy" for State employees and proclaimed that drug testing of State employees "should be premised on uniform criteria." Governor Kean directed this Cabinet Task Force to formulate "a Statewide drug-testing policy that

equitably balances employee rights and the State's vital interests in public safety and in promoting and maintaining a drug-free workplace."

#### Background

Prior to the establishment of the Cabinet Task Force, several departments in the Executive Branch had undertaken independent initiatives to deal with the issue of drug testing of State employees. In response to inquiries from State, county and municipal law enforcement agencies, the Attorney General requested the New Jersey Criminal Justice Advisory Council to report on all aspects of drug testing. As a result of the Council's report, the Attorney General issued uniform, Statewide drug-testing guidelines for the law enforcement community in October of 1986. In 1988, the Department of Corrections instituted a drug-testing program for corrections officers, supervisors, investigators and recruits, and the Department of Labor issued a policy dealing with substance abuse by its employees. In June of 1988, the Commissioner of the Department of Transportation submitted a draft policy for drug testing of employees of that Department to the Governor for approval and suggested Cabinet level discussions on a Statewide drug testing policy.

Against this backdrop, Governor Kean issued Executive Order Number 191 and directed this Task Force to recommend a uniform and comprehensive policy on drug testing for State employees.

Task Force Approach to the Problem of Developing  
Uniform Policy and Guidelines

The Task Force reviewed legal and scientific literature and drug testing policies prepared by federal and state governmental agencies. It gathered available statistics on the extent of the problem of drug abuse among State employees. Its members heard from experts in the fields of Health, Employee Assistance Programs, Pharmacology, Forensic Chemistry and Civil Rights; a total of ten experts shared their experience and knowledge. A representative of one of this State's major Labor Unions addressed the Task Force, and a subcommittee met with the Labor Advisory Board to the Commissioner of Personnel.

The Task Force examined and vigorously debated the many complex issues involved in developing a uniform and equitable drug testing policy for the diverse State workforce. We exchanged correspondence on draft documents and met on fifteen occasions, most frequently for a full day, in an effort to develop a sound, equitable and workable proposal for a Statewide drug-testing policy.

The Task Force viewed Governor Kean's command to develop and recommend a uniform policy on drug testing as a directive that was as much intended to protect employees from diverse and unsound testing policies as it was to promote a drug-free workplace. The task of striking an equitable balance between individual rights implicated and State interests promoted was not a simple one.

In formulating this proposed policy, the Task Force was required to make sensitive judgments on difficult issues. In many cases, the proper choice between alternative solutions was far from clear, and the Task Force is not completely confident that every conclusion reached is correct. While we might have preferred to leave the difficult and sensitive decisions to others or for a later day, we felt that we did not have that luxury.

A majority of the Task Force endorsed each provision of the proposed policy; no member wholeheartedly endorses every one. Our report describes our disagreements and discussions in an effort to illuminate the issues by explaining the positions of all members of our group. The descriptions of minority positions are necessarily abbreviated; those departments that have deemed it necessary to elaborate have filed separate reports.

#### Overview of the Proposed Policy

The illegal use of drugs by State employees endangers the lives and safety of the public and the workforce. It reduces the efficiency of the workforce and increases the cost of the State services. Further, the illegal possession, use, sale and distribution of drugs is inconsistent with conduct that is reasonably expected of State employees. For all these reasons, the Task Force has concluded that the State should establish a clear rule prohibiting its employees from engaging in this conduct at all times.

A drug testing program that is properly implemented and administered can aid in identifying and deterring the illegal use of drugs: such a program is one means of promoting a drug-free workplace. The policy we propose calls for urinalysis by certified laboratories applying the most accurate methods now available, and it provides persons tested with a meaningful opportunity to challenge the results of a drug test. It is designed to preclude any action based on unreliable or inaccurate test results. The Task Force has concluded that under these circumstances drug testing is a necessary and viable means of promoting a drug-free workplace.

Drug testing, while necessary, is intrusive: both the collection and analysis of a urine sample entail invasions of privacy that persons may reasonably desire to avoid. Further, drug testing is expensive: the costs of accurate testing include not only the price of the urinalysis but also the expenses of monitoring, record keeping and affording hearings to persons who challenge test results. For these reasons, the Task Force has concluded that drug testing should only be employed in circumstances where it is consistent with individual rights and practical constraints.

The Task Force has determined that a legally and economically sound testing policy calls for distinctions based on the nature of the duties State employees perform. The State's need to test for illegal use of drugs is greatest where improper or inadequate performance of duties would pose a threat to safety or law enforcement. We recommend screening all persons who are

selected for these sensitive positions for use of illegal drugs. While the State cannot feasibly test all applicants for State employment, it cannot afford to place an applicant who is illegally using drugs in a sensitive position.

The proposed policy also includes special drug testing rules for employees who hold sensitive positions. We recommend provisions that would authorize random testing of these employees under narrowly defined circumstances and with prior approval of the Attorney General. In addition, the proposed policy would permit departments to test employees in sensitive positions for illegal use of drugs in conjunction with regular medical examinations.

The Task Force has concluded that employees who do not perform duties of a sensitive nature should not be required to submit to a drug test unless objective evidence provides a reasonable basis to suspect that a particular employee is illegally using drugs. The proposed policy requires review of all requests to perform reasonable suspicion drug tests in order to ensure that no employee is tested without good cause.

In order to reduce as well as detect the illegal use of drugs by State employees, the Task Force recommends either rehabilitation and discipline, or dismissal of any State employee who has illegally used, possessed, sold or distributed drugs. The Task Force believes that the State has a duty to ensure that employees who can be retained successfully complete necessary treatment and refrain from further illegal use of drugs. The proposed policy calls for drug testing in conjunction with

participation in a rehabilitation program.

An important goal of this proposed policy is encouraging employees to voluntarily seek assistance with substance abuse problems. Accordingly, the policy proposes that discipline should not ordinarily be imposed if an employee seeks assistance with a substance abuse problem before there is reasonable suspicion of illegal use of drugs or conduct affecting the safety of the public or safety in the workplace.

#### Conclusion

Governor Kean charged this Cabinet Task Force with the responsibilities of "formulating a Statewide drug-testing policy for State employees that equitably balances employee rights with the State's vital interests in public safety and in promoting a drug-free workplace" and "drafting drug testing guidelines based on statewide policy to be submitted to the Governor for his approval." Our proposed policy and this report represent our efforts to fulfill these responsibilities.

In light of the complexity of the issues addressed and the importance of the conclusions reached, the Task Force has recommended that Governor Kean circulate our report and the proposed policy to the representatives of the various collective bargaining units and to other interested parties. It is clear that the labor representative who addressed the Task Force and those that consulted with members of the Task Force have, and should be given an opportunity to express, views on drug testing.

Adoption of a Statewide drug-testing policy cannot, however, be delayed until consensus is reached. The Department of Transportation is in dire need of a testing program to protect the public it serves: it has foregone testing while awaiting a Statewide policy. Across the State workforce, employees who perform equally sensitive duties may or may not be tested for illegal use of drugs: the difference is attributable only to departmental affiliation. The National Drug Control Strategy calls for drug testing as a condition of some federal grants and advises that the Federal government will move to generally strengthen the requirements of the Federal Drug-Free Workplace Act of 1988. A sound, equitable and uniform drug-testing policy must be adopted with all reasonable speed if the State is to serve the public and its employees.

Accordingly, the Task Force recommends that the Governor either adopt this policy by Executive Order after a brief period for comment or direct the Department of Personnel or a group of all interested departments, each of which have responsibility to set standards of conduct and discipline for employees, to begin proceedings for rulemaking to implement this policy. The rulemaking process should be consistent with the provisions of the Administrative Procedure Act and with Supreme Court decisions governing rulemaking concerning issues on which various administrative agencies have overlapping responsibilities.

Implementation of this proposed policy will require funding. A commitment of funds and personnel will be necessary to identify sensitive positions, train supervisors, administer tests and

conduct hearings. Equally important, there will be a need for increased funding for programs for treatment of substance abuse: the proposed policy will no doubt result in identification of greater numbers of employees in need of rehabilitation. The evidence of the staggering costs of substance abuse is, however, overwhelming. Whether the costs of implementing and executing the proposed policy will ultimately be recovered through a reduction of the costs of illegal use of drugs is, admittedly and necessarily, a matter of speculation. The Governor must weigh the costs and benefits.

Effectuation of this proposed policy will require fixing responsibility for its implementation. The process of identifying Sensitive Positions, which requires the cooperation of all departments and agencies, will need oversight. Testing and laboratory sites must be identified. Questions of the proper construction of the policy will undoubtedly arise when it is applied in the workplace, and practicalities may call for modifications of the proposed policy. The process of the developing this proposed policy was difficult: its execution will be no easier. Therefore, the Task Force recommends that the Governor identify staff in the Governor's Office, or a subcommittee of the ex officio members of the Governor's Council on Alcoholism and Substance Abuse, or some State office as the body responsible for effectuating a Statewide drug-testing policy.

For the reasons outlined in this report, we recommend the drug-testing policy which follows to Governor Thomas H. Kean.

## PROPOSED DRUG-TESTING POLICY FOR STATE EMPLOYEES

I. PURPOSE: The purpose of this Policy is to promote and maintain a drug-free workplace and to thereby protect and foster the State's vital interests in the safety of the public and the safety, effectiveness and efficiency of the State workforce. Drug testing is merely one means of promoting a drug free workplace, and it is the purpose of this Policy to establish Statewide guidelines that limit drug testing to circumstances that are consistent with an equitable balance of the individual rights of State employees, their rights to a safe workplace and the State's vital interests in public safety and in promoting and maintaining a drug-free workplace.

### II. FINDINGS:

1. It is the policy of this State to maintain a drug-free workplace.
2. Federal law requires recipients of federal grant funds to prohibit the illegal possession, use, sale and distribution of drugs in the workplace.
3. The State has a responsibility to provide safe services to its citizens and a safe workplace for its employees.
4. The State has a responsibility to maintain a workforce that is effective and efficient.
5. Drug abuse has effects that include impairment of an abuser's faculties. These impairments, which may endure after intoxication, may lead to errors in judgment, inattentiveness, and diminished coordination, dexterity and composure. There is growing evidence that prolonged abuse of drugs has even more serious effects upon the health and faculties of abusers.
6. Impairments of the faculties that are caused by drug intoxication and drug abuse are a threat to the health and safety of State employees and to the public they serve. These impairments interfere with the safe, effective and efficient performance of government service.
7. Drug abuse in or outside of the workplace has been shown to lead to increased tardiness, absenteeism, use of health care benefits, and accident rates. Drug abuse, therefore, is inimical to efforts to maintain an effective and efficient workforce. It threatens the safety, security and overall working conditions of all employees and the safety and security of the public.

8. The illegal possession, use, sale or distribution of drugs is criminal conduct and, therefore, is inconsistent with conduct that is reasonably expected of State employees, who hold their positions as a public trust.

9. Current illegal use of drugs is incompatible with State employment.

10. State employees who illegally use drugs may be more susceptible to coercion and improper influence.

11. There are a variety of drug tests and these tests have varying degrees of accuracy; the procedures for collection and testing of urine samples and the procedures permitting an opportunity to challenge test results that are included in this Policy are ones that assure that only accurate test results will be used in employment decisions.

12. Drug testing is one means of promoting a drug-free workplace.

13. Drug testing implicates the constitutional rights of State employees, and this Policy limits drug testing to circumstances that are consistent with those rights.

14. The State should provide its employees with training on the problems of substance abuse and on available programs for treatment of substance abuse problems.

15. Employees should be encouraged to voluntarily seek treatment for substance abuse problems.

### III. STANDARDS FOR EMPLOYEE CONDUCT:

1. All State employees are required to refrain from the illegal use, possession, sale and distribution of drugs at all times.

2. a. All State employees whose responsibilities include supervision and management and who believe, on the basis of facts that would lead a reasonable person to believe, that there has been an incident involving the illegal use, possession, sale or distribution of drugs in the workplace shall report the incident to their Department or Agency Head through procedures developed by the Department or Agency Head.

b. Employees other than those with supervisory or managerial responsibilities who believe, on the basis of facts that would lead a reasonable person to believe, that there has been an incident involving the illegal use, possession, sale or distribution of drugs in the workplace are encouraged to report the incident to the Department or Agency Head through procedures developed by their Department or Agency Head.

c. Prior to administering a drug test or taking disciplinary action other than that necessary to maintain safety, health, order or effective direction of services or to eliminate a hazard, a Department or Agency Head who receives a report of the illegal possession with intent to distribute, sale or distribution of drugs in the workplace must forward the report to the Director of the Division of Criminal Justice.

3. Any State employee who is formally charged in a complaint or indictment with an offense prohibiting the use, possession, sale or distribution of drugs or who is convicted of an offense prohibiting the use, possession, sale or distribution of drugs must report the charge or conviction according to procedures established by the Department or Agency Head.

#### IV. SCOPE OF POLICY:

1. This Policy applies in all principal executive departments, all governmental agencies assigned to a principal executive department and the Office of the Governor.

2. This Policy states the circumstances under which each Department or Agency will administer drug tests to applicants and employees.

3. This Policy states uniform testing procedures that are to be employed to ensure reliability of drug tests conducted.

4. This Policy states uniform criteria that will be applied by each Department or Agency in determining the appropriate employment consequences for employees who illegally possess, use, sell or distribute drugs, whether the finding is supported by a confirmed positive drug test or other evidence.

5. This Policy states substantive and procedural rights for employees and applicants subject to employment consequences under its provisions.

6. Subsequent to the effective date of this Policy, any drug testing of applicants or employees shall be conducted under circumstances and in a manner consistent with this Policy. Nothing in the Policy shall be construed to prohibit testing required by Federal law. Nothing in this Policy shall be construed to invalidate otherwise valid drug tests administered or employment consequences imposed prior to the effective date of this Policy.

V. DRUG TESTING POLICIES AND EMPLOYMENT CONSEQUENCES--APPLICANTS:

1. Applicant Drug Testing.

a. Testing. Each Department or Agency, as a condition of appointment, must require applicants for Sensitive Positions to submit to a test for illegal use of drugs, subject to paragraphs 1 through 5 of Section VII.

b. Consequences.

(i) An applicant for a Sensitive Position who receives a confirmed positive test result must be rejected and may not thereafter seek appointment for a Sensitive Position in State service without first producing credible evidence that he is not currently illegally using drugs and without first consenting to unannounced testing for illegal use of drugs, as a condition of employment in the position sought, for a reasonable period of time, not to exceed one year.

(ii) Nothing in this Policy shall be construed to require a Department or Agency to offer employment to an individual who previously received a confirmed positive test result and has complied with the conditions stated in paragraph (i) of this subsection.

c. Employment Application. Each application for a Sensitive Position shall require the applicant to state: the date and circumstances of any previous denials of employment based on a confirmed positive preemployment drug test; the date and circumstances of any discharge from, or discipline during, employment that was based on a confirmed positive drug test or other evidence of illegal possession, use, sale or distribution of drugs; the date of any convictions involving illegal possession, use, sale or distribution of drugs.

d. Appeal Rights. An applicant who is rejected pursuant to the provisions of this section and who is entitled to the protections of the Civil Service Laws may challenge the basis for the rejection by invoking the Examination and Selection Appeals process provided in Chapter 4, subchapter 6, of Title 4A of the New Jersey Administrative Code. An applicant who is not entitled to the protection of the Civil Service Laws may employ procedures equivalent to those provided for in Section VIII, 3., b. In addition to any other issue that may be raised, the applicant may challenge the results of a confirmed positive test.

VI. DRUG TESTING POLICIES -- CURRENT EMPLOYEES:

1. Reasonable Suspicion Drug Testing.

a. Definition. "Reasonable suspicion" means the existence of facts that provide a reasonable, objective basis to suspect that a drug test of an employee will produce evidence of illegal use of drugs.

b. Reasonable Suspicion Testing: Criteria. Each Department or Agency may require an employee to submit to a drug test when:

(i) The Department or Agency can identify facts that provide a reasonable, objective basis to suspect that a drug test of a particular employee will produce evidence of illegal use of drugs; and

(ii) The particular reasonable suspicion test has been approved, after review of the facts supporting a finding of reasonable suspicion:

(1) By the Department or Agency Head, or designated representative of the Department or Agency Head, if the suspicion is based solely on evidence of illegal use of drugs;

(2) By the Director of the Division of Criminal Justice or his designated representative, if the suspicion is based on evidence that includes evidence of the illegal possession of drugs with the intent to distribute or the illegal sale or distribution of drugs.

2. Random Drug Testing.

a. Definition. "Random drug testing" means drug testing that is not supported by individualized reasonable suspicion and is conducted by selecting employees on the basis of objective criteria unrelated to the employees' identity.

b. Random Testing: Criteria.

(i) A Department or Agency may conduct random drug tests of employees enrolled in law enforcement training programs if:

(1) The persons to be tested are participating in a training program for a law enforcement position that has been identified as Sensitive according to the provisions of paragraphs 1 through 4 of Section VII; and

(2) The persons to be tested have been given notice prior to participation in the training program that random testing will be conducted and that negative results on random drug tests are a condition of successful completion of the training program; and

(3) The Attorney General has approved the Department or Agency random testing program.

(ii) A Department or Agency may conduct random drug tests of all employees in a group if:

(1) The employees in the group to be tested hold positions that have been identified as Sensitive according to the provisions of paragraphs 1 through 4 of Section VII, and the Department or Agency has a specific, identifiable and articulable basis for a reasonable suspicion that unidentified employees in the group to be tested are illegally using drugs, and random testing is necessary to alleviate a serious threat to the public safety presented by the illegal use of drugs; and

(2) The Attorney General has given prior approval of the specific random drug test; and

(3) The employees in the group to be tested have been advised that they hold Sensitive Positions and may be subject to random drug tests on this basis.

(iii) A Department or Agency may conduct random drug tests of all employees in a group if:

(1) The employees in the group hold positions that have been identified as Sensitive according to the provisions of paragraphs 1 through 4 of Section VII; and;

(2) The positions are so sensitive that improper or inadequate performance of the duties would present an immediate and substantial threat to the lives of numerous persons; and

(3) Random drug testing is necessary to detection of the illegal use of drugs among employees in the group; and

(4) The Attorney General has given prior approval of the plan for random tests of the employees in the group; and

(5) The Commissioner of Personnel, the Director of the Office of Employee Relations and the employees in the group have been given prior notice of the plan to conduct random drug tests.

(iv) No Department or Agency may conduct random drug tests under any circumstances other than those identified in subsections (i) through (iii) of this section without the express approval of the Governor.

### 3. Medical Testing.

a. A Department or Agency may conduct drug tests in conjunction with regular medical examinations if:

(i) The employees in the group hold positions that have been identified as Sensitive according to the provisions of paragraphs 1 through 4 of Section VII; and

(ii) The drug test is given as part of a bona fide regular medical examination, which is required as a condition of employment for all employees in the group, to determine fitness for duty; and

(iii) The drug test is conducted according to the procedures set forth in this Policy; and

(iv) The Attorney General has approved of the plan; and

(v) The employees have been given prior notice that a test for the illegal use of drugs will be included in the regular medical examination.

### VII. SENSITIVE POSITIONS:

1. Identification of Sensitive Positions: Each Department or Agency and the Department of Personnel must identify positions within the Department or Agency that are Sensitive. The following factors should be considered:

a. Whether improper or inadequate performance of the duties of the position presents a substantial risk to the health and safety of the public, coworkers or the employee because the duties require

(i) operation of a vehicle of public transportation;

(ii) performance of maintenance work that affects the safe operation of a vehicle of public transportation;

(iii) maintenance or operation of devices that regulate the safe travel of vehicles of public transportation;

(iv) carrying a firearm;

(v) operation of heavy or dangerous equipment or machinery;

(vi) performance of other duties that the department or agency can demonstrate would pose equally substantial threats to health and safety if improperly or inadequately performed.

b. Whether performance of the duties of the position by a person illegally using drugs poses a substantial risk to the proper enforcement and administration of the criminal law because the duties require

(i) direct responsibility for enforcement of the criminal law;

(ii) direct access to confiscated controlled substances;

(iii) direct responsibility for the supervision, custody or transport of persons charged with or convicted of crime or persons charged with delinquency or adjudicated delinquent;

(iv) performance of other duties that the Department or Agency can demonstrate would pose equally substantial threats to the proper administration of the criminal justice system if improperly or inadequately performed.

2. Submission of Lists of Sensitive Positions for Approval. Within 60 days of the approval of this Policy each Department or Agency must submit a List of Sensitive Positions to the Department of Personnel. The list may refer to all positions in a Title, or it may designate certain positions, identified by position number, in a Title. The Department or Agency must state its reason or reasons for identifying all positions in a Title, or particular positions, as Sensitive.

3. Approval of Listing of Sensitive Positions. Upon receipt of a Department or Agency List of Sensitive Positions, the Department of Personnel shall review the list for consistency with this Policy. Within 90 days of receipt, the Department of Personnel, after consultation with the Attorney General and the submitting Department or Agency Head, shall notify the Department or Agency of its approval or disapproval of the categorization of each Title, or particular position in a Title, on the Department or Agency List.

4. Amendment of List of Sensitive Positions. A Department or Agency may amend its List of Sensitive Positions by submitting proposed amendments, either additions or deletions, for approval in accordance with the procedures identified in paragraphs 2 and 3 of this section of the Policy.

5. Approval of Testing For Applicants in Sensitive Positions. Each Department or Agency that employs persons in Sensitive Positions must submit a plan for applicant testing to the Attorney General for approval prior to conducting applicant testing. The plan must:

a. include a provision for reasonable notice to applicants who will be subject to testing;

b. conform with the procedures for testing included in these guidelines;

c. provide for consideration of evidence of an applicant's:

(i) previous denials of employment based on a confirmed positive preemployment drug test;

(ii) discharge from, or discipline during employment based on a confirmed positive drug test or other evidence of illegal possession, use, sale or distribution of drugs;

(iii) convictions involving illegal possession, use, sale or distribution of drugs.

d. The Attorney General must approve or disapprove the plan within 60 days.

VIII. CONSEQUENCES OF ILLEGAL USE, POSSESSION, SALE OR DISTRIBUTION OF DRUGS BY STATE EMPLOYEES:

1. Consequences Where Department or Agency Finds Illegal Use, Possession, Sale or Distribution of Drugs.

a. Following a confirmed positive drug test or a finding that an employee has illegally possessed, used, sold or distributed drugs, an employee must be discharged unless the employee:

(i) agrees to participate, if required by the Department or Agency, in a counseling or rehabilitation program that has been approved by the Employee Advisory Service of the Department of Personnel or by the Department or Agency Head and any Federal or State agency responsible for the approval or licensure of such programs and agrees to provide and authorize the EAS or other treatment program to provide the Department or Agency with information relating to the employee's progress in and successful completion of the counseling or rehabilitation program; and

(ii) agrees to refrain from the illegal use of drugs; and

(iii) successfully completes any required counseling or rehabilitation program; and

(iv) consents to unannounced drug testing for a reasonable period of time not to exceed one year; and

(v) refrains from the illegal use of drugs.

b. Where action to discharge is not taken because the employee complies with the five conditions specified above, appropriate discipline must be imposed. Appropriate discipline may range from written reprimand to discharge.

c. Nothing in Subsection (a) or (b) precludes dismissal where the employee holds a position that has been designated Sensitive according to the provisions of paragraphs 1 through 4 of Section VII or where the circumstances of the individual case require dismissal.

d. An employee who is enrolled in a training program for a law enforcement position will be denied the permanent appointment that would follow upon successful completion of training.

2. Voluntary Participation in Treatment Program. Employees are encouraged to voluntarily seek assistance in dealing with substance abuse problems.

a. Discipline should not ordinarily be imposed if an employee seeks assistance with a substance abuse problem from EAS or the department or agency before there is reasonable suspicion of illegal use of drugs or conduct affecting the safety of the public or safety in the workplace.

b. If an employee in a Sensitive Position seeks assistance with a substance abuse problem, the employee will be required to provide and to authorize the EAS or other treatment program to provide the department or agency with information relating to the employee's progress in and successful completion of the counseling or rehabilitation program.

### 3. Hearings

a. Procedures: Civil Service Employees. Discipline of permanent employees in the career service and of persons serving a working test period must be administered in accordance with applicable regulations and procedures of the Merit System Board, N.J.A.C. tit. 4A, ch. 2, or in accordance with the provisions of any applicable negotiated labor agreement.

b. Procedures: Employees Not Covered by the Civil Service Laws or a Negotiated Labor Agreement. Employees who are subject to discipline under the provisions of this Policy and who

are not covered by the provisions of the Civil Service Laws or a negotiated labor agreement will be afforded hearing rights under procedures adopted by each Department. The Department hearing procedures for both major and minor discipline imposed pursuant to this policy must be substantially equivalent to the department level proceedings provided for major discipline in Chapter 2 of Title 4A of the New Jersey Administrative Code. There will be no administrative appeal beyond the department level.

c. Procedures: Employees Covered by A Negotiated Labor Agreement but not by the Civil Service Laws. The provisions of the applicable negotiated labor agreement will apply to the discipline of any employee who is not entitled to the protection of the Civil Service Laws but is entitled to the protections of a negotiated labor agreement.

d. Issues that may be Raised in a Disciplinary Hearing Required. In addition to any other issue that may be raised, an employee who is subject to discipline under the provisions of this Policy may challenge the results of a confirmed positive test and the basis for the request to submit to testing or may contend that his conduct did not constitute a refusal to submit to a drug test.

e. Factors To Be Considered In Determining Quantum of Discipline. The following factors are to be considered in determining appropriate discipline:

(i) The extent to which the employee's illegal drug use endangered or threatened the health or safety of other employees or the public;

(ii) Factors relevant to the sensitivity of the employee's position, as identified in paragraph 1 of Section VII of this Policy, and the demands of the sensitivity of the position with respect to questions concerning discharge, suspension or transfer;

(iii) Whether the drug related conduct occurred in the workplace;

(iv) The extent to which the employee's job performance has been affected;

(v) Whether the employee to be disciplined voluntarily reported the illegal use of drugs;

(vi) The need to deter the employee and other employees;

(vii) Whether the employee previously has been disciplined for illegal use of drugs or other conduct related to illegal drugs;

(viii) The need to ensure the public that State government enforces its Policy of maintaining a drug-free workplace;

(ix) The employee's willingness to participate in necessary rehabilitation;

(x) Other prior disciplinary action.

f. Forfeiture. Where forfeiture of public office or employment is required under the provisions of N.J.S.A. 2C:51-2, that penalty must be imposed.

**IX. TAMPERING WITH DRUG TEST AND REFUSAL TO SUBMIT TO A DRUG TEST AUTHORIZED UNDER THE PROVISIONS OF THIS POLICY:**

**1. Tampering.**

a. Subject to the procedures specified in Section VIII, 3, a.-d., an employee who purposely falsifies or attempts to falsify a drug test administered pursuant to this Policy shall be subject to discipline.

b. Subject to the appeal rights specified in Section V, d., an applicant who purposely falsifies or attempts to falsify any drug test authorized pursuant to this Policy shall be rejected.

c. Any person who purposely falsifies or attempts to falsify a drug test may be subject to criminal prosecution.

**2. Refusal to Submit to A Drug Test Authorized Under the Provisions of this Policy.**

a. Refusal. No applicant or employee may refuse to submit to a drug test authorized under this Policy.

b. Consequences: Applicants. Subject to the appeal rights specified in Section V, d., an applicant who refuses to submit to a test authorized under this Policy must be rejected. In addition to any other issue that may be raised, the applicant may contend that his or her conduct did not constitute a refusal to take the test.

c. Consequences: Employees. Subject to the procedures specified in Section VIII, 3, a.- d., an employee who refuses to submit to an authorized test must be disciplined for insubordination: discipline may include termination. Subject to the procedures specified in Section VIII, 3, a.- d, an employee who is enrolled in a training program for law enforcement and refuses to submit to a drug test authorized pursuant to the

provisions of this policy will be denied the permanent appointment that would follow upon successful completion of training. In addition to any other issue that may be raised in a disciplinary proceeding for refusal, the employee may challenge the basis for the request to submit to testing or may contend that his conduct did not constitute a refusal to submit to a drug test.

#### X. REPORTING PROCEDURES.

1. Development of Procedures for Reporting of Formal Charges, Convictions, and Illegal Conduct in the Workplace. Each Department or Agency head must develop and advise all employees of procedures through which employees are to report formal charges and convictions, as required by Rule 3 of Section III, and through which employees with supervisory or managerial responsibilities are required to report the illegal possession, use, sale or distribution of drugs in the workplace, as required by Rule 2 of Section III. The procedures must specify the time within which such reports must be made and the manner in which such reports must be made. The Department or Agency head must notify all employees that failure to make a required report will be considered as insubordination and treated accordingly.

#### XI. PUBLICATION OF DRUG POLICY.

1. Each Department or Agency shall provide to each employee and each applicant whom the Department or Agency intends to offer employment:

- a. a copy of this Policy
- b. the Department or Agency procedures for reporting formal charges of and convictions for drug offenses, and the Department or Agency procedures for reporting drug offenses in the workplace.

#### XII. TRAINING.

The Department of Personnel, in consultation with other departments as appropriate, will develop training on the following:

1. For all employees,
  - a. the health and workplace problems presented by substance abuse;
  - b. the available treatment and counseling programs;
  - c. the provisions of this Policy.
2. For supervisors,
  - a. the provisions of this Policy;
  - b. "reasonable suspicion" drug testing;
  - c. the various means of identifying and dealing with performance problems that may be attributable to substance abuse;

3. For monitors who will be responsible for collection of specimens for drug testing, the training outlined in Section XIII.

### XIII. TESTING PROCEDURES

#### A. In General.

1. Applicability. All drug tests administered pursuant to the provisions of this Policy shall be conducted in accordance with the procedures outlined in this Section.

2. Modification. The Governor may modify these procedures to reflect improvements in available technology, to reduce or supplement the list of substances that will be screened, or to diminish or increase the cutoff levels for positive tests.

#### B. Authorization Procedures.

1. No drug tests will be performed unless the test is:

a. A test of an applicant for a Sensitive Position authorized pursuant to Section V of this Policy.

b. A reasonable suspicion test authorized pursuant to the provisions of Section VI, 1.

c. A random drug test authorized pursuant to the provisions of Section VI, 2.

d. A medical test authorized pursuant to the provisions of Section VI, 3.

2. No test should be performed unless a Drug Test Authorization Form has been properly executed. (Sample attached).

#### C. Collection Sites.

1. Designation of Collection Sites. Each department and agency should designate the number of sites it deems necessary for the collection of urine samples that will be tested pursuant to the provisions of this Policy. Departments and agencies should cooperate to minimize the number of collection sites by establishing joint collection sites through cooperative agreements with other departments and agencies.

2. Requirements for Collection Sites.

a. Security. If possible, access to a collection site should be limited at all times to security staff, test monitors and

persons submitting samples. If it is not possible to so restrict access at all times, access should be so restricted during testing.

b. Materials. Each Collection site should have the following:

- Acknowledgment Forms (Applicant and Employee);
- Medication Forms;
- Continuity of Evidence Forms;
- Specimen Containers (120 ml) in Sealed Plastic Bags;
- Refrigerators and freezers for storage of specimens;
- Sealing tape;
- Plastic Evidence Bags;
- Labels;
- Facilities adequate to permit persons submitting specimens to wash and dry their hands;
- Blue dye for water in any toilet in the collection site;
- Stalls or screens to provide a person who does not hold or is not applying for a Sensitive Position with privacy from visual observation; the secluded area will not include a water supply; if there is a toilet in the area its water supply will be dyed blue;
- Record book for recording the date and identification number of each second specimen retained in the collection site freezer at the request of the person tested.

D. Designation of Collection Site Monitors. Each department and agency should designate the number of collection site monitors necessary to conduct testing authorized pursuant to this Policy. Where joint collection sites are utilized, the monitors may be designated as provided by cooperative agreement.

E. Qualifications of Collection Site Monitors. Collection site monitors will be persons of the same sex as the person to be tested who have completed a training program approved by the Department of Personnel after consultation with other appropriate departments. The training should cover site security; means of tampering with tests; the proper completion of the required forms; proper handling of specimens.

F. Collection Procedures. The collection site monitor should:

1. Verify the identity of the person submitting a specimen either by photo identification or by identification by a department or agency supervisor or personnel officer;
2. Examine the Drug Test Authorization Form;

3. Request the person submitting a specimen to complete the following:

- a. the appropriate acknowledgment form;
- b. a medication form.

4. Instruct the person to remove all unnecessary outer clothing.

5. Observe the person who will submit the specimen wash and dry his or her hands.

6. Examine, with the person who will submit the specimen, the specimen container in its sealed plastic bag: where the person will submit two samples each specimen container in its sealed plastic bag will be examined.

7. Instruct the person to produce one 50 ml specimen; instruct the person that he or she may produce a second sample, which will be preserved for 30 days in the event that the person desires to procure an independent test.

8. a. If so required by the department or agency, make visual observation of the voiding process if:

(1) the person is one who holds or is applying for a Sensitive Position in law enforcement;

(2) the monitor has observed the person engage in conduct clearly indicating an attempt to substitute or adulterate the sample;

(3) the person has previously been found to have used a controlled substance or tampered with a test; or

(4) the test is one to which the employee has consented as a condition of continued employment following rehabilitation.

b. In all cases other than those identified in subsection a., allow the person to void with the privacy of a screen or stall but make aural observations of the voiding process.

c. In any case where the employee or applicant requests an observer, allow an observer.

d. Indicate and describe the circumstances surrounding any failure to produce a specimen or any other unusual behavior on the Monitor's Checklist.

9. Observe while the person:

a. seals the container(s);

b. tapes the container(s);

c. affixes a label bearing the person's social security number (or some other number assigned by the department or agency) and date to the specimen container(s) and sealing tape(s);

d. seals the plastic evidence bag(s);  
e. affixes label(s) bearing the identifying number to the bag(s).

10. Complete the Collection Site Monitor's Checklist form, Drug Testing Incident Report form and the appropriate portion of the Continuity of Evidence form(s).

11. Affix the Continuity of Evidence form(s) to the sealed bag(s) with evidence tape.

12. Refrigerate the specimen that will be transported to the laboratory, transport (or cause the transfer of) the specimen to an approved laboratory.

13. If specimens are hand delivered, secure laboratory's acknowledgment of receipt on Continuity of Evidence form and a copy of the form; if specimens are shipped, laboratory will return the form to the department or agency head, or designee.

14. Place any second specimen supplied in a limited access freezer: the monitor will enter a record (by number and date only) of all second specimens deposited in the freezer in a permanent record book.

15. Forward, at the end of the collection period each day, all the monitor's checklists, acknowledgment forms, medication forms, continuity of evidence forms and all copies of any paperwork indicating the names of persons who submitted samples to the department or agency head, or designee. No records, other than the permanent record book of specimens retained, will be kept by the monitor.

16. The monitor will dispose of specimens retained 30 days after the date of collection.

#### G. Urinalysis

1. All urinalysis will be conducted by the State Medical Examiner, the State Police Laboratory, or by laboratories certified by either the federal government pursuant to 49 CFR Part 40 (53 Fed. Regis. 47002 et seq.), or the New Jersey Department of Health. The New Jersey Department of Health will not approve a laboratory unless the laboratory has adequate quality assurance procedures that include blind performance tests, chain of custody procedures that require an entry documenting date and purpose each time a specimen is handled or transferred, and personnel qualified to interpret the results of GCMS tests. Nothing in this Section shall be construed to prohibit any department or agency from obtaining the approval necessary to perform initial or confirmatory tests.

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2. The Enzyme Multiplied Immunoassay Technique (EMIT) will be employed to screen all specimens for illegal drugs. Specimens will be screened for drugs as listed below: any specimen that does not reveal the presence of drugs at or above the levels specified below will be deemed negative and reported as such.

Drug	ng/ml
Marijuana metabolite	20 (law enforcement) 50 (all others)
Cocaine metabolite	300
Opiate metabolites	300
Phencyclidine	25
Amphetamines	1000

No further tests will be performed on specimens that are negative under these standards.

3. A specimen that tests positive under the foregoing criteria will be subjected to a confirmatory test. Gas chromatography/mass spectrometry (GCMS) will be employed to confirm the presence of any illegal drug revealed by the EMIT. Results of a GCMS will be deemed negative and reported as such unless the laboratory review officer determines that the results reveal the presence of one of the enumerated controlled substances.

4. The laboratory personnel responsible for transmitting tests results will immediately forward all confirmed positive test results to the department or agency head or designee.

#### H. Department or Agency Action.

1. Upon receipt of a confirmed positive test result the department or agency head or designee will:

a. notify the applicant or employee and advise the person of the right to obtain an independent analysis, according to procedures to be developed by the department or agency, if the employee submitted a second specimen; and,

b. submit the result and medication form to a medical officer or other review officer with sufficient training to interpret and evaluate positive results in light of relevant biomedical information.

2. The medical or review officer should advise the department or agency head or designee if the positive result is attributable to a cause other than the use of illegal drugs.

3. The department or agency head will take appropriate action according to the substantive and procedural provisions of this Policy or, if a positive test result is attributable to use of a legal prescription drug that impacts on job performance, according to any applicable regulations governing fitness for duty.

4. Each department or agency should maintain all records of positive tests results and all medication forms in strictest confidence. An applicant or employee who seeks to challenge a test result or to challenge action based on refusal to submit to a test may have access to all records dealing with his or her test.

## SECTION I: COMMENTARY

This proposed uniform drug-testing policy for State employees is designed to promote a drug-free workplace and thereby protect the State's interests in safety and in an effective and efficient workforce. The purpose is derived from Executive Order No. 191, which established this Task Force.

Recognizing that substance abuse threatens public safety and the safety, efficiency and effectiveness of the State workforce, Governor Kean directed the Task Force to develop a drug testing policy that "equitably balances employee rights with the State's vital interests in public safety and in promoting and maintaining a drug-free workplace." Drug testing is one means of reducing the illegal use of drugs by State employees. This proposed policy sets forth the circumstances under which the Task Force believes that drug testing is consistent with an equitable balance of the employee rights it implicates and the State interests it furthers.

### Task Force Debate on the Purpose of This Policy

This proposed policy is, as the Governor requested, a drug-testing policy. It addresses the abuse of illegal substances. The Departments of Health, Higher Education and the Public Advocate object to our formulation of a policy that does not deal with legal substance abuse. Those Departments have prepared a report on this issue that appears in Appendix B.

The majority of the Task Force recognizes that substance abuse takes several forms. The abuse of illegal drugs, however, is of particularly grave concern because of its unlawful nature and its prevalence. The integrity of the State workforce is at stake, its ability to maintain the public trust under attack. A State employee who abuses illegal drugs increases the potential that he or she will be the target of undue or illegal influence. It is possible, even likely, that such an employee is using, selling or proselytizing the use of illegal drugs on the job. That this may occur among law enforcement or corrections officers and other State employees sworn to uphold the law is particularly alarming.

For these reasons, the Task Force concluded that the breadth of the substance abuse problem should not divert our attention from the impact of illegal drug abuse on the workplace and how drug testing may stem the tide of employee abuse of illegal drugs. The Governor directed this Task Force to formulate a Statewide drug-testing policy. A different group, the Governor's Council on Alcoholism and Drug Abuse, is charged with formulation of a comprehensive plan "for the treatment, prevention, research, evaluation, education and public awareness of alcoholism and drug abuse in this State . . . ." L. 1989, c. 51. Our charge is not so broad, and if we fail to propose a uniform, equitable criteria for drug testing we will serve neither the public nor State employees.

## SECTION II: COMMENTARY.

This Section lists the findings upon which the Task Force based the substantive provisions of this proposed policy. The foundations for the findings are discussed below.

### Findings 1 & 2 : STATE DRUG-FREE WORKPLACE POLICY AND FEDERAL DRUG-FREE WORKPLACE REQUIREMENTS.

State policy requires a drug-free workplace for State employees. Governor Thomas H. Kean has declared, "The State of New Jersey is committed to maintaining a drug-free workplace for all State employees in order to protect the health and safety of State employees and the public." Exec. Order No. 204, para. 2 (1989). In Executive Order No. 191, the Governor described the State's interest in promoting and maintaining a drug-free workplace as a "vital" State interest. Exec. Order No. 191, declaration 3 & para. 2.a. (1988).

The Legislature's commitment to eradication of drug and alcohol abuse is further evidence of State policy on this issue. The Legislature established the Governor's Council on Alcoholism and Drug Abuse to address the prevention and treatment of substance dependence. See L. 1989, c. 51. In recognition of the serious and pervasive threat to the health, safety and welfare of the citizens of this State posed by the unlawful use, manufacture and distribution of controlled dangerous substances, the Legislature enacted a Comprehensive Drug Reform Act. N.J.S.A. 2C:35-1.1 et seq.

This important State policy is reinforced by federal law. The Drug-Free Workplace Act of 1988 requires all recipients of federal grant funds to adopt a drug-free workplace policy and maintain a drug-free workplace. Public Law 100-960, Title V, Subtitle D. That law also compels grant recipients to prohibit the illegal use, possession, sale and distribution of drugs in the workplace. This State has adopted a drug-free workplace policy that complies with the Drug-Free Workplace Act; its obligation to execute this policy is a continuing one.

Finding 3: THE STATE'S RESPONSIBILITY TO PROVIDE SAFE SERVICES AND A SAFE WORKPLACE

The State's duty to provide a workforce that will not endanger the public is well-established. Indeed, our Legislature has recognized that it is "inherently unfair" to prohibit persons who are injured by a State employee from recovering for injuries resulting from breach of that duty. N.J.S.A. 59:1-2, 59:2-2; see, e.g., *Corridon v. City of Bayonne*, 129 N.J. Super. 393, 396-97 (App. Div. 1974) (duty to supervise officer who carried firearm while intoxicated). Equally plain is the duty to provide State employees with a safe workplace. N.J.S.A. 34:6A-26, 34:6A-33 to -34, 59:2-2; see, e.g., *Servis v. State*, 211 N.J. Super. 509, 512 (Law Div. 1986) (wrongful death claim by survivor of State employee injured in workplace actionable under the Tort Claims Act). The State cannot allow its workers to endanger the public or one another.

Finding 4: THE STATE'S RESPONSIBILITY TO MAINTAIN AN EFFECTIVE AND EFFICIENT WORKFORCE

The State's duty to provide an effective and efficient workforce is founded in provisions of this State's constitution. The reorganization of the Executive Branch of Government accomplished by New Jersey Constitution of 1947 and legislative action implementing its provisions was shaped by principles "directed toward the achievement of maximum efficiency and economy in the execution of State administrative activities." Milmed, *The New Jersey Constitution of 1947* (reprinted in *N.J.S.A. Constitution, Articles 1 to 3*, at 103). Further, our Constitution requires a Civil Service system that is based on "merit and fitness." *N.J. Const. of 1947, Art. 7, sec. 1, para. 2.*

Toward the end of providing an effective and efficient workforce, the Legislature has declared that it is the policy of this State "to select and advance employees on the basis of their relative knowledge, skills and abilities" and to "provide public officials with appropriate appointment, supervisory and other personnel authority to execute properly their constitutional and statutory responsibilities." *N.J.S.A. 11A:1-2.*

Our courts have recognized the State's responsibility to provide a workforce that has integrity and is capable, *Matter of Carberry*, 114 N.J. 574, 578 (1989), and its duty to maintain "an adequate, efficient and effective public workforce," *State v. Local 195, IFPTE*, 179 N.J. Super. 146, 153 (App. Div. 1981), certif. denied, 89 N.J. 433 (1981).

Findings 5, 6 & 7: THE EFFECTS OF SUBSTANCE ABUSE AND THEIR IMPACT ON PUBLIC SAFETY AND THE EFFECTIVENESS AND EFFICIENCY OF THE STATE WORKFORCE

Substance abuse, in or outside of the workplace, has tremendous impact on public safety and the effectiveness and efficiency of the workforce. The employer costs in the form of increased use of sick leave and health benefits, absenteeism, and accident rates and decreased productivity noted by Governor Kean in Executive Order No. 191 are well documented. According to one source, "Workers with drug abuse problems [including alcohol and prescription drugs] have an absentee rate 16 times greater than the median, are four times as likely to be involved in an accident, use one-third more sickness benefits, have five times as many compensation claims while on the job, and perform at only 55% to 66% of their capacity." D. Masi, Drug Free Workplace: A Guide For Supervisors 25 (1987).

Dr. Molly Joel Coyo, Commissioner of Health, advised the Task Force that estimates place last year's nationwide costs of substance abuse in terms of health benefits and reduced productivity at approximately 99 billion dollars. The Department of Personnel reports that of the 3,902 State employees who utilized Employee Advisory Service in fiscal year 1989, 18.5 percent had drug problems and 11.9 percent had alcohol problems.

In 1986, in his Blueprint for a Drug-Free Workplace, Governor Kean noted that the costs of the battle against illegal drugs "are not limited to the price of incarcerating convicted drug pushers or of providing treatment programs for drug addicts, but also include higher medical insurance premiums, worker

compensation expenses, and decreased employee productivity due to absenteeism, slow-downs, mistakes and sick leave." Governor Thomas H. Kean, *Blueprint for a Drug-Free New Jersey* 5 (1986). In 1987, the Legislature enacted the Comprehensive Drug Reform Act of 1986 finding that "unlawful use, manufacture and distribution of controlled dangerous substances continues to pose a serious and pervasive threat to the health, safety and welfare of the citizens of this State." N.J.S.A. 2C:35-1.1.

Abuse of illegal drugs affects health, productivity and safety in many ways. Drug abusers are known to neglect nutrition, sleep needs and their general health, which makes them more vulnerable to disease and illness generally. N.I.D.A., *Strategic Planning for Workplace Drug Abuse Programs* 3 (1987).

Repeated use of cocaine can cause chronic fatigue, convulsions, depression, irritability, memory problems, nasal bleeding, paranoia and severe headaches. President's Commission on Organized Crime, *America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime* 16 (1986).

Marijuana smoking harms the lungs and may cause bronchitis, emphysema and lung cancer; it brings about chronic mental change. *Id.* at 39, 42. Marijuana use affects psychomotor performance, short-term memory, concentration, logical thinking, tracking performance, glare recovery, coordination, depth perception, time sense and peripheral vision. *Id.* at 41; Schwartz & Hawks, *Laboratory Detection of Marijuana U.S.C.*, 254 *JAMA* 788 (1985). Regular use of marijuana has been identified as a cause of amotivational syndrome. *America's Habit*, *supra* at 41.

Substance dependence in general is characterized by a pattern of procuring, taking and recovering from the effects of the drugs; severely dependent persons allocate virtually all of their time around these activities. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed 1987). As Dr. Robert J. Pandina explained to the Task Force, the effects of drug use extend far beyond intoxication.

Abuse of illegal substances is of particular concern because of its long term affect on health and fitness for employment. Controlled dangerous substances are classified as such on the basis of their addictive properties. N.J.S.A. 24:21-6 to -8.1. The substances are illegal because they are harmful and likely to cause debilitating dependence.

The New Jersey Supreme Court recently gave a graphic account of what the Court described as "the devastating effect of drugs" on the life of one attorney who was disbarred for misappropriation of client funds:

It cannot be doubted that respondent's judgment was impaired by cocaine. Anyone who doubts the effect of cocaine on the health and well-being of the young person need only to read this record. At first attracted to the drug by its promise of heightening his mental prowess while he was working the long hours of a young Rate Counsel, respondent soon became pathetically dependent. His respiratory tract became so severely damaged by the ingestion of the drug that he bled from its use. Had he not checked himself into a detoxification program in early 1984, he is certain that he would have died.

Matter of Steinhoff, 114 N.J. 268, 271 (1989). The Court's opinion describes how drug abuse affected all aspects of the

attorney's practice from his dress, to his neglect of clients, to his mishandling of trust accounts. Id. at 269.

Evidence of the sort outlined above led the Task Force to find that use of illegal drugs may cause impairments that endure beyond intoxication and that prolonged abuse of drugs has serious effects on the health and faculties of drug abusers.

It led the Task Force to conclude that drug abuse increases workplace accidents, leads to increased absenteeism, raises the cost of health care benefits, and undermines State efforts to maintain an effective and efficient workforce.

On the basis of this evidence, the Task Force found that drug abuse threatens the safety and working conditions of State employees and the safety and security of the public.

Finding 8, 9 & 10: ILLEGAL CONDUCT RELATED TO CONTROLLED DANGEROUS SUBSTANCES AND STATE EMPLOYMENT

The Task Force found that the illegal possession, use, sale or distribution of drugs, in or outside of the workplace, is inconsistent with the conduct reasonably expected of State employees who hold their positions as a public trust. It concluded that current illegal use of drugs is incompatible with State employment. Persons who are involved with illegal drugs are involved in criminal conduct. N.J.S.A. 2C:35-1 et seq.

While public policy obviously precludes all persons from violating the criminal laws of this State, the Legislature has taken special action to disapprove criminal conduct by public employees. Both the forfeiture of office and civil service laws

provide employment sanctions for criminal conduct by State employees. N.J.S.A. 11A:4-11, 2C:51-2; N.J.A.C. 4A:2-2.3(a)(5)-(6). The policy expressed in these laws is required in a system of State employment that is based on "merit and fitness."

"[O]ur government is founded upon trust." State v. Gregorio, 186 N.J. Super. 138 (Law Div. 1982). State employees who commit crimes undermine that foundation.

Respect for the law and confidence in public officers cannot be compelled. These attributes stand as a voluntary tribute to just laws and integrity in public office. While they exist, both the law and the official will retain public trust.

Hayes v. Hudson County Bd. of Freeholders, 116 N.J. Super. 21, 26 (App. Div. 1971) (quoting People ex rel. Keenan v. McGuane, 13 Ill.2d 520, 150 N.E.2d 168, 177 (1958)). State employees

stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity.

Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 474-75 (1952) (citations omitted). "The enforcement of these obligations is essential to the soundness and efficiency of our government, which

exists for the benefit of the people who are its sovereign." Id. at 476.

The Legislature has embodied this common law doctrine of public trust in the forfeiture of office statute, which is applicable to all State employees. *State v. Botti*, 189 N.J. Super. 127, 140-41 (App. Div. 1983) (equating the forfeiture of office law and the common law doctrine of public trust). Crimes and offenses that impact on the performance of duty violate the public trust. See N.J.S.A. 2C:51-2; *Botti*, 189 N.J. Super. at 140-41 (forfeiture of office upon mayor's conviction for mail fraud in private business transactions).

For these reasons, the Task Force found that illegal drug-related activity is inconsistent with conduct that is reasonably expected of employees who hold their positions as a public trust. For these reasons, the Task Force found that current illegal use of drugs is incompatible with State employment. *Matter of Carberry*, 114 N.J. 574, 578 (1989) ("use of illegal drugs is incompatible with with the integrity of the State Police").

A minority of the Task Force objected to these findings. The minority contends that the State does not regulate the conduct and private lives of its employees away from the workplace with respect to other criminal conduct and, therefore, should not do so here. In the Public Advocate's view the rule creates a risk of unfounded or retaliatory accusations relating to non-workplace conduct. In the majority's view, the forfeiture of office law refutes the first claim: serious crimes result in forfeiture regardless of their relationship to performance of duty. N.J.S.A. 2C:51-2. Because use of illegal drugs undermines effectiveness, efficiency and the public trust the

majority found that an absolute prohibition of illegal conduct related to drugs is a justifiable regulation of conduct that affects fitness for public service. Further, the risk of reliance on unfounded and retaliatory accusations is no different here than in any other context.

A related finding lends additional support: employees who illegally use drugs may be more susceptible to coercion than employees who do not engage in this conduct. While there is no hard evidence to support this finding, logic compels it. Use of illegal drugs necessarily brings the user into contact and cooperation with persons who are engaged in illegal drug trade. As a result, persons engaged in illegal conduct gain knowledge of the ongoing illegal activity of a State employee who uses drugs. Further, dependence on illegal drugs necessitates acquisition of funds to support the habit. Employees who use illegal substances, therefore, place themselves in a position to be influenced and pressured that is not occupied by all others.

There is precedent for this finding. The United States Supreme Court drew this inference of susceptibility in *National Treasury Employees Union v. VonRaab*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989). President Reagan found that illegal use of drugs creates the possibility for coercion of federal employees. Executive Order 12564 (1986). While the finding clearly has greater validity for employees who hold law enforcement positions or perform other duties involving the detection, apprehension, prosecution or detention of drug offenders, the danger of coercion and improper influence of other employees is always present to some extent.

## Findings 11: THE ACCURACY & RELIABILITY OF DRUG TESTING

There are a variety of methods of testing for drugs. Chemical analysis of blood, hair, saliva and urine reveals traces of substances that have been recently ingested. D. Masai, supra at 60. Depending upon the drug and the method of chemical analysis employed, toxicologists estimate that a test may uncover traces of illegal substances used from four to 45 days prior to the collection of the sample. Id. at 61. These drug tests do not measure "impairment" in the sense that blood alcohol or breath alcohol tests measure legal intoxication. At some future date blood alcohol tests might be used to measure impairment, but scientists have not yet agreed on the level of any controlled substance that indicates impairment. Id. at 61. Thus, this finding addresses the ability to drug tests to accurately and reliably detect the presence of controlled substances.

Urinalysis is the drug test that is most frequently employed. Id. It is the method of testing proposed in this policy.

Urinalysis is favored for several reasons. It is less intrusive and less expensive than testing blood. Because urinalysis tests have been widely performed there is more information concerning the reliability, proper methods of administering and costs of urinalysis tests than there is concerning testing of hair or saliva. Further, there is a wealth of State experience on this testing method. Both the State Police and the Department of Corrections have employed urinalysis to test for use of illegal drugs for several years. Furthermore,

courts throughout the country have evaluated the reliability of urinalysis tests. See, e.g., National Treasury Employees Union v. VonRaab, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1384 (1989).

The Task Force concluded that use of dual urinalysis tests -- an initial screen for specified drugs, Enzyme Multiplied Immunoassay Technique (EMIT); followed, if positive, by a confirmatory test, gas-chromatography/mass-spectrometry (GCMS) -- is preferable to any other testing method now available.

Drug testing cannot be effective if it is not reliable. The Task Force concluded that tests conducted under the following circumstances were sufficiently reliable: monitoring sufficient to reduce the opportunity for tampering; adherence to strict chain of custody to assure the source and integrity of the sample; analysis by a qualified laboratory and review of results by a qualified professional; reporting of a positive result only if a positive EMIT result is confirmed by a GCMS test; retaining a portion of sample for independent testing by an employee who wishes to procure it. The procedures section of this proposed policy, Section XIII, sets forth a system for testing that includes these components. The United State Supreme Court has described drug tests of this sort administered under these circumstances as "highly accurate." VonRaab, \_\_\_ U.S. \_\_\_, 109 S. Ct. at 13\_\_.

Dr. Molly Joel Coye, who does not object to testing under all circumstances, explained that laboratory error is possible and that drug-wise employees may well be able to avoid detection by temporary abstinence or tampering with the test. Dr. John P.

Morgan described studies that had revealed false positive and false negative test results. All experts, however, agreed with Dr. Richard Saferstein that GCMS testing, when properly performed, is highly accurate. All conceded that human error accounted for inaccuracies in GCMS tests. Further, all agreed that positive results that are accurate but that are attributable to ingestion of certain foods or over-the-counter medications can be screened out if there is proper review by a qualified professional. The Public Advocate's privacy concerns with this screening process and the majority's response are discussed in the Commentary to Finding 13 of this Section.

The majority of the Task Force concluded that requiring performance of GCMS tests by certified laboratories that are periodically tested for error will produce accurate and reliable tests. Similarly, it concluded that monitoring and other safeguards for tampering that were explained by the Substance Abuse Coordinator for the Department of Corrections testing program will reduce the possibility of tampering. The Task Force was not persuaded that the remote possibility of error or tampering under these circumstances called for abandonment of a valuable tool for detecting illegal use of drugs. See VonRaab, \_\_\_ U.S. \_\_\_, 109 S. Ct. at \_\_\_ (dismissing such an objection to drug testing as "unpersuasive").

Finding 12: DRUG TESTING IS A MEANS OF PROMOTING A DRUG-FREE WORKPLACE

Urinalysis identifies traces of illegal drugs in the sample examined. The Task Force has concluded that administering an

accurate and reliable test that reveals recent, past use of illegal drugs will serve to promote the State's interests in safety and the efficiency and effectiveness of its workforce despite its inability to indicate some scientifically identified level of "impairment."

As discussed above, the effects of the illegal use of drugs do not end with intoxication that is visibly reflected by difficulties with gross motor coordination. Drug tests allow the State to identify applicants and employees who may be suffering from the residual effects of drug use and, therefore, may be unsuited to perform duties in which they would pose a risk to themselves or others. As Dr. Robert J. Pandina explained to the Task Force, tests that measure impairment alone -- such as visual observations and gross motor disturbance -- do not detect the subtle and distinct effects of drug abuse. Urinalysis reasonably, if not perfectly, detects these potential risks.

Drug tests are clearly critical to maintaining a drug-free workplace when there is little opportunity to observe work performance. An applicant cannot be monitored for impairment on any day other than the day of an interview. Similarly, employees who work unsupervised much of the day -- transportation workers and law enforcement officers are examples -- cannot be continuously observed. Problems with their work performance may be revealed only by the tragic results of a lapse in proper performance. In these cases, drug tests are an important, and indeed may be the only, means of detecting the risk before the tragedy.

Even where visual observations lead to a reasonable suspicion that an employee is illegally using drugs, urinalysis is necessary to confirm or refute that suspicion. While some members of the Task Force were of the view that an employer's sole concern should be impaired work performance and not the source of impairment, others did not agree.

First, reasonable suspicion testing is a means of deterring as well as detecting illegal use of drugs. While experts disagree on the deterrent value, the Task Force has concluded that testing is a reasonable deterrent.

Second, knowledge that an employee is using illegal drugs is important in determining the appropriate employment action: it is clearly critical if the employee is one whose duties involve law enforcement responsibilities or tasks that might jeopardize the safety of the public or the employee if improperly performed. As the New Jersey Supreme Court stated after noting the dangerous and sensitive duties performed by State Troopers, "Equally obvious is the need for troopers to remain drug free. The use of illegal drugs is incompatible with the integrity of the state police and with the ability of troopers to perform their duties." *Matter of Carberry*, 114 N.J. 574, 578 (1989). See also *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139 (3d Cir. 1987) (noting the City's interest in maintaining public trust in the police department, the court concluded that the city could dismiss police officers who use illegal drugs), cert. den. \_\_\_ U.S. \_\_\_, 109 S. Ct. 1636 (1989).

Further, all experts who addressed the Task Force noted that drug testing provides information that is important to rehabilitation efforts. Some experts, along with some members of the Task Force, felt that only persons involved in the rehabilitative process should be privy to that information and that disclosure to the employer represents an unwarranted invasion of privacy and, perhaps, a violation of professional ethics.

The majority, however, concluded that if the State is serious about providing an effective and efficient workforce and establishing a standard of conduct that precludes use of illegal drugs by State employees at all times, drug testing is necessary. Only the employer can hold employees to this standard of conduct. Only an employer can demand that an employee, who can be retained despite illegal use of drugs, seek treatment and refrain from the illegal use of drugs. Knowledge that an employee has used illegal drugs is critical knowledge if the State is to fulfill its responsibility to maintain "an adequate, efficient and effective public workforce," *State v. Local 195, IFPTE*, 179 N.J. Super. 146, 153 (App. Div. 1981), certif. denied, 89 N.J. 433 (1981). The State workforce must act in a manner that inspires public respect for the law and public confidence in government. *Hayes v. Hudson County Bd. of Freeholders*, 116 N.J. Super. 21, 26 (App. Div. 1971). In the majority's view, any intrusion upon privacy is warranted, and there is no violation of patient physician privilege where tests are performed at the request of the employer for employment purposes. Such physical examinations

are common. See generally *Skinner v. Railway Labor Executives Ass'n*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1402, 103 L. Ed. 2d 685 (1989); *E.E.O.C. v. New Jersey*, 631 F. Supp. 1506 (D.N.J. 1986).

Further, the State should do its part to deter and, where possible, rehabilitate persons who illegally use drugs. In commenting upon the most recent information available on the drug problem in this nation William J. Bennett explained,

Non-addicted users still comprise the vast bulk of our drug involved population. There are many millions of them. And each represents a potential agent of infection for the non-users in his personal ambit.

But there is good news, too. Though compared to addiction, non-addicted behavior is the more common and contagious form, it is also more susceptible to change and improvement. The same general techniques employed to slow and mixed effect with addicts may achieve markedly better results with non-addicts. Casual and regular drug users are much more easily induced to enter treatment, for example, and they are much more likely to reduce or cease their use as a result of it.

In fact, all the basic mechanisms we use against illegal drugs -- to raise their price; to restrict their availability; to intensify legal and social sanctions for their sale, purchase and use; and to otherwise depress general demand for them -- have a more immediate and positive behavioral effect on non-addicts than on addicts.

The White House, National Drug Control Strategy at 11-12 (1989).

The State should utilize drug testing and the information it provides to the benefit of non-addicted users in the workforce. These persons are likely to respond to treatment and employment sanction and at risk of developing debilitating dependency if they do not.

For all of these reasons, the majority of the Task Force concluded that drug testing would foster the State's interests in

safety and in an efficient and effective workforce.

The Public Advocate took exception to this conclusion. That Department opposes drug testing on the ground that it does not detect impairment and that only on-the-job impairment is a proper concern for an employer. The Public Advocate posits that training supervisors to detect impairment of employees in the workplace and use of coordination tests that measure impairments are less intrusive than requesting an employee to submit a urine sample and more successful in detecting impairment.

The United States Court of Appeals For the District of Columbia Circuit recently rejected similar challenges. That Court found drug testing to be a reasonable method for the army to deal with its responsibility to ensure that its civilian employees did not create dangerous risks even though drug testing does not measure on-the-job impairment. *National Federation of Federal Employees v. Cheney*, \_\_\_ F.2d \_\_\_ (D.C. Cir. 1989) (1989 U.S. App. Lexis 12963, at 8). It found the tests the appellants recommended as an alternative to drug testing no less intrusive or degrading than urinalysis. *Id.* at \_\_\_ (Lexis at 9). The majority of the Task Force, for the reasons discussed above and especially in light of Dr. Pandina's information on the long term and subtle effects of drug abuse, was not convinced that other devices or visual observations alone could successfully detect these subtle impairments. One expert who addressed the Task Force on neurobehavioral techniques he was developing was unable to provide the group with literature on the program. The majority was also concerned that alternative tests would not identify the

source of impairment in any case. As discussed above, illegal use of drugs by State employees is a proper concern of State employers.

The Departments of Health and Human Services, while not opposed to drug testing in all circumstances, generally view drug test results as a tool for rehabilitation rather than employment action. To that extent, the Department of Health shares the Public Advocate's view that employers need not normally know the cause of impairment. That Department, however, does not dispute that employees who perform sensitive duties cannot remain on the job while using illegal drugs and recognizes that use of illegal drugs may preclude an employee from being qualified to serve in the law enforcement area.

The majority concluded that drug tests provide information that is critical to promoting the interests furthered by maintaining a drug-free workplace and to deterring illegal use of drugs.

#### Finding 13: THE CONSTITUTIONAL RIGHTS OF EMPLOYEES

In responding to the Governor's charge to develop a drug testing policy that "equitably balances employee rights with the State's vital interests in public safety and in promoting and maintaining a drug-free workplace," the Task Force considered the impact of drug testing on the individual rights of employees.

##### 1. Employee Rights Implicated by Drug Testing

Drug testing is a means of reducing illegal use of drugs by the State workforce that is not without impact on the rights of

employees. A drug test administered by the State as employer is a search within the meaning of the Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution: it implicates an employee's constitutional right to freedom from unreasonable search and seizure. U.S. Const. amend. IV; N.J. Const. art. I, para. 7; National Treasury Employees Union v. VonRaab, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1384 (1989); Fraternal Order of Police v. City of Newark, 216 N.J. Super. 461, 466 (App. Div. 1987). Drug tests administered to State employees for employment purposes must be reasonable under the totality of the circumstances: constitutional reasonableness is a question of the balance of the need for the particular search against the invasion of the personal rights that the search entails. Fraternal Order of Police, 216 N.J. Super. at 470; VonRaab, \_\_\_ U.S. at \_\_\_, 109 S. Ct. at 1393.

The drug testing method the Task Force proposes requires an employee to submit a urine sample for testing. Both the process of collecting this sample of bodily fluid and the analysis of that sample are intrusions upon an employee's reasonable expectations of privacy. Skinner v. Railway Labor Executives' Ass'n, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1402 (1989). As the Public Advocate notes, urination is a private act and analysis of a urine sample can reveal information about an employee's health that is highly personal and unrelated to illegal use of drugs. A drug test may require an employee to reveal medical problems that would otherwise be unknown.

The test authorized under this policy will test only for the

presence of specified controlled substances. Employees will be requested to reveal information on use of prescription drugs or over-the-counter medications that are known to lead to positive drug test results, but medical information will not be otherwise revealed.

The Task Force carefully considered the impact of drug testing on these privacy interests in evaluating the propriety of drug testing.

## 2. The Ultimate Balance

The majority of the Task Force concluded that whether the individual rights implicated by drug testing were outweighed by the State's vital interests depended essentially upon two factors: 1. the sensitivity of the employee's position -- i.e., the degree to which illegal use of drugs by a person performing the employee's duties would threaten the State's interest in public and workplace safety or the enforcement of the criminal laws of this State; or, 2. the existence of facts giving the employer a reasonable basis to suspect that an employee is illegally using drugs.

The Task Force concluded that an equitable balance of interests called for testing of all applicants for Sensitive Positions and, under narrowly drawn circumstances, for random testing of employees who hold Sensitive Positions. See Commentary to Sections V and VI, 2 and 3. The Task Force concluded that no other applicants should be tested, and that other employees should be tested only if there is a reasonable basis for suspecting that the particular employee to be tested is

illegally using drugs. See Commentary to Section VI, 1.

The Public Advocate -- on the ground that testing is often unreliable, does not address the serious problem of abuse of legal substances, does not detect impairment, entails a significant intrusion upon an employee's reasonable expectations of privacy, and that impairment can be detected by other means -- concluded that drug testing was unreasonable under all circumstances. The Department of Health objected to all but reasonable suspicion testing.

For the reasons stated above, the view that drug testing was always inequitable was not shared by any other agency represented on the Task Force. The testing provisions of this policy reflect the points at which the majority of the Task Force deemed that an equitable balance of the individual interests implicated and the State interests furthered calls for drug testing.

Findings 14 & 15: THE STATE SHOULD PROVIDE TRAINING ON SUBSTANCE ABUSE And ENCOURAGE EMPLOYEES TO SEEK TREATMENT FOR SUBSTANCE ABUSE PROBLEMS

The Task Force has found that the State should provide all employees with training on substance abuse and on available programs for treatment of substance abuse problems and should actively encourage and work with employees to voluntarily seek treatment for substance abuse problems. As discussed in the Commentary to Findings 5, 6, and 7 of this Section, substance abuse has a tremendous impact on public safety and the effectiveness and efficiency of the workforce. It has a

devastating impact on the lives of substance abusers and those around them.

For all these reasons, the Task Force found that the State should provide its employees with training and with information on available treatment programs. This training and rehabilitation are critical components of a drug-free workplace policy designed to eliminate the illegal use of drugs and its harmful effects. Education on the dangers of substance abuse and encouragement of voluntary participation in substance abuse programs are important means of dealing with substance abuse problems before they are revealed in poor job performance or seriously endanger health and safety.

### SECTION III: COMMENTARY

This Section of the Policy sets forth three standards for employee conduct.

Prohibition of Criminal Conduct Involving Controlled Substances. Subsection 1 provides that all State employees are required to refrain from the illegal use, possession sale and distribution of drugs at all times. The Task Force believes that the State should establish and enforce this standard.

The Task Force found that criminal conduct involving controlled dangerous substances is inconsistent with conduct reasonably expected of State employees who hold their positions as a public trust. Finding 8, Section II. The Task Force found that illegal use of drugs is incompatible with State employment. Finding 9. The Task Force found that State employees who illegally use drugs may be more susceptible to coercion and improper influence. Finding 10. Illegal use of drugs, in or outside of the workplace, has deleterious effects on safety and on the effectiveness and efficiency of the workforce. Findings 5, 6 and 7. These findings lead the Task Force to recommend that the State require all employees to refrain from the illegal use, possession, sale and distribution of drugs at all times.

The Task Force has concluded that the State cannot overlook its role in ensuring that employees who are involved with illegal drugs change their course of conduct. Data for 1988 show that across 21 cities, 53 to 90 percent of male arrestees tested

positive for an illegal drug. Bureau of Justice Assistance, FY 1988 Report on Drug Control 18. In 1986, Governor Kean noted that 50 percent of the crimes prosecuted in this State are drug-related, and that nearly one-third of all convicted offenders were under the influence of drugs when they committed their crimes. Blueprint, supra at 7. The Governor stated:

Despite enhanced law enforcement and the increased availability of more dangerous drugs, drug dealing and use continues to flourish. The reason is obvious. Widespread demand for controlled substances means that distributors can reap enormous profits.

Id. The Executive Summary of President Bush's National Drug Control Strategy identifies society's over-permissiveness with respect to drug use as the first of several "fundamental themes" that underlie the National Strategy to control illegal drugs. Executive Summary, National Drug Control Strategy 3 (1989). The State, which employs some 80,000 workers, should take a lead in instructing its employees that conduct that contributes to this national problem is unacceptable and will lead to either discipline and necessary rehabilitation or discharge.

As William J. Bennett explains in his Introduction to the National Drug Control Strategy, "non-addicted users still comprise the vast bulk of our drug-involved population." The White House, National Drug Control Strategy 11 (1989). These persons most often remain in the workforce, enjoy the pleasures of drugs and are "willing and able to proselytize" drug use. Id. Their drug use is highly contagious. Id. Their behavior, however, is "susceptible to change and improvement." Id. The

State should deter this conduct by members of its workforce.

By force of federal law governing grant recipients and Executive Order of Governor Kean, State government prohibits all illegal drug activity in the workplace. Because the State has a duty to provide safe public services, an efficient and effective workforce and a safe workplace, because State employees must obey the law to promote the public trust and because drug abuse has adverse effects in the workplace and throughout the State, the Task Force concluded that it is appropriate for State Government to require its employees to refrain from the illegal possession, use, sale and distribution of drugs at all times.

A minority of the Task Force views this standard as an improper attempt to regulate private lives and off-the-job conduct. The minority argues that the State does not have analogous rules prohibiting State employees from engaging in other criminal conduct. For the reasons stated above and in the Commentary to Findings 8, 9 and 10, the majority disagrees with the propositions and the conclusion.

#### Reporting Illegal Drug Activity in the Workplace.

Subsection 2, a. requires supervisors who reasonably believe that that there has been an incident involving the illegal possession, use, sale or distribution of drugs in the workplace to report such incidents to the department or agency head. The Task Force believes that these reports are essential

if the State is to fulfill its legal responsibility to maintain a workplace that is free of drug crimes. Executive Order No. 204; Public Law 100-960, Title V, Subtitle D.

Subsection 2, b. requires departments and agencies to encourage employees who reasonably believe that a drug offense has been committed in the workplace to report the incident.

Both reporting provisions are triggered when there is a reasonable belief that an offense has been committed. The reasonable belief standard serves two purposes. First, it avoids placing supervisors or employees in the position of ferreting out crime: there must be a reasonable belief. Second, it protects employees who might be the subject of a report: reports are not to be filed unless the facts would lead a reasonable person to believe an offense had been committed in the workplace.

These reporting provisions were the subject of vigorous debate by the Task Force. The Department of Law and Public Safety opposes the provision as drafted. That Department takes the position that both supervisors and employees without supervisory authority should be required to report drug offenses in the workplace. In that Department's view, the State's responsibility to eliminate this dangerous and illegal conduct in the workplace is one that extends to all employees. The Governor's Office of Employee Relations shared this view.

The majority of the Task Force took the position set forth in the policy.

Referral of Reports to the Division of Criminal Justice.

Subsection 2., c. requires department and agency heads who receive reports of illegal possession with intent to distribute, sale or distribution of drugs in the workplace to forward the report to the Director of the Division of Criminal Justice prior to taking any employment action other than that necessary to maintain safety or order.

The purpose of this referral requirement is to leave the investigation of criminal conduct and the decision to prosecute to the State agency charged with the enforcement and prosecution of the criminal law. N.J.S.A. 52:17B-101. Initiation of disciplinary action by a department or agency head could interfere with an ongoing criminal investigation or have adverse impact on the admissibility of evidence in a criminal prosecution. The referral system is designed to preserve both the rights of employees and the integrity of criminal investigations. It is also, however, designed to protect the rights of employees. Investigation of criminal conduct requires both expertise and knowledge of the constitutional rights of criminal suspects.

There was much debate over the proper formulation of this provision. The Department of Law and Public Safety took the position that all reports of all illegal drug related activity, in or out of the workplace, should be forwarded to the Division of Criminal Justice prior to initiating disciplinary action. As drafted, the provision does not require referral of reports of illegal use of drugs in the workplace and does not require

referral of reports of any drug-related conduct outside of the workplace.

Other departments concluded that reports of illegal possession with intent to sell, distribution or sale, in or out of the workplace, should be forwarded to Criminal Justice. The Public Advocate opposed mandatory referral and takes the position that agency heads should retain the discretion to determine the proper means of addressing employee misconduct.

The majority of the Task Force concluded that the position set forth in the policy strikes the proper balance.

Report of Criminal Charges. Subsection 3 requires employees who are formally charged with or convicted of an offense prohibiting the possession, use, sale or distribution of drugs to report the charge or conviction through established departmental channels. This procedure is designed to allow the department or agency to make a timely decision on the propriety of allowing an employee who has been charged with or convicted of a drug-related crime to remain in the workforce.

State policy expressed in statutes and regulations governing public employees support this provision. Civil Service law explicitly recognizes that it is proper for the State to consider whether an employee who has been charged with a crime should remain in the workforce pending resolution of the charge. N.J.S.A. 11A:2-13; N.J.A.C. 4A:2-2.5(a)(2). The State must consider whether an employee who has been convicted of a crime may remain in the workforce. N.J.S.A. 2C:51-2. And, Executive

Order No. 204 requires State employees to report convictions for drug offenses committed in the workplace.

Given the impact of drug abuse on the workplace and the fact that illegal drug-related conduct is inconsistent with conduct reasonably expected of State employees, the majority of the Task Force agreed that this standard was important to promoting a drug-free workplace.

A strong minority, including the Department of Higher Education, objected to the portion of this standard that requires reporting of formal charges of crime. These members of the Task Force objected on the ground that employees are not universally required to report formal charges or convictions and on the ground that this requirement subjects employees to scrutiny on the basis of allegations, possibly entirely unfounded, alone.

The majority did not agree. An indictment is a charge returned by a grand jury after a finding that there is probable cause to believe that the person committed the crime charged. *State v. Gonzalez*, 114 N.J. 592, 608 (1989). A person charged with a crime by way of complaint is entitled to a hearing to determine whether there is probable cause for the complaint. R. 3:4-2; *Gonzalez*, 114 N.J. at 598, 607 (the question of whether persons charged with disorderly persons offenses, other than traffic offenses, are entitled to a probable cause hearing before disposition of the charge is not resolved). Thus, a formal charge is not entirely unfounded. The Legislature has expressly recognized that pending criminal charges are a proper concern for State employees. N.J.S.A. 11A:2-13. In the area of charges of

conduct involving controlled dangerous substances, which has tremendous impact on the workplace, it is reasonable for the State to request its employees to provide this public information concerning the lodging of formal criminal charges.

## SECTION IV: COMMENTARY

This section defines the scope of application of this proposed policy.

Subsection 1: Departments and Agencies Subject to This Uniform Policy. Subsection 1, consistent with Governor Kean's directive to develop a Statewide drug-testing policy, proposes that this policy apply in all departments, agencies, boards and commissions in the Executive Branch, including the Office of the Governor.

Subsection 2: Uniform Criteria for Drug Testing. As subsection 2 provides, this proposed policy states all circumstances under which departments and agencies will administer drug tests to applicants and employees. Drug testing is authorized on the basis of employee conduct and the sensitivity of the duties of the position an applicant seeks or an employee holds. Differences in testing depend upon these uniform criteria not upon the department or agency to which an employee is assigned.

There was some debate as to whether departments and agencies should be required or merely authorized to conduct drug tests under the circumstances delineated in this proposed policy. For the reasons discussed in the Commentary to Sections V and VI, the Task Force concluded that applicants subject to testing under this proposed policy must be tested. The reasonable suspicion,

random and medical testing of employees, in contrast, is authorized, not required. No drug testing may be conducted under circumstances not authorized in this Policy.

Subsection 3: Uniform Testing Procedures. Subsection 3 provides that all drug tests must be performed according to the procedures included in this proposed policy.

Subsection 4: Uniform Employment Consequences. Subsection 4 provides that all departments and agencies must employ the same criteria in determining the appropriate employment consequences for employees who illegally possess, use, sell or distribute drugs.

Requiring departments and agencies to administer drug tests under uniform guidelines would not greatly advance a Statewide drug-free workplace policy if employees who engaged in similar conduct were subject to varying consequences depending upon the department or agency to which they were assigned. Under this proposed policy, employment consequences may vary depending upon whether the employee voluntarily sought assistance with a substance abuse problem, the sensitivity of the duties the employee performs and the employee's conduct and work history, but all departments and agencies must apply the same criteria in determining appropriate employment consequences.

Subsection 5: Substantive and Procedural Rights. Subsection 5 provides that all departments and agencies must afford applicants and employees the notice and hearing rights outlined in this policy.

Subsection 6: A Prospective Policy. Subsection 6 states a rule of prospective application for this proposed policy. While the proposed policy should control all drug testing and disciplinary action based on the illegal possession, use, sale or distribution of drugs after its effective date, it is a prospective document and is not intended to invalidate any prior department or agency action.

Subsection 6: Exemption for Testing Required by the Federal Government. Subsection 6 also states a narrow exception to uniform application of the provisions of the proposed policy. The sole exception is for drug testing authorized by federal law. For example, federal law now requires drug testing of certain transportation workers and employees of the Department of Military and Veterans Affairs and it conditions receipt of federal funds upon additional drug testing. Nothing in this proposed policy should be construed as an attempt to preempt current or future federal drug-testing requirements or to preclude a State agency from participating in a program that conditions receipt of federal funds on drug testing.

## SECTION V: COMMENTARY

This section sets forth proposed drug-testing policy for applicants.

Applicants Who Will Be Tested. Section 1 proposes that each department and agency be required to test all applicants for Sensitive Positions for illegal use of drugs. The test is to be administered, as a condition of appointment, to an applicant who has been selected for the position. This testing requirement also applies to current employees who seek appointment to a Sensitive Position. No department or agency has unilateral discretion to identify, or refrain from identifying, positions that are Sensitive.

The criteria and procedure for identification of Sensitive Positions are fully discussed in the Commentary to Section VII. In general, Sensitive Positions are those with great potential for impact on the State's vital interests in maintaining a drug-free workplace -- i.e., those in which improper or inadequate performance of duties would pose a threat to the safety of the public or the workforce or to the administration of the criminal justice system.

The Task Force concluded that the State has a compelling interest in avoiding appointment of a person who is illegally using drugs to a Sensitive Position. It believes that this interest outweighs an applicant's interest in freedom from the intrusion upon any reasonable expectations of privacy entailed in

submitting a urine sample for analysis. The United States Supreme Court has held that drug tests administered to employees who seek promotion to positions of this sort are constitutionally reasonable. See *National Treasury Employees Union v. VonRaab*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1384 (1989). The Task Force is not aware of any case that has held that a drug test administered to an applicant for a sensitive position is an unreasonable search.

Applicant testing is the most common form of workplace drug testing currently conducted in the nation. The Bureau of Labor Statistics estimates that 3.9 million job applicants were tested in 1988 and that 11.9 percent of them tested positive for illegal use of drugs. The White House, *National Drug Control Strategy* 56 (1989).

The New Jersey Department of Corrections began testing applicants in 1987. Between October of 1987 and October of 1988, 14 percent of the applicants tested, 599 of 4036, tested positive for illegal use of drugs (these figures exclude six applicants who tested positive but subsequently submitted proof that they were using prescribed drugs). All of these applicants had been advised that they would be required to submit to a urine test for illegal use of drugs as a condition of appointment. Of the 2010 applicants for the State Police Academy who were tested for illegal use of drugs only 11, or .5 percent, tested positive.

The Task Force considered the results of applicant testing reported by the Department of Corrections and State Police and concluded that drug testing of applicants is important to selection of a workforce fit to perform the duties of the

positions identified as Sensitive under this Policy. Even if one were to assume that an average of the positive test rates found by the State Police and the Department of Corrections reflected the rate of drug abuse among applicants for Sensitive Positions, testing would be warranted to prevent the staffing of Sensitive Positions with that percentage of persons using illegal drugs.

Task Force Debate: Applicant Testing. The Department of Labor and the Office of Employee Relations supported a policy that would require testing of all applicants. These members considered the impact of illegal use of drugs on the safety, efficiency and integrity of the workforce sufficient to require the State to exclude all applicants who use illegal drugs. The Departments of Corrections, Transportation and Higher Education articulated the need for testing of applicants for Sensitive Positions.

The proposed policy reflects the majority position: testing all applicants would be administratively burdensome and cost prohibitive. Further, applicants appointed to non-sensitive positions can typically be monitored for effective and efficient performance during a working test period without substantial risk to safety or law enforcement. Testing is required to prevent placing a person who illegally uses drugs in a Sensitive Position.

Task Force Debate: Requiring Departments and Agencies to Test Employees for Sensitive Positions. Having determined that applicants for positions identified as Sensitive under this Policy could be tested for illegal use of drugs, the Task Force concluded that no department or agency should have the discretion to refrain from testing these applicants. Leaving the decision to test applicants for Sensitive Positions to the various departments and agencies could result in disparate testing practices, despite a uniform testing policy. An applicant testing policy should be fair and rational. Allowing for differences based solely on departmental affiliation would be neither. Appropriations will be required to ensure that all departments and agencies can comply.

In essence, the debate on this issue is whether the Governor sought a policy that would establish uniform limits on testing or uniform testing requirements. The minority views Governor Kean's Executive Order as one designed to limit unwarranted drug testing not to compel all testing that is justified. The Public Advocate believes that applicant testing should be within the discretion of the agency head and should not be mandated. The minority views budgetary constraints of individual departments as an additional concern.

Consequences for Applicants Who Test Positive for Illegal Use of Drugs. Subsection 1, b. requires rejection of an applicant who tests positive for the illegal use of drugs. It also requires an applicant to meet certain conditions before again

seeking appointment to any Sensitive Position in State Government.

An applicant who subsequently seeks appointment to a Sensitive Position in State government following a positive preemployment drug test must submit some credible evidence that he is not illegally using drugs and must agree to unannounced drug testing as a condition of employment. The department or agency offering a Sensitive Position to such an applicant has the discretion to set the time period for unannounced testing, but the period may not exceed one year. These requirements are contained in subsection 1, b.(i).

The proposed policy does not attempt to enumerate or quantify the sort of proof that an applicant must offer as "some credible evidence" of refraining from unlawful use of drugs. This is an issue that must be addressed on a case-by-case basis. A negative drug test administered under reliable circumstances should suffice.

Subsection 1, b.(ii) provides that no department or agency is required to appoint an applicant who meets these requirements. The employer's discretion to make appointments according to merit and fitness is retained.

These restrictions on application for a Sensitive Position following a positive drug test represent an attempt to equitably balance the interests at stake. The Task Force considered the restrictions essential to preservation of the interests served by testing these applicants.

On the other hand, the Task Force concluded that a positive test should not preclude an applicant from seeking a position that is not sensitive: such a bar would result in treating the applicant differently than others who apply for a non-sensitive position. The Task Force also concluded that a positive test should not always bar an applicant from future appointment to a Sensitive Position, either permanently or for a set period of time. If an applicant is otherwise qualified for the Sensitive Position, is drug-free and is willing to submit to unannounced testing to confirm that he remains drug-free, then he should be eligible for consideration. While several alternative approaches were debated, the reapplication provision adopted received unanimous support.

Employment Applications for Sensitive Positions. Subsection 1, c. requires applications for Sensitive Positions to call for information on positive drug tests, prior employment action based on illegal drug-related conduct and prior convictions for illegal use, possession, sale or distribution of drugs. The purpose is twofold. First, the information will prevent circumvention of the reapplication requirement without necessitating a registry of positive test results. Second, the information will ensure similar treatment of applicants who have engaged in similar illegal drug-related conduct.

The Public Advocate argued that an applicant should only be required to disclose positive results of drug tests administered by the State; the concern was for reliability of tests

administered by private employers because such tests are not necessarily subject to procedural protections equivalent to those of this proposed policy. The majority of the Task Force was satisfied that appointing authorities are experienced and well-equipped to evaluate the significance of the information contained in an employment application.

Appeal Rights. Subsection 1, d. provides that an applicant who is entitled to challenge a rejection from State employment under the provisions of the New Jersey Administrative Code, N.J.A.C. tit. 4A, ch. 4, subch. 6, may invoke those appeal rights and challenge a rejection based on a positive drug test. Applicants not protected by the Civil Service laws may invoke departmental procedures equivalent to those specified in Section VIII, 3., b.

## SECTION VI: COMMENTARY

This Section contains the Task Force recommendations for drug testing State employees.

### SUBSECTION 1: REASONABLE SUSPICION DRUG TESTING

#### Subsections 1, a. and b.: Reasonable Suspicion Drug Testing: Criteria & Review Procedures.

The Task Force proposes authorizing drug tests that are based on reasonable suspicion. Subsection 1, a. defines reasonable suspicion. As subsection 1, b. (i) provides, a department or agency must be able to identify facts that provide an objective, reasonable basis to suspect that a drug test of a particular employee will produce evidence of illegal use of drugs in order to require an employee to submit to a drug test on this basis.

A drug test based on reasonable suspicion is, simply put, a one given when there is good cause, which can be articulated, to suspect that the employee who will be tested is illegally using drugs. The department need not be able to prove that the employee is using drugs or even that it is probable that the employee is using drugs: it need only have facts sufficient to provide a reasonable basis to suspect that the employee is illegally using drugs.

While several members of the Task Force would have preferred a more precise definition of reasonable suspicion, none is available. The standard is a common sense, non-technical

standard that must be applied on a case-by-case basis in light of the facts known.

An example illustrates the problem of an attempt to delineate circumstances sufficient to establish reasonable suspicion. Information offered by a concerned spouse might ordinarily give rise to reasonable suspicion but probably would not if the employee is one who regularly performs all assigned tasks in a timely and acceptable manner and the couple is one that has recently separated. The Task Force concluded that the best definition of reasonable suspicion is one that explains the inquiry: whether the facts involving a particular employee provide an objective, reasonable basis to suspect that a test will produce evidence of drug use.

In order to ensure that an employee is not subjected to a drug test unless there is sufficient evidence to warrant reasonable suspicion, subsection 1, b. (ii) requires prior approval by a responsible person who has reviewed a statement of the objective facts supporting the test. Normally the approval of the department or agency head or designee will suffice. If, however, the facts supporting the test include evidence of illegal possession with intent to distribute, sale or distribution of drugs, the approval of the Director of the Division of Criminal Justice is required.

The approval of the Director is required in order to protect the integrity of ongoing criminal investigations and the rights of employees. The concerns are the same as those raised by the

issue of referral of reports of illegal conduct to the Director of the Division of Criminal Justice. See Commentary to Section III.

Task Force Debate on Approval By the Director of the Division of Criminal Justice. A minority of the Task Force objected to any requirement of approval by the Director of the Division of Criminal Justice. See Commentary to Section III.

The Department of Law and Public Safety, in contrast, believes that the Director's approval should be required in all cases. Prior approval would ensure that no drug test was administered until the Director determined to forego criminal investigation. See Commentary to Section III. Further, review by the Director would ensure that the basis for a request to perform a drug test is adequate.

The Department of Personnel objects to the requirement of approval by the Director in cases involving drug offenses not occurring in the workplace. That Department also objects to the absence of a time limit for Director approval and recommends that the Director's failure to respond within five days should be deemed an approval of the test.

The majority of the Task Force concluded that review by the Director was important in cases involving evidence of illegal possession with intent to distribute, distribution and sale of drugs but that the approval requirement would unjustifiably interfere with a department's ability to deal with impaired employees in cases involving use alone. The minority stressed

that departments would be free to take action other than drug testing in all cases and noted that there are several alternative courses where there is evidence of impairment.

The Need For Training Of Supervisors. All members agree that implementation of a reasonable suspicion testing program will require training of supervisors and of persons who will be responsible for review and approval of test requests. The Department of Law and Public Safety stresses that training will be critical in the absence of a requirement of review by the Director of the Division of Criminal Justice. Section XII requires such training.

The Propriety of Reasonable Suspicion Testing. For the reasons discussed in the Commentary to Finding 12 of Section II, the Task Force concluded that reasonable suspicion drug tests are an important means of furthering the variety of State interests served by maintaining a drug-free workforce. Where there is reasonable suspicion that an individual employee is illegally using drugs, the individual employee's right to freedom from the intrusions entailed in a drug test is outweighed by the State's interests in maintaining a drug-free workforce.

As the Appellate Division of the New Jersey Superior Court has stated, "The reasonable individualized suspicion test fairly accommodates the legitimate interest of employee privacy without unduly restricting the public employer's opportunity to monitor and control the use of drugs by its employees." Fr. Order of

DRUG SCREENING MEDICATION FORM

ANSWER ALL QUESTIONS

THIS CONFIDENTIAL FORM IS USED ONLY TO ASSIST THE DEPARTMENT TO IDENTIFY A POSSIBLE LEGITIMATE REASON FOR ANY POSITIVE TEST RESULTS.

1. HAVE YOU TAKEN ANY MEDICATION IN THE LAST THIRTY(30) DAYS? \_\_\_\_\_

2. IDENTIFY THE MEDICATION \_\_\_\_\_

3. WHEN WAS THE LAST TIME YOU TOOK THE MEDICATION \_\_\_\_\_

4. WHAT DOCTOR PRESCRIBED THE MEDICATION \_\_\_\_\_

5. WHAT PHARMACY FILLED THE PRESCRIPTION \_\_\_\_\_

6. WHAT IS THE PRESCRIPTION NUMBER \_\_\_\_\_

7. LIST THE NON-PRESCRIPTION, OVER THE COUNTER MEDICATIONS TAKEN IN THE PAST 30 DAYS. ( LIST COUGH MEDICINE, COLD TABLETS, ASPIRIN, ETC.)

1. \_\_\_\_\_ DATE TAKEN \_\_\_\_\_

2. \_\_\_\_\_ DATE TAKEN \_\_\_\_\_

3. \_\_\_\_\_ DATE TAKEN \_\_\_\_\_

\_\_\_\_\_  
SIGNATURE OF MONITOR

\_\_\_\_\_  
SIGNATURE OF EMPLOYEE/APPLICANT

\_\_\_\_\_  
DATE AND TIME

\_\_\_\_\_  
SOCIAL SECURITY NUMBER

APPLICANT

ACKNOWLEDGEMENT

1. I HAVE PREVIOUSLY BEEN ADVISED THAT THE NEW JERSEY DEPARTMENT OF \_\_\_\_\_ WILL SCREEN ALL APPLICANTS FOR SENSITIVE POSITIONS FOR THE ILLEGAL USE OF DRUGS.
  
2. ONE OF THE CONDITIONS FOR EMPLOYMENT WITH THE NEW JERSEY DEPARTMENT OF \_\_\_\_\_ FOR A SENSITIVE POSITION IS MY COMPLIANCE WITH REGULATIONS RELATING TO THE TESTING FOR THE ILLEGAL USE OF DRUGS.
  
3. THE MONITOR WILL BE THE SAME SEX AS ME.
  
4. I MAY REQUEST THAT I MAY PROVIDE TWO URINE SAMPLES. ONE SAMPLE WILL BE KEPT FROZEN FOR ME FOR A PERIOD OF THIRTY (30) DAYS. IN THE EVENT THAT I WISH TO CHALLENGE THE RESULTS OF MY TEST, I OR MY LEGAL REPRESENTATIVE MUST IMMEDIATELY NOTIFY THE DEPARTMENT OF \_\_\_\_\_ OF MY INTENTION TO CHALLENGE THE RESULTS AT A CERTIFIED LABORATORY OF MY CHOICE, AT MY EXPENSE. OTHERWISE, FROZEN SAMPLES WILL BE DESTROYED AT THE EXPIRATION OF 30 DAYS.
  
5. IN THE EVENT I AM UNABLE TO PROVIDE ENOUGH URINE FOR THE TEST SAMPLE AT THE TIME REQUESTED, I WILL BE GIVEN A REASONABLE PERIOD OF TIME, NOT TO EXCEED EIGHT HOURS, TO PRODUCE A SUFFICIENT AMOUNT OF URINE. LIQUIDS WILL BE MADE AVAILABLE TO ME. FAILURE TO PROVIDE AT LEAST 50 ML. OF URINE MAY BE CONSIDERED A REFUSAL AND MY APPLICATION REJECTED.
  
6. SHOULD I REFUSE TO PROVIDE A SAMPLE OF URINE FOR ANALYSIS, MY APPLICATION WILL BE REFUSED.

APPLICANT \_\_\_\_\_ DATE \_\_\_\_\_

MONITOR \_\_\_\_\_

S A M P L E

EMPLOYEE  
ACKNOWLEDGEMENT

I ACKNOWLEDGE THAT THE DEPARTMENT OF \_\_\_\_\_ HAS INFORMED ME THAT THEY HAVE REASONABLE SUSPICION THAT I MAY BE USING ILLEGAL DRUGS, NARCOTICS, OR CHEMICALS WHICH MAY EFFECT MY PERFORMANCE. THE MONITOR REPRESENTING THE DEPARTMENT HAS INFORMED ME OF THE FOLLOWING:

1. I HAVE PREVIOUSLY BEEN ADVISED THAT THE NEW JERSEY DEPARTMENT OF \_\_\_\_\_ BEGAN THE SCREENING OF ITS EMPLOYEES FOR THE ILLEGAL USE OF DRUGS BY OBTAINING URINE SAMPLES PURSUANT TO THE DIRECTIVE ISSUED ON \_\_\_\_\_ (date). I FURTHER UNDERSTAND THAT THIS PROGRAM BECAME EFFECTIVE ON OR ABOUT \_\_\_\_\_ (date).

2. ONE OF THE CONDITIONS OF MY EMPLOYMENT WITH THE NEW JERSEY DEPARTMENT OF \_\_\_\_\_ IS THAT I ABSTAIN FROM THE USE OF ILLEGAL DRUGS, AND MY COMPLIANCE WITH REGULATIONS RELATING TO THE TESTING FOR THE ILLEGAL USE OF DRUGS.

3. THE MONITOR WILL BE THE SAME SEX AS ME.

4. I MAY REQUEST A WITNESS OF MY OWN CHOICE IF THAT WITNESS IS NEARBY AND AVAILABLE.

5. I MAY REQUEST THAT I MAY PROVIDE TWO URINE SAMPLES. ONE SAMPLE WILL BE KEPT FROZEN FOR ME FOR A PERIOD OF THIRTY (30) DAYS. IN THE EVENT THAT I WISH TO CHALLENGE THE RESULTS OF MY TEST, I OR MY LEGAL REPRESENTATIVE MUST IMMEDIATELY NOTIFY THE DEPARTMENT OF \_\_\_\_\_ OF MY INTENTION TO CHALLENGE THE RESULTS AT A CERTIFIED LABORATORY OF MY CHOICE, AT MY EXPENSE. OTHERWISE, FROZEN SAMPLES WILL BE DESTROYED AT THE EXPIRATION OF 30 DAYS.

6. MY REFUSAL TO PROVIDE A SAMPLE OF URINE FOR ANALYSIS WILL BE TREATED AS INSUBORDINATION.

7. IN THE EVENT I AM UNABLE TO PROVIDE ENOUGH URINE FOR THE TEST SAMPLE ON DEMAND, I WILL BE GIVEN SUFFICIENT TIME (NOT TO EXCEED EIGHT (8) HOURS) TO PRODUCE THE SUFFICIENT AMOUNT OF URINE. LIQUIDS WILL BE MADE AVAILABLE TO ME. FAILURE TO PROVIDE AT LEAST 50 MILLILITERS ( 2 oz.) OF URINE MAY BE CONSIDERED A REFUSAL AND I WILL BE SUSPENDED WITH PAY, PENDING A HEARING.

EMPLOYEE \_\_\_\_\_ MONITOR \_\_\_\_\_ DATE \_\_\_\_\_

EMPLOYEE-RANDOM TESTING

ACKNOWLEDGEMENT

I acknowledge that the Department of \_\_\_\_\_ has informed me that RANDOM URINALYSIS TESTING will be conducted in the unit or group where I am employed, for the use of illegal drugs, narcotics, or chemicals which may effect my performance. The monitor representing the Department has informed me of the following:

1. I have previously been advised that the New Jersey Department of \_\_\_\_\_ began the screening of its employees for the illegal use of drugs by obtaining urine samples pursuant to the directive issued on \_\_\_\_\_ (date). I further understand that this program became effective on or about \_\_\_\_\_ (date).
2. One of the conditions of my employment with the New Jersey Department of \_\_\_\_\_ is that I abstain from the use of illegal drugs, and my compliance with regulations relating to the testing for the illegal use of drugs.
3. The monitor will be the same sex as me.
4. I may request a witness of my own choice, if that witness is nearby and available.
5. I may request that I provide two urine samples. One sample will be kept frozen for me for a period of THIRTY (30) days. In the event that I wish to challenge the results of my test, I or my legal representative must immediately notify the Department of \_\_\_\_\_ of my intention to challenge the results at a certified laboratory of my choice, at my expense. Otherwise, frozen samples will be destroyed at the expiration of 30 days.
6. My refusal to provide a sample of urine for analysis will be treated as insubordination.
7. In the event I am unable to provide enough urine for the test sample on demand, I will be given sufficient time (not to exceed eight (8) hours) to produce the sufficient amount of urine. Liquids will be made available to me. Failure to provide at least 50 milliliters ( 2 oz.) of urine may be considered a refusal and I will be suspended with pay, pending a hearing.

EMPLOYEE \_\_\_\_\_ MONITOR \_\_\_\_\_ DATE \_\_\_\_\_

Police v. City of Newark, 216 N.J. Super. 461, 473 (App. Div. 1987) (dicta).

A drug test administered for employment purposes is a constitutional search when it is based on reasonable suspicion. Several courts have held that reasonable suspicion of illegal use of drugs is an adequate basis for requesting an employee in a sensitive position to submit to a drug test. See, e.g., Copeland v. Philadelphia Police Dept., 840 F.2d 1139 (3d Cir. 1989), cert. den. \_\_\_ U.S. \_\_\_, 109 S. Ct. 1636 (1989). There is no authority addressing reasonable suspicion testing of employees in non-sensitive positions, but this appears to be attributable to the fact that employees in non-sensitive positions who have challenged testing programs have not challenged "reasonable suspicion" testing. See, e.g., Harmon v. Thornburg, 878 F.2d 484, 486 n.1 (D.C. Cir. 1989).

The Department of Personnel proposed a more restrictive standard for "for cause" testing of employees who do not hold sensitive positions -- clear signs of duty impairment that pose a danger to the employee or others. This proposal found support from the Departments of Environmental Protection, Human Services and the Public Advocate. The majority rejected this proposal for the reasons stated above. Further, as discussed in the Commentary to findings 5, 6 & 7 and 8, 9 & 10, there are a multitude of workplace problems caused by substance abuse that do not rise to the level of "a clear danger to the employee or others" -- inattentiveness, excessive absenteeism and possession of drugs in the workplace to name a few. In the majority view, a

department or agency must have the discretion to require an employee to submit to a drug test when the employer has good reason to suspect that the employee is illegally using drugs. The proposed policy does not require a department or agency to perform tests on reasonable suspicion.

Department Discretion to Conduct Drug Tests Based on Reasonable Suspicion. The proposed policy does not require a department or agency to conduct a drug test when it has reasonable suspicion. There are many reasons for this position. The decision to conduct a test on this basis calls for a careful assessment of all the facts involved; supervisors should not be placed in the position of violating policy if they assess the facts with undue caution. Further, testing is merely one of many means available for dealing with substance abuse in the workplace. Where the duties of a position are not sensitive a department or agency should not be precluded from utilizing others avenues -- e.g., employee performance can be documented, an employee can be referred to the Employee Advisory Service, and discipline or discharge on the basis of performance or conduct is an option.

#### SUBSECTION 2: RANDOM DRUG TESTING

Subsection 2, a. defines "random drug testing," it is testing that is not based on a reasonable suspicion that a particular

employee is illegally using drugs: employees must be selected for random testing on a basis unrelated to their identity.

Subsection 2, b. delineates the three circumstances under which random drug testing of employees who hold positions identified as Sensitive under the criteria and procedure provided in Section VII may be required.

Subsection 2, b. (i): Law Enforcement Training Programs.

Subsection 2, b., (i), authorizes random drug tests of persons participating in a training program for a Sensitive Position in law enforcement. The trainees must have notice of the testing requirement prior to enrollment, and the testing program must have the approval of the Attorney General.

A testing program of this sort has been in place in many police training academies of this State for several years. Since 1988, this testing has been required in all academies by rule of the Police Training Commission.

The Task Force determined that random testing of all trainees who will be authorized to carry firearms and enforce the criminal laws of this State upon completion of training is critical. The training process itself involves the handling of firearms and its concomitant risks. Further, the State must take measures to ensure that its vital interests in public safety and proper enforcement of the criminal law are not undermined by entrusting the performance of these duties to persons who illegally use drugs.

The New Jersey Supreme Court has recognized the State's responsibility to supervise officers who have the authority to carry firearms, use deadly force and enforce law and order; the Court has recognized that illegal use of drugs is incompatible with the integrity of law enforcement agencies and the ability of officers to perform their duties. *Matter of Carberry*, 114 N.J. 574, 578 (1989).

Such testing is apparently reasonable under federal constitutional standards. The United States Supreme Court has upheld a testing program in which all employees who apply for promotion to a position requiring them to carry a firearm will be tested for illegal use of drugs. *National Treasury Employees Union v. VonRaab*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1384 (1989). The Federal District Court for the District of New Jersey has approved random drug testing of recruits participating in a training program for Corrections Officers. *Poole v. Stephens*, 688 F. Supp. 149 (D.N.J. 1988). Federal courts have upheld random tests of officers already employed. *Policeman's Benevolent Ass'n v. Township of Washington*, 850 F.2d 133, 135 (3d Cir. 1988), cert. den. \_\_\_ U.S. \_\_\_, 109 S. Ct. 1637 (1989); but cf. *Fr. Order of Police v. City of Newark*, 216 N.J. Super. 461, 473 (App. Div. 1987) (in a case decided prior to *Carberry*, *VonRaab*, the court invalidated, on State constitutional grounds, random testing of police officers).

The Department of Health is opposed to random testing under all circumstances. The Public Advocate correctly notes that this issue has not been resolved by the New Jersey Supreme Court under

the State Constitution. The Task Force, nonetheless, recommends random testing under the narrow circumstances identified in this policy.

While one New Jersey trial level court, in an unpublished opinion which has no precedential value, invalidated testing under similar circumstances, that case was decided prior to the United States Supreme Court's decision in Skinner and VonRaab. See Sweeney v. Bergen County, (Ch. Div. 1988, Docket No. C-4175-87). VonRaab, which allows testing of applicants for promotion to positions that require an employee to carry a firearm, supports the random tests proposed here. Further, several of the judicial decisions upon which the trial judge in Sweeney relied, have been overruled or reversed. The testing is clearly distinguishable from the blanket random testing of sworn officers invalidated in Fr. Order of Police v. City of Newark, 216 N.J. Super. 461, 473 (App. Div. 1987). Therefore, the Task Force concluded that it is appropriate to recommend continuation of this form of random testing in academies.

Subsection 2, b. (ii): Reasonable Suspicion of Illegal Use Of Drugs by a Group of Employees Holding Sensitive Positions.

Subsection 2, b. (ii) authorizes random testing of an entire group of employees holding Sensitive Positions if there is a basis for reasonable suspicion that unidentified employees in that group are illegally using drugs. The reasonable suspicion required here, unlike that required under subsection 1, cannot be narrowed to an individual employee; it extends to the entire

group. A department or agency that seeks authority to conduct a random test on this basis must be able to demonstrate the factual basis for the reasonable suspicion. In addition, it must be able to demonstrate that testing all employees in the group identified is necessary to alleviate a serious threat to public safety.

An example best illustrates the application of this section: assume that numerous "crack" vials are found in a locker room used by bus drivers following the day shift but before the night shift arrived. If a Department sought to conduct a random test on the basis of this evidence, it would be required to establish:

1. that the bus drivers hold positions identified as Sensitive pursuant to Section VII of this Policy;
2. that there was good reason to suspect, because there was limited access to the locker room, that one or more of the day shift drivers left the vials;
3. that the suspicion extends to the entire group of bus drivers to be tested -- i.e., a test of the night shift or of drivers who were absent on the day in question would not be warranted;
4. that the the use of crack by one or more of these bus drivers poses a threat to the public safety; and,
5. that a random test of the entire group is necessary to alleviate the threat to public safety -- i.e., that the bus drivers responsible cannot be reasonably identified by other means, such as questioning.

In order to ensure that all conditions are satisfied and that a test on the basis asserted is consistent with the constitutional rights of the employees, the test may not be performed unless the Attorney General approves it. Further, the

employees must have been notified that they were subject to testing on this basis.

The Task Force concluded that the State's vital interest in public safety outweigh the individual interest of the employees subject to random testing when all of the requirements of this subsection are satisfied. Federal courts have upheld drug tests of employees in sensitive positions that were not supported by any suspicion of drug use among the group to be tested. See *VonRaab*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1384; *Skinner v. Railway Labor Executives' Ass'n*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1402 (1989); see *Harmon v. Thornburg*, 878 F.2d 484, 489 (D.C. Cir. 1989) (the fact that a drug test is random does not require a "fundamentally different analysis from that pursued by the Supreme Court in VonRaab").

The tests authorized here are distinguishable from the random tests disapproved by a New Jersey Court. In a case involving random tests of officers employed by the City of Newark, the Appellate Division ruled the tests impermissible after finding: no evidence of illegal use among group of officers; no evidence of widespread use among officers of the department; no evidence of danger to the public; and some evidence that the City had information that would allow it to identify the officers who were illegally using drugs. *City of Newark*, 216 N.J. Super. at 474-75.

Subsection 2, b., (iii): Random Testing of Employees in Sensitive Positions: When Illegal Use of Drugs Would Pose An Immediate And Substantial Threat to The Lives of Numerous Persons. Subsection 2., b., (iii) authorizes testing of an entire group of employees who hold Sensitive Positions, without any suspicion of illegal use of drugs among the group. This testing is authorized only if the duties of the positions the employees hold are so sensitive that illegal use of drugs by an employee in the group would pose an immediate and substantial threat to the lives of numerous persons and the test is "necessary" for detection of illegal use of drugs by an employee in the group -- e.g., because the employees work under circumstances where neither their work product nor day-to-day performance can be observed. A department or agency must gain prior approval of the Attorney General before conducting random tests authorized in this subsection. Further, the Commissioner of the Department of Personnel, the Director of the Office of Employee Relations and the employees in the group must have been given prior notice of the plan to conduct random drug tests.

This random testing proposal is limited to cases where a drug-related lapse could cause irreversible and calamitous results and drug testing is necessary to alleviate that danger. The majority of the Task Force concluded that the State's interests in public safety outweigh the individual rights implicated under circumstances of this nature.

The Court of Appeals for the District of Columbia recently employed similar analysis in upholding random urinalysis tests for civilian employees who pilot airplanes and helicopters for

the army. The Court considered the threat of irreversible harm, the employers need to avert it, and the difficulty of observing the performance of these employees. The Court concluded that the government's interest in avoiding the substantial threat to life outweighed the employees' interest in freedom from urine testing. *National Federation of Federal Employees v. Cheney*, \_\_\_ F.2d \_\_\_ (D.C. Cir. 1989) (1989 U.S. App. Lexis 12963). One New Jersey Court has, in dicta, indicated that random testing of persons engaged in "extra-hazardous" activities such as working with high voltage wires or nuclear energy might be permissible. *City of Newark*, 216 N.J. Super. at 476 n.12.

Subsection 2, b. (iv): Other Random Testing Precluded.

Subsection 2, b. (iv) precludes random testing under any circumstances other than those outlined in this section. It allows one exception for random tests that are administered with the express approval of the Governor.

Task Force Debate: Attorney General Approval. The Department of Personnel objects to the absence of a time limit for Attorney General approval of random testing. That Department suggests that a failure to approve within a specified time should be deemed approval of the test requested. The Task Force rejected the position after considering the sensitivity of the judgments involved in testing without individualized reasonable suspicion: approval by default would defeat the purpose of the approval requirement -- careful scrutiny of the legal propriety of the

test proposed.

The majority of the Task Force also considered but rejected the Department of Personnel's concern that it and the Governor's Office should be required to approve the random testing authorized in Subsection 2, b., iii. The majority concluded that notice to the Department of Personnel and the Office of Employee Relations was an adequate check on the Attorney General's exercise of approval authority. The majority concluded that the Department of Personnel's participation in the identification of Sensitive Positions gave that agency appropriate opportunity for input, and that identification of these extra-sensitive positions and the question of the necessity for random testing to detect illegal use of drugs was best left to the department or agency and the Attorney General.

### SUBSECTION 3: MEDICAL TESTING

Subsection 3, a.: Criteria for Medical Testing. Subsection 3, a. proposes authorizing departments or agencies to conduct drug tests in conjunction with regular medical examinations administered, as a condition of employment, to determine the fitness for duty of employees who hold Sensitive Positions. The drug test must be conducted in accordance with the drug testing procedures outlined in this proposed policy; the department or agency must obtain prior approval of the Attorney General, and the employees cannot be tested unless they have been given prior notice that a test for illegal drugs will be part of the medical examination.

The Task Force concluded that employees in sensitive positions who were subjected to medical examinations for fitness could also be tested for use of illegal drugs. The additional test involves little, if any, intrusion additional to that involved in the medical examination and absence of traces of illegal drugs is highly relevant to fitness for positions that are Sensitive under the criteria set forth in this proposed policy. For these reasons, the Task Force recommends allowing drug test under these circumstances. One New Jersey Court has, in dicta, indicated that such testing is permissible. City of Newark, 216 N.J. Super. at 469 n.6.

Prior approval of the Attorney General is required to assure that departments and agencies do not institute regular medical examinations as a means of conducting unauthorized random testing. While the Task Force views this possibility as extremely remote, the Public Advocate expressed concern that the medical testing provision, in conjunction with the random testing provisions, would have the effect of permitting wholesale random testing of employees in Sensitive Positions. That Department also views medical testing as creating serious risks for a violation of professional ethics. As discussed previously, in the view of the majority medical examinations to determine fitness for duty are common and are not considered violative of a physician's responsibilities.

The Department of Human Services objects to drug testing in conjunction with a medical exam unless the exam is given in

connection with a fitness for duty exam upon return to duty after leave of absence related to the use of drugs.

Task Force Debate: Attorney General Approval. The Department of Personnel objects to the requirement of Attorney General approval of drug testing in conjunction with medical examinations. That Department contends that the Department of Health is better suited to evaluate medical examinations. The majority viewed the issues involved as legal not medical.

The Department of Personnel also objects to the absence of a time limit for Attorney General approval of medical testing. The Department suggests that a failure to approve within a specified time should be deemed approval of the test requested. The Task Force rejected the position after considering the sensitivity of the judgments involved in testing without individualized reasonable suspicion: approval by default would defeat the purpose of the approval requirement -- careful scrutiny of the legal propriety of the test proposed.

## SECTION VII: COMMENTARY

This Section provides the criteria and procedures that the Task Force proposes for identification of Sensitive Positions. As stated in the introductory clause of subsection 1, each department or agency, in cooperation with the Department of Personnel, is to identify positions that are Sensitive under the criteria stated in this Section.

Subsection 1, a.: Risk to Health and Safety. Subsection 1, a. deals with positions that the Task Force deemed should be identified as Sensitive because of the health or safety risk that an employee using illegal drugs would pose if allowed to perform those duties. The subsection sets forth a two part test: 1. the duties must be such that improper or inadequate performance would present a substantial risk to the health or safety of the public, coworkers or the employee; and, 2. the duties must involve one of the five enumerated activities or an activity that a department or agency can demonstrate would pose an equally substantial threat to health and safety.

Activities the Task Force has identified are: operation of a vehicle of public transportation; performance of maintenance work that affects the safe operation of a vehicle of operation; maintaining or operating devices that regulate the safe travel of vehicles of public transportation; carrying a firearm; and, operating heavy or dangerous equipment or machinery.

There was no dispute as to the propriety of the criteria the Task Force selected for identification of these safety Sensitive Positions. The provision that allows departments or agencies the opportunity to identify additional activities that satisfy the criteria of this subsection is not intended to be broadly construed. The Task Force has identified activities that it believes pose substantial threats if not properly or adequately performed. The activities all involve the potential for immediate, serious and irreversible harm to life or limb if performed by a person suffering from the effects of the illegal use of drugs. See Commentary to Findings 5, 6 and 7, Section II.

Subsection 1, b.: Risk to The Criminal Justice System.

Subsection 1, b. deals with positions that the Task Force deemed should be identified as Sensitive because of the threat to the enforcement and administration of the criminal law that an employee using illegal drugs would pose if allowed to perform those duties. The subsection sets forth a two part test: 1. the duties must be such that improper or inadequate performance would present a substantial risk to the proper enforcement and administration of the criminal law; and, 2. the duties must involve one of the three enumerated activities or an activity that a department or agency can demonstrate would pose an equally substantial threat to proper administration of the criminal justice system.

Activities the Task Force has identified are: direct responsibility for the enforcement of the criminal law; direct

access to confiscated controlled substances; direct responsibility for the supervision, custody or transport of persons charged with or convicted of crime or charged with delinquency or adjudicated delinquent.

There was no dispute as to the propriety of the criteria the Task Force selected for identification of these criminal-justice-system Sensitive Positions. The provision that allows departments or agencies the opportunity to identify additional activities that satisfy the criteria of this subsection is not intended to be broadly construed. The Task Force has identified activities that it believes pose substantial threats to the apprehension, prosecution and detention of persons who violate the criminal law if performed by persons who are themselves using illegal drugs.

Subsections 2 through 5: Procedures Designed to Ensure Uniform Application of The Criteria.

Subsections 2 through 5 outline a process for the identification of Sensitive Positions that the Task Force believes is necessary to, and will accomplish, uniform application of the criteria for identification of Sensitive Positions.

Subsection 2 proposes that departments and agencies submit lists of positions, either all positions in a Title or particular position numbers within a Title, that the department or agency deems Sensitive under the criteria stated in subsection 1. Reasons for the selection must be provided. The Department of

Human Services objects to this procedure. That Department is of the opinion that the Department of Personnel is the appropriate department to determine and identify sensitive positions in a uniform manner. The majority determined that the procedure it adopted would provide necessary input from the departments and provide for uniformity through review by the Department of Personnel.

Subsection 3 calls for the Department of Personnel to review the lists submitted, consult with the Attorney General and approve or disapprove each entry. The Task Force anticipates that the Department of Personnel will compare lists submitted by various departments in recommending additions to and deletions from individual lists.

Subsection 4 allows departments and agencies to seek amendments to final lists.

Subsection 5 requires prior approval by the Attorney General before an applicant testing program is implemented. This requirement is designed to ensure that all substantive and procedural requirements of this proposed policy are satisfied.

The process outlined in subsections 2 through 5 of this Section is designed to ensure that applicants and State employees are subject to drug testing under uniform criteria.

## SECTION VIII: COMMENTARY

This section delineates the procedures and states the consequences for illegal use, possession sale or distribution of drugs by State employees. Subsection 1 applies where the Department or Agency finds that an employee has engaged in this conduct. Subsection 2 applies where the employee seeks assistance with a substance abuse problem prior to any evidence of drug abuse or of a performance problem affecting the safety of the public or the workplace.

### Subsection 1: EMPLOYMENT CONSEQUENCES AND REHABILITATION WHERE A DEPARTMENT OR AGENCY FINDS THAT AN EMPLOYEE HAS ILLEGALLY POSSESSED, USED, SOLD OR DISTRIBUTED DRUGS.

Subsection 1, a. proposes measures that each department or agency should take when it finds that an employee has illegally possessed, used, sold or distributed drugs. An employee must be discharged unless the employee agrees to and satisfies the conditions outlined in paragraphs (i) through (v) of subsection 1, a. The Task Force deems these conditions necessary to ensure that an employee who is retained discontinues the illegal use of drugs. Each condition is discussed below.

Rehabilitation. Paragraph (i) conditions continued employment on an employee's agreement to participate in any counseling or rehabilitation program required by the department or agency. The treatment program must be one that is approved by the Employee Advisory Service of the Department of Personnel or by the department or agency and by any federal or state agency

responsible for approving or licensing treatment programs. The decision to impose this condition is left to the discretion of the department or agency; a majority concluded that rehabilitation might not be required in every instance.

This provision was the subject of vigorous debate centering on the Employee Advisory Service of the Department of Personnel: the issue was whether departments or agencies could exercise discretion in selection of rehabilitative programs or whether the departments and agencies should be required to utilize the referral system of the Employee Advisory Service.

The majority position is reflected in the proposed policy -- discretion should be allowed. The Task Force, noting individual experiences indicating that the Employee Advisory Service currently lacks the resources to promptly respond to employee needs, concluded that additional demands for services likely to be generated by this proposed policy could not be met by the EAS.

The Department of Personnel cannot support this proposed policy because the policy does not incorporate mandatory referral to EAS. That Department's position is as follows: 1. The Legislature has vested the power and duty to develop employee assistance programs to improve the efficiency and effectiveness of the public workforce in the Commissioner of Personnel. N.J.S.A. 11A:2-11(g), 11A:6-26(b); 2. The Administrative Code currently provides a system for referral of employees to the advisory service that the Commissioner has established. N.J.A.C. 4A:6-4.10; 3. The evaluation of an employee to determine whether rehabilitation or counseling is required is a matter beyond the

expertise of other departments and agencies; 4. EAS has valuable experience with the records of licensed treatment programs, some are successful some are not; and, 5. Successful rehabilitation requires monitoring and follow-up that cannot be accomplished through a referral system that does not include EAS and its follow-up programs for employees who return to the workforce.

The Department of Law and Public Safety is constrained to join with the Department of Personnel in objecting to this provision of the proposed policy. The Attorney General finds the Department of Personnel's position on the statutory authority and responsibility of the Commissioner one that is well-taken. The Attorney General is concerned, however, with the perceived inability of EAS to respond to current needs and believes that additional funding and overall enhancement of the service may well be required. The Attorney General also stresses that it will be necessary for the EAS to work with the various departments and agencies to develop a system that will allow the employer to gain the information on the progress of employees who are referred to EAS for illegal use of drugs. This information is critical to sound employment decisions. It is also critical if this State is to satisfy its responsibilities under the Federal Drug-Free Workplace Act, which requires grant recipients to certify that certain employees have successfully completed rehabilitation. The Department of Law and Public Safety is encouraged by the willingness of the Acting Commissioner of the Department of Personnel to work with the various departments to resolve these difficulties.

The Department of Health shares the Department of Personnel's concern that individual departments and agencies may not be equipped to approve and select treatment and rehabilitation programs.

Agreement to Refrain from Illegal Use of Drugs. Paragraph (ii) conditions continued employment on the employee's agreement to refrain from the illegal use of drugs. The Task Force unanimously agreed that this condition is a necessary and obvious component of a drug-free workplace policy.

Successful Completion of Required Counseling or Rehabilitation. Paragraph (iii) conditions continued employment on successful completion of any counseling or rehabilitation required by the department or agency. The Department of Personnel proposed a provision requiring participation in an EAS "aftercare" program in cases where the program selected by a department or agency does not include an aftercare component. The majority rejected this proposal. Follow-up after completion of rehabilitation is an important concern, but is a concern that departments or agencies can address, as appropriate, in approving a rehabilitation or counseling program for the employee.

Consent to Unannounced Testing. Paragraph (iv) conditions continued employment following a confirmed positive test on consent to unannounced drug testing for a reasonable period of time, not to exceed one year. This proposed provision is

designed to afford departments and agencies a means of assuring that an employee who can be retained following a drug test is refraining from the illegal use of drugs.

Refraining from Illegal Use of Drugs. Paragraph (v) conditions continued employment on the employee's honoring of an agreement to refrain from the illegal use of drugs.

Subsection 1, b: The Requirement of Discipline. Subsection 1, b. provides that discipline must be imposed in all cases in which an employee who has received a confirmed positive test result is retained. Discipline may range from written reprimand to major disciplinary sanction.

The reasons for proposing this requirement of discipline are manifold. The policy the Task Force recommends proposes the establishment of a standard of conduct that directs employees to refrain from this conduct at all times. The reasons that led the Task Force to propose this rule are compelling. See Commentary to Section III. The State cannot afford to have its employees view the rule as a rhetorical platitude.

Moreover, the Task Force believes that use of the disciplinary process to compel participation in rehabilitation will serve a salutary purpose. It will not only allow the employer to ensure that an employee refrains from this dangerous course of conduct but also encourage the employee to successfully complete rehabilitation. As discussed in the Commentary to Finding 12 of Section II, social sanctions of the sort proposed

here are effective with the users of illegal drugs who are most likely to be in the workplace, those who are not yet hopelessly addicted. The disciplinary component, while arguably punitive in appearance, is designed to deter, and ensure the rehabilitation of, employees who are illegally using drugs.

This component of the proposed policy was vigorously debated. The Departments of Health, Higher Education, Human Services, the Public Advocate and Personnel object to the focus on discipline, and contend that the illegal use of drugs should be viewed as an issue of health and rehabilitation. The Public Advocate believes discipline should not be mandated and that agency heads should retain the discretion to determine the appropriate response to a positive test result. The majority agrees that substance dependence is a serious health problem; its victims require compassion. The majority does not, however, agree that the State can ignore the illegality of the conduct involved in this form of substance abuse or miss the opportunity to demonstrate to persons who use illegal drugs that they must desist from this course of conduct if they desire to continue in public service. Further, the majority notes that discipline may range from written reprimand to discharge and believes that this allows ample room for the exercise of appropriate discretion.

As discussed in the Commentary to subsection 2 of this Section, in order to encourage employees to deal with substance abuse problems, the proposed policy provides that discipline should not ordinarily be imposed if an employee voluntarily seeks

treatment before the department or agency has reasonable suspicion of illegal use of drugs or conduct affecting the safety of the public or safety in the workplace.

Subsection 1, c: Retention Not Required. Subsection 1, c. clarifies that no department or agency is required to retain an employee who agrees to and complies with the conditions stated in subsection 1, a. and b. The sensitive nature of the employee's duties or the employee's work history and discipline record may require discharge. This provision preserves necessary discretion to maintain a fit workforce.

The proposed policy is silent on the issue of reapplication for State employment by a person who has been discharged from State service for illegal use of drugs. The Departments of Personnel, the Public Advocate, Health and Human Services objected to the this silence. The Department of Personnel proposed a provision that would require a department or agency to consider an employee who had been discharged based solely on a confirmed positive drug test eligible for reemployment in a non-sensitive position and for rehabilitation following discharge. The Departments of Health, Human Services and the Public Advocate agreed with the general thrust of this proposal. The remainder of the Task Force, reasoning that there is no presumption of eligibility for reemployment in the case of any other discharge from State service, concluded that such a presumption would be inappropriate in this case. Silence on this issue leaves eligibility for reemployment in either a sensitive

or non-sensitive position following discharge for resolution on a case-by-case basis.

Subsection 1, d: Employees Enrolled in a Training Program for Law Enforcement Officers. Subsection 1 d. merely provides that an employee who is enrolled in a training program for law enforcement officers and who is found to have illegally possessed, used, sold or distributed drugs will be denied the appointment that would have followed upon successful completion of the program.

Subsection 2: VOLUNTARY PARTICIPATION IN TREATMENT PROGRAM.

Subsection 2 is intended to encourage employees to seek assistance for substance abuse problems before there is reasonable suspicion of illegal use of drugs or of conduct affecting the safety of the public or safety in the workplace. Accordingly, subsection 2, a. provides that discipline should not ordinarily be imposed if an employee voluntarily seeks the assistance of the department or agency or EAS before the department or agency has evidence that would require it to take action.

In order to ensure that employees who hold sensitive positions do not jeopardize safety while participating in treatment, subsection 2, b. requires an employee in a sensitive position to provide and authorize EAS or other treatment facility

to provide information relevant to the employee's progress in and successful completion of the counseling or rehabilitation program.

This subsection states a strong preference for encouraging participation in necessary treatment programs. While this subsection does not preclude discipline in all cases, the authority to discipline an employee who voluntarily seeks treatment must be exercised in light of the purpose of this subsection -- encouraging voluntary participation in treatment programs. It was necessary to reserve the ability to discipline because illegal use of drugs by employees in some sensitive positions may render them unqualified to continue to perform their assigned duties. See generally Matter of Carberry, 114 N.J. 574, 578 (1989). The Departments of Personnel, and the Public Advocate supported a rule that would have prohibited discipline in all cases of voluntary participation. The majority concluded that discretion must be, as it is in other cases, reserved to the departments and agencies responsible for the supervising the work of the employee. The Department of Labor views the majority's formulation as potentially overrestrictive of department discretion.

### Subsection 3: HEARINGS.

Subsection 3 details procedures for hearings and factors that must be considered in determining the appropriate discipline.

extent to which job performance was affected; whether the employee voluntarily reported the illegal use of drugs; prior disciplinary actions taken; and, the employee's willingness to participate in rehabilitation. The focus is, as it is in all discipline of State employees, on correcting and eliminating problems that undermine the effectiveness and efficiency of the workforce.

Subsection 3, f: Forfeiture. Paragraph f. merely states that where the forfeiture of office law requires discharge is compelled. N.J.S.A. 2C:51-2.

## SECTION IX: COMMENTARY

This Section specifies the consequences for applicants and employees who tamper with or refuse to submit to a drug test authorized pursuant to the provisions of this proposed policy.

### Subsection 1: TAMPERING

Subsection 1, a. requires discipline of an employee who tampers with a drug test authorized under this policy, whether his own or that of another. The procedural provisions of Section VIII must be followed.

Subsection 1, b. requires rejection of an applicant who tampers with an authorized drug test. The procedural provisions of Section VIII must be followed.

Subsection 1, c. advises that a person who tampers with an authorized test may be subject to criminal prosecution. Tampering with or fabricating physical evidence relevant to an official proceeding or investigation that is ongoing, pending or about to be instituted is a crime of the fourth degree. N.J.S.A. 2C:28-4.

### Subsection 2: REFUSAL TO SUBMIT TO AN AUTHORIZED TEST

Subsection 2, a. provides that no applicant or employee may refuse to submit to a drug test authorized pursuant to the provisions of this proposed policy. The proposed policy does not define "refusal." As the plain meaning of the term "refuse" denotes, it does not include inability to produce a urine sample.

While a minority thought it desirable to qualify the verb "refuse" with a modifier such as "wilfully" or "voluntarily," the majority concluded that the additional language would merely confuse what was clear.

The rationale for this provision is obvious. If an applicant or employee can refuse a test without consequence, the purposes of the testing cannot be furthered.

Subsection 2, b. provides that all departments and agencies must reject an applicant who refuses to submit to an authorized drug test.

The proposed policy does not, as it does in the case of a confirmed positive applicant test, impose any restrictions on reapplication for a Sensitive Position by an applicant who refuses to submit to a drug test. A refusal, while an adequate and necessary basis for rejecting an applicant for a Sensitive Position, cannot be equated with a positive drug test.

Subsection 2, c. proposes that an employee who refuses to submit to a drug test authorized pursuant to the provisions of this policy be disciplined for insubordination according to the procedures outlined in Section VIII of the proposed policy. The quantum of discipline for insubordination is left to the discretion of the department or agency. This subsection also proposes that employees who are enrolled in a training program for law enforcement be denied the permanent appointment that would follow upon successful completion of the program.

## SECTION X: COMMENTARY

This Section requires departments and agencies to develop procedures for reporting criminal convictions, formal criminal charges and illegal drug-related activity in the workplace. Section III of the proposed policy requires these reports. The procedures required by this Section must specify a time-frame for reporting, and employees must be notified that failure to submit a required report will be treated as insubordination.

## SECTION XI: COMMENTARY

This section is proposed in order to ensure that all persons who will be subject to the terms of the policy will have notice of its provisions. The section recommends that each department and agency head be required to distribute this policy and the department or agency reporting procedures to each current employee. Applicants whom the department or agency intends to offer employment must also be provided with these documents.

SECTION XII: COMMENTARY

This Section emphasizes that the Department of Personnel, in cooperation with the Departments of Health and Law and Public Safety, will be required to develop training for employees, supervisors and collection site monitors. Training will be essential to the success of the proposed policy.

New Jersey State Library

## SECTION XIII: COMMENTARY

This Section sets forth the procedures for performing drug tests authorized pursuant to the provisions of this proposed policy.

Subsection A. Subsection A states that all drug tests must be conducted in accordance with the procedures set forth in this section. It allows, however, for the Governor or his designee to modify the procedures as testing technology advances. Further, subsections D, E and F, which refer to testing site facilities and procedures, are necessarily in the form of guidelines that could be followed to ensure the integrity of the collection process.

Subsection B. Subsection B refers to the provisions of this proposed policy that authorize testing and requires completion of Drug Test Authorization Form (see Appendix D) before any drug test may be conducted. This provision is designed to ensure that a test will be conducted unless all of the conditions for testing are satisfied.

Subsection C. Subsection C requires designation of collection sites and details suggested requirements for adequate collection sites. This subsection strongly suggests that departments and agencies cooperate to minimize the number of

APPENDIX A

SPEAKERS

## APPENDIX A

The Following Persons Addressed The Cabinet Task Force on Drug Testing In The Workplace

Dr. Molly Joel Coye, Commissioner of Health

Monroe Drew, Program Director, Employee Advisory Services,  
Founder of New Jersey EAS Program - First in Country

Dr. Charles Golden, Director of the Neuropsychology Clinic,  
Professor of Neuropsychology, Drexel University

Dr. James L. Mastrich, Jr., Former Director of Employee  
Assistance Programs for Rutgers Medical School

Nancy Miller, M.S.W., A.C.S.W., C.E.A.P., Employee Assistance  
Director, United Labor Agency

Dr. John P. Morgan, Medical Professor and Director of the Program  
in Pharmacology, CCNY School of Biomedical Education, Associate  
Professor of Pharmacology, Mt. Sinai School of Medicine, Adjunct  
Scholar, Center for the Study of Drug Development, University of  
Rochester

Eric Neisser, Legal Director, A.C.L.U. of New Jersey

Dr. Robert G. Newman, President, CEO, Beth Israel Medical Center,  
New York City, President, CEO, Doctor's Hospital, New York City

Dr. Robert J. Pandina, Scientific Director, Center of Alcohol  
Studies, Rutgers University, Instructor, New Jersey School of  
Alcohol and Drug Abuse Studies

Donald R. Philippi, Business Manager, Local 195 International  
Federation of Professional and Technical Engineers

Dr. Richard Saferstein, Chief Forensic Chemist, New Jersey State  
Police

APPENDIX B

REPORT OF SUBCOMMITTEE  
ON WORKPLACE ALCOHOL ABUSE

REPORT OF THE  
SUBCOMMITTEE ON WORKPLACE ALCOHOL ABUSE  
TO THE  
CABINET TASK FORCE ON DRUG TESTING IN THE WORKPLACE

Molly J. Coye, M.D., M.P.H.  
Commissioner of Health

T. Edward Hollander  
Chancellor of Higher Education

Alfred A. Slocum  
Public Advocate

Introduction

In Executive Order No. 191 Governor Thomas H. Kean observed that the abuse of drugs and alcohol in the workplace "reduces job efficiency, increases absenteeism and sick leave, and, most importantly, jeopardizes the lives and safety of fellow employees and citizens." He formed the Cabinet Task Force on Drug Testing, and charged it, among other things, to formulate a "drug-testing policy for State employees that equitably balances employee rights with the State's vital interests in public safety and in promoting and maintaining a drug-free workplace."

In the course of its deliberations, the Cabinet Task Force has considered the issue of workplace substance abuse in the context of the mandates of the Federal Drug-Free Workplace Act, and from the broader perspective of working toward a safer, more

productive workplace. On March 14, 1989, Governor Kean signed Executive Order No. 204, setting out policies in compliance with the Federal Drug-Free Workplace Act. The Cabinet Task Force continues to gather information and to deliberate on issues of worker drug testing, workplace safety and productivity.

In the course of these continuing deliberations, the Chairperson formed a subcommittee to address the question of the extent to which the Cabinet Task Force should address the problem of alcohol abuse in the workplace. Below are the findings and recommendation of that subcommittee.

#### Summary

The subcommittee considered the information presented in the course of the Cabinet Task Force's deliberations, and made two findings. First, the subcommittee found that alcohol abuse presents a greater threat than illegal drug abuse to workplace health, safety and productivity. Second, it found that it would be ineffective, perhaps counterproductive, to design programs to address and combat illegal drug abuse, but not alcohol abuse by workers.

#### Discussion

The first finding of the subcommittee is that alcohol abuse is a major cause of health problems, and a major cause of reduced

workplace safety and productivity in New Jersey and the nation.

A recent study from the Public Health Service reported:

- . Approximately 18 million adults in the United States have alcohol abuse problems; approximately 10.6 million suffer from the disease of alcoholism.
- . Alcohol is a factor in nearly half of all accidental deaths, suicides and homicides, including 42% of fatal motor vehicle accidents.
- . Health care treatment costs for alcoholism were approximately \$13.5 billion in 1983; at least 500,000 Americans were reported to be in treatment for alcoholism and alcohol abuse in September 1984.
- . Health care costs for alcohol-related accidents were estimated at \$15 billion in 1983; reduced productivity costs were estimated at \$65.6 billion.<sup>1</sup>

A 1982 report from the National Institute on Alcohol Abuse and Alcoholism found significant correlation between alcohol abuse and workplace safety and productivity. Problem drinkers were found to be absent 2.5 times as often as a control group, and to have 2.2 times the number of days of disability. Problem drinkers were found to have 3.5 times as many workplace accidents

1. Fact Sheet for Sixth Annual Report to Congress on Alcohol and Health, Alcohol, Drug Abuse and Mental Health Administration, Public Health Service, U.S. Department of Health and Human Services (Fall 1987).

as the control group.<sup>2</sup>

A recent Special Report from the Bureau of National Affairs cited similar statistics, finding that drug and alcohol abuse leads to increased absenteeism and tardiness, reduced productivity, increased illness, accidents and injuries, and higher use of medical benefits. The report indicated that alcohol abuse was a larger workplace problem than was abuse of other drugs. The report cited one estimate of \$30.8 billion in lost productivity attributable to alcohol abuse, with \$8.3 billion attributable to other drugs, and another estimate attributing \$65 billion in lost productivity to alcohol abuse, and \$33 billion to other drugs.<sup>3</sup>

The final report from a study commission to the Maine Legislature emphatically stated that alcohol abuse presents more significant workplace health and safety risks than drug abuse:

The Majority calls attention to the fact that all surveys and studies emphasize that alcohol is the most common substance abused, and that the costs caused by alcohol abuse exceed the

2. Fact Sheet: Facts on Alcohol Use Important to Industry, National Institute on Alcohol Abuse and Alcoholism (October, 1982).
3. Alcohol & Drugs in the Workplace: Costs, Controls, and Controversies, a BNA Special Report (The Bureau of National Affairs, Inc., 1986).

costs caused by abuse of all other substances combined by a wide margin.<sup>4</sup>

National studies, then, agree that alcohol abuse, like illegal drug abuse, presents severe workplace safety and productivity problems. New Jersey's problem does not differ significantly from that of the nation. Dr. Molly Coye, New Jersey Commissioner of Health, reported that alcohol abuse is a major public health problem in the State, absorbing approximately 20% of New Jersey's health care dollars.<sup>5</sup>

The second significant finding of the subcommittee is that a drug program designed to enhance workplace health, safety and productivity should address the problems of legal drugs (including alcohol) as well as illegal drugs. Every invited speaker before the Cabinet Task Force who expressed an opinion stated the strong view that the problems of alcohol and drug abuse are workplace problems that should be addressed together.<sup>6</sup>

4. Report of the Maine Commission to Examine Chemical Testing of Employees to the State of Maine 112th Legislature, Second Regular Session p. 15 (December 31, 1986) (Majority Report).
5. Testimony to Cabinet Task Force on April 21, 1989.
6. The invited speakers who agreed that an employee program to express substance abuse should encompass all abused substances included: Dr. Molly J. Coye, New Jersey Commissioner of Health (April 21, 1989); Dr. Robert J.

(Footnote continues on next page)

Dr. Coye stated the view that an overemphasis on illegal drugs could "deflect" attention from the more prevalent, and arguably more serious workplace problem of alcohol abuse.<sup>7</sup> Dr. Mastrich expressed the view that providing for management and supervisory training, counseling and referral for illegal but not legal drugs would be to ignore the primary workplace safety and productivity problem. Further, such a limited program would ignore the opportunity to address all types of substance abuse in the workplace.<sup>8</sup> Rev. Drew reported his observation that abusers

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(Footnote continued from previous page)

Pandina, Scientific Director, Center of Alcohol Studies, Rutgers University (April 21, 1989); Monroe Drew, Director, Employee Advisory Service of New Jersey (April 21, 1989); Dr. James L. Mastrich, psychologist, consultant in Employee Assistance Programs and former Director of Employee Assistance Programs for Rutgers Medical School (May 2, 1989); Nancy M. Miller, M.S.W., Employee Assistance Director, United Labor Agency (May 2, 1989); Dr. John P. Morgan, Medical Professor and Director of the Program in Pharmacology of CCNY School of Biomedical Education, Associate Professor, Sinai School of Medicine (May 2, 1989); and Dr. Robert G. Newman, President and Chief Executive Officer of Beth Israel Medical Center and Doctors Hospital, both in New York City (May 2, 1989). Dr. Richard Saferstein, Chief Forensic Scientist for New Jersey State Police (May 2, 1989) and Charles J. Golden, Professor of Neuropsychology, addressed technical testing questions and did not address EAPs. Eric Neisser, legal director of the New Jersey Chapter of the American Civil Liberties Union, did not address the issue of the effectiveness of EAPs.

7. Testimony to Cabinet Task Force on April 21, 1989.

8. Testimony to Cabinet Task Force on May 2, 1989.

of one drug tend to abuse other drugs as well.<sup>9</sup>

The subcommittee found two reasons for addressing the problems of alcohol and illegal drugs together. First, a program addressed only to illegal drugs would deflect effort and attention from the problem of alcohol abuse, a problem with a much more significant impact on workplace health, safety and productivity. Second, the problems of abuse of alcohol and illegal drugs overlap, leading to the natural conclusion that the solutions overlap as well.<sup>10</sup>

#### Conclusion

The Subcommittee on Alcohol Abuse examined the information presented by the invited speakers as well as the other information available to the Cabinet Task Force. We conclude that:

- Alcohol abuse creates at least as great a health, safety and productivity problem in the workplace as does the abuse of illegal drugs.

9. Testimony to Cabinet Task Force on April 21, 1989.

10. Another subcommittee of the Task Force is addressing treatment issues, and will address more specifically the nature of some of the possible solutions available to the Task Force.

- . A drug program designed to enhance workplace health, safety and productivity should address the problems related to the abuse of alcohol as well as other drugs.

The subcommittee recommends that the information contained in its report be incorporated into the final report of the Cabinet Task Force to the Governor, for his consideration and for his referral, as appropriate, to future bodies considering these difficult issues.

APPENDIX C

REPORT OF SUBCOMMITTEE  
ON EMPLOYEE ASSISTANCE:  
EMPLOYEE ASSISTANCE - AN ALTERNATIVE TO PUNISHMENT

William Waldman  
Acting Commissioner Human Services

Molly J. Coye, M.D., M.P.H.  
Commissioner of Health

## Employee Assistance - An Alternative to Punishment

### Introduction

It seems clear that any drug-testing policy must maintain a balance between discipline and rehabilitation. Prevention, education, intervention and treatment programs all have a place in this policy.

While there are certainly instances where termination of employment may be appropriate for a drug-related offense, there are many benefits to be gained through rehabilitation efforts and referral to Employee Assistance Programs (EAPs).

As a result of a drug abuse problem, many employees and their families suffer from other problems such as family discord, domestic violence, divorce, depression and other health and mental health problems which impact on job performance. EAP's are designed toward dealing with a wide range of personal problems of both the employee and his family.

Studies have shown that employee participation in an EAP results in improved job performance and productivity following treatment, reduction in absenteeism, decreases in health care utilization and reduction in accidents on the job. In August 1977, the Medical department of the American Telephone and Telegraph Company initiated an Employee Assistance

Program (EAP). The program was established in response to the growing recognition that employees with medical/behavioral problems could benefit from supportive counseling. The study was designed to document the impact of the EAP on the Corporation and the individuals served. While many of the benefits to employees and their families are intangible, there is evidence that supervisors and managers benefit and receive support through the system in resolving employee problems which impact negatively on the workplace when they are left unresolved.

While the benefits of EAP's are many, an EAP must have sufficient resources to be effective. Although there have been presentations by our own Employee Advisory Service, a number of concerns arise with respect to whether EAS can handle the expected increase in referrals as a result of this new drug-testing policy. Does EAS have enough staff for scheduling of appointments quickly? Are the numbers of counselors available sufficient to see all referrals of employees and their families? Are the counselors appropriately trained to work with substance abusers? Are linkages with the community for out-patient and in-patient treatment in place and are those programs covered by employee health insurance plans?

## Employee Assistance & Employee Drug Abuse

No effort to stem drug abuse in the workplace can be effective without a series of elements.

1. Active support from the highest levels of management.
2. Written, clear, promulgated policy about the abuse of drugs/alcohol and its consequences in state employment.
3. Education/instructions for employees and supervisors on:
  - a) effects of alcohol and drugs;
  - b) use of workplace/employee assistance programs.
4. A capable, fully funded and utilized employee assistance program.

### 1. Support

Without support from the Governor and Cabinet members, any effort will fail. That support must be seen by employees as active and sincere with a clear explanation of the problems dimensions and articulated backing for solutions. Demonstrated seriousness by management is an absolutely necessary ingredient to make the effort work.

2. Policy

An acknowledgement of factual information drawn from both national studies and New Jersey personnel information should show the rationale for such a policy. Recognition of alcohol/drugs as a treatable disease must be clearly stated and acknowledged. Steps for acting upon abuse/suspected abuse problems should be presented in straight-forward fashion including, as necessary and appropriate, testing, discipline and the role of the employee assistance effort. Part of the policy could include the concept "drug-free" as a condition of employment. Acceptance of recovery is an integral part of the overall policy.

3. Education/Instruction

Employees can be educated about the dangers of drug/alcohol abuse in a realistic, down-to-earth fashion. Lectures, films, brochures and on-going fact sheets are all valuable elements in this process. Prevention should be the ultimate goal of drug/alcohol education.

Supervisors/managers also require separate, specific training to react appropriately to employees who may be suffering from drug/alcohol abuse or any of a number of other possible problems. But this training must stress attention to job performance and highly specific

events. It must divert the supervisor who would attempt to be a diagnostician and keep his attention riveted on performance. What an employee does in off-work hours may have little or no relevance to his or her work performance. (This obviates the common fear that a supervisor is "witch-hunting" or attempting to dictate behavior).

Both the education and supervisor training component can be performed by in-house personnel, employee assistance professionals or hired consultants.

#### 4. Employee Assistance Program

EAPs are cost-effective, humanitarian job-based strategies for helping employees whose personal problems are affecting their work performance. Most basically, an EAP is in place to conserve human resources, balancing economics and empathy. It is a win-win proposition for employees and management. EAPs are confidential and nonpunitive. They affirm three important ideas:

- 1) Employees are valuable members of the team;
- 2) It is better to offer assistance to employees experiencing personal problems than to discipline or fire them; and
- 3) Recovering employees become more productive and effective.(1)

- 4) Any client referred to an EAP who breaks his/her contract, is subject to disciplinary action.

A recent U.S. Chamber of Commerce publication, "Drug Abuse in the Workplace," discusses a wide range of issues. In its segment on drug testing, it states "....employees should keep in mind that the ultimate goal in identifying employees with drug abuse problems is rehabilitation. Toward that end, company sponsored employee assistance programs, referral to public counseling and rehabilitation centers, and reasonable efforts to offer continued employment are appropriate and advisable."(2)

The most obvious question is probably not "Are EAP's good for people?" It is more likely "Are EAP's good for management?"

The answer to the first appears to be obvious and straight-forward. When attention is paid to employees, the concept of re-enforcement readily explains the increased sense of well-being. It's simply better to have a system for dealing with problems than not.

The second question's answer is equally positive and strong! EAP's have shown themselves to be efficient and cost-effective.

"For example, in 1984 a program jointly administered by AT&T and the Communication Workers of America cost the company \$1.3 million, but saved the company \$3.3 million. Furthermore, job retention for employees using the EAP was 97%."(3)

A series of studies performed over the last 12 years appears to bear out the AT&T conclusions. Some of this work is summarized in "Cost Impact of Employee Assistance Programs," Mastrich & Beidel, & Ct., 1985.

A study of New Jersey employees of A.T. & T. in 1981 shows an overall cost savings to the company of \$448,000 by EAP use.(4)

But, to be effective, an E.A.P. must be perceived as useful by employees as well as by management. Employees must be reassured with the concept that this is a confidential, effective, fair unit to deal with. This implies, among other things, that the EAP must be known among the employees; no reputation is as bad as a poor reputation. To be so known, an E.A.P. must have sufficient staff to adequately perform its function and individual staff members must be as familiar, as possible, to employees. Clearly the problems of the state E.A.S. at this time include insufficient visibility. More staff, more strategically placed and more active in employee education is all necessary if the EAS is to continue its mandate as "the state's E.A.P.."

### Interface Between Drug Testing & EAP

Drug-testing is but one method of increasing assurance in identifying persons with a problem. It therefore, becomes another item of information for EAP, as well as management, to consider in dealing with an employee. It is one of several tools which can aid EAP efforts to assess and direct toward appropriate treatment.

But EAP cannot directly operate the drug-testing process (wrong messages sent/apples and oranges). It can only utilize the information provided in its assessment. The neutrality of the EAP cannot be compromised or it will lose the premise on which it is founded: complete confidentiality.

An Employee Assistance Program can perform, through its confidential operations, many functions for the betterment of both employees and the organization (state government).

Perhaps the most important thing to remember is that each organization has its own unique characteristics, dynamics and culture. While it is useful to compare notes with others, each work force may have some special characteristic that an EAP must accommodate-high turnover, assorted shifts,

predominantly one gender or minority group, or considerable decentralization. No matter what the special requirement of the work force, an EAP can be designed to fit those needs. Ultimately, however, the success of the EAP will depend on the quality of the staff and the commitment of those responsible for its operation.(5)

All of the above questions must be answered in order to assess the effectiveness of EAS along or whether some additional resources need to be identified. In any event, the clear trend, along with drug testing, is to provide a work environment that not only values safety in the workplace but values its employees as well. This means that EAP's need to be used as a valuable resource and tool and that they should continue to be developed and improved.

### References

- (1) What Works: Workplace Without Drugs, U.S. Department of Labor, 1989; P. 17.
- (2) Drug Abuse In the Workplace, 2nd Edit, U.S. Chamber of Commerce, Washington, DC, 1988; P. 37.
- (3) Ibid; P. 52.
- (4) Employee Assistance Program Evaluation, Gaeta, Grey & Lynn, for AT&T, 1981; P. 14.
- (5) What Works: Workplace Without Drugs, U.S. Department of Labor, 1989; P. 18.

APPENDIX D

SAMPLE DRUG-TESTING FORMS

S A M P L E

STATE OF NEW JERSEY

DEPARTMENT OF \_\_\_\_\_

DRUG TEST AUTHORIZATION

CLASSIFICATION OF TEST

- ( ) APPLICANT - SENSITIVE POSITION \_\_\_\_\_  
(Specify Position)
- ( ) RANDOM - RANDOM - Basis For Test \_\_\_\_\_  
(Training/ Group /Extra-Sensitive  
Suspicion Position)
- ( ) REASONABLE SUSPICION - Basis For Suspicion \_\_\_\_\_  
Form Completed By
- ( ) MEDICAL - SENSITIVE POSITION \_\_\_\_\_  
(Specify Position)

AUTHORIZED BY:

Department/Agency Head \_\_\_\_\_

Designee \_\_\_\_\_  
(Name and Title)

Where Required for Reasonable Suspicion Test by Section VI,  
1, b., (ii), 2

Director of The Division of Criminal Justice \_\_\_\_\_  
Designee \_\_\_\_\_  
(Name and Title)

Where Required For Random Test based on Group Suspicion by Section VI,  
2, b. (ii)

Attorney General \_\_\_\_\_

I certify that all requirements of the Policy Section authorizing this test have been met.

\_\_\_\_\_  
(Authorizing Agent)

BASIS FOR SUSPICION

REASON TO SUSPECT

- 1. ( ) RESULT OF BONA FIDE MEDICAL EXAMINATION
- 2. ( ) INFORMANT INFORMATION:  
( ) RELIABLE IN PAST ON \_\_\_\_\_ OCCASIONS
- 3. ( ) RELATIVE:  
( ) IMMEDIATE FAMILY  
( ) OTHER
- 4. ( ) CO-WORKER  
( ) PERSONAL OBSERVATION  
( ) FROM ANOTHER SOURCE
- 5. ( ) SUPERVISOR

CHECK FACTORS THAT APPLY

- |                                    |                      |
|------------------------------------|----------------------|
| ( ) PERSONAL OBSERVATION OF USE    | ( ) DIZZINESS        |
| ( ) DETERIORATED WORK PERFORMANCE  | ( ) TREMORS          |
| ( ) SLURRED SPEECH                 | ( ) RAMBLING SPEECH  |
| ( ) APPEARANCE                     | ( ) WORK HABITS      |
| ( ) ABSENTEEISM                    | ( ) CONFUSION        |
| ( ) STAGGERING                     | ( ) DROWSINESS       |
| ( ) ANXIETY                        | ( ) PANIC            |
| ( ) CHRONIC TARDINESS              | ( ) NEGLECT OF DUTY  |
| ( ) SERIOUS MISTAKES               | ( ) INCOMPETENCE     |
| ( ) BELLIGERENT                    | ( ) HYPERACTIVE      |
| ( ) UNUSUAL REQUESTS TO QUIT EARLY | ( ) DEPRESSION       |
| ( ) RESULT OF ACCIDENT             | ( ) EYES ( ) DILATED |
|                                    | ( ) CONSTRICTED      |
|                                    | ( ) RED RIMMED       |
|                                    | ( ) WATERY           |

- 6. ( ) INFORMATION OBTAINED BY A LAW ENFORCEMENT AGENCY

REMARKS \_\_\_\_\_

7. STATEMENT OF REASONS FOR REQUEST \_\_\_\_\_

\_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

8. AUTHORIZATION \_\_\_\_\_  
(Signature of Officer Authorized to Approve Test

S A M P L E

COLLECTION SITE MONITOR'S CHECKLIST

DATE: \_\_\_\_\_ TIME: \_\_\_\_\_

FACILITY \_\_\_\_\_

CONTACTED BY \_\_\_\_\_

EMPLOYEE IDENT. \_\_\_\_\_

SOC. SEC. NO. \_\_\_\_\_ ALTERNATE ID NO. \_\_\_\_\_

MONITOR \_\_\_\_\_ ASSIGNED TO \_\_\_\_\_

TEST BEGAN AT \_\_\_\_\_ ENDED AT \_\_\_\_\_

CHECK OFF LIST:

- ORDER TO SUBMIT ISSUED
- MEDICATION FORM COMPLETED
- ACKNOWLEDGEMENT FORM SIGNED
- CHAIN OF EVIDENCE FORM SIGNED
- EMPLOYEE REFUSED TO SUBMIT TO THE TEST
- DATE SAMPLE OBTAINED \_\_\_\_\_
- TIME SAMPLE OBTAINED \_\_\_\_\_
- SAMPLE CONSISTS OF \_\_\_\_\_ ML OF URINE
- EMPLOYEE VOIDED IN MY PRESENCE
- EMPLOYEE REQUESTED TO VOID IN PRIVATE
- EMPLOYEE PROVIDED SECOND SAMPLE OF \_\_\_\_\_ ML, TO BE FROZEN
- EMPLOYEE UNABLE TO VOID, EIGHT HOUR PERIOD BEGAN AT \_\_\_\_\_  
ENDED AT \_\_\_\_\_ WHEREUPON \_\_\_\_\_ ML VOIDED
- FLUIDS MADE AVAILABLE TO SUSPECT WERE \_\_\_\_\_
- SAMPLE SEALED, TAPED AND MARKED BY EMPLOYEE

REMARKS: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

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

DRUG SCREENING INCIDENT REPORT

DEPARTMENT FACILITY \_\_\_\_\_ DATE \_\_\_\_\_ TIME \_\_\_\_\_

TEST AUTHORIZED BY \_\_\_\_\_ TITLE \_\_\_\_\_

NAME OF EMPLOYEE \_\_\_\_\_ TITLE \_\_\_\_\_

SOC. SEC. NO. \_\_\_\_\_ SEX \_\_\_\_\_ AGE \_\_\_\_\_ PHONE NO. \_\_\_\_\_

ADDRESS \_\_\_\_\_ APT. NO. \_\_\_\_\_

CITY/TOWN \_\_\_\_\_ STATE \_\_\_\_\_ ZIP \_\_\_\_\_

DATE OF EMPLOYMENT \_\_\_\_\_ ASSIGNMENT \_\_\_\_\_

BASIS FOR TEST \_\_\_\_\_ RANDOM \_\_\_\_\_ REASONABLE SUSPICION \_\_\_\_\_

DATE TESTED \_\_\_\_\_ TIME \_\_\_\_\_ AM/PM \_\_\_\_\_

NAME OF MONITOR \_\_\_\_\_ TITLE \_\_\_\_\_

WITNESS \_\_\_\_\_ FOR \_\_\_\_\_

WITNESS \_\_\_\_\_ FOR \_\_\_\_\_

VOLUME OF SPECIMEN #1 \_\_\_\_\_ ML/OZ #2 \_\_\_\_\_ ML/OZ

CONFIRMING LABORATORY RESULTS \_\_\_\_\_ FOR \_\_\_\_\_

DISCIPLINARY PROCEEDINGS \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

REMARKS \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

S A M P L E

COLLECTION SITE MONITOR'S CHECKLIST

DATE: \_\_\_\_\_ TIME: \_\_\_\_\_

FACILITY \_\_\_\_\_

CONTACTED BY \_\_\_\_\_

EMPLOYEE IDENT. \_\_\_\_\_

SOC. SEC. NO. \_\_\_\_\_ ALTERNATE ID NO. \_\_\_\_\_

MONITOR \_\_\_\_\_ ASSIGNED TO \_\_\_\_\_

TEST BEGAN AT \_\_\_\_\_ ENDED AT \_\_\_\_\_

CHECK OFF LIST:

- ORDER TO SUBMIT ISSUED
- MEDICATION FORM COMPLETED
- ACKNOWLEDGEMENT FORM SIGNED
- CHAIN OF EVIDENCE FORM SIGNED
- EMPLOYEE REFUSED TO SUBMIT TO THE TEST
- DATE SAMPLE OBTAINED \_\_\_\_\_
- TIME SAMPLE OBTAINED \_\_\_\_\_
- SAMPLE CONSISTS OF \_\_\_\_\_ ML OF URINE
- EMPLOYEE VOIDED IN MY PRESENCE
- EMPLOYEE REQUESTED TO VOID IN PRIVATE
- EMPLOYEE PROVIDED SECOND SAMPLE OF \_\_\_\_\_ ML, TO BE FROZEN
- EMPLOYEE UNABLE TO VOID, EIGHT HOUR PERIOD BEGAN AT \_\_\_\_\_  
ENDED AT \_\_\_\_\_ WHEREUPON \_\_\_\_\_ ML VOIDED
- FLUIDS MADE AVAILABLE TO SUSPECT WERE \_\_\_\_\_
- SAMPLE SEALED, TAPED AND MARKED BY EMPLOYEE

REMARKS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

DRUG SCREENING INCIDENT REPORT

DEPARTMENT FACILITY \_\_\_\_\_ DATE \_\_\_\_\_ TIME \_\_\_\_\_

TEST AUTHORIZED BY \_\_\_\_\_ TITLE \_\_\_\_\_

NAME OF EMPLOYEE \_\_\_\_\_ TITLE \_\_\_\_\_

SOC. SEC. NO. \_\_\_\_\_ SEX \_\_\_\_\_ AGE \_\_\_\_\_ PHONE NO. \_\_\_\_\_

ADDRESS \_\_\_\_\_ APT. NO. \_\_\_\_\_

CITY/TOWN \_\_\_\_\_ STATE \_\_\_\_\_ ZIP \_\_\_\_\_

DATE OF EMPLOYMENT \_\_\_\_\_ ASSIGNMENT \_\_\_\_\_

BASIS FOR TEST \_\_\_\_\_ RANDOM \_\_\_\_\_ REASONABLE SUSPICION \_\_\_\_\_

DATE TESTED \_\_\_\_\_ TIME \_\_\_\_\_ AM/PM \_\_\_\_\_

NAME OF MONITOR \_\_\_\_\_ TITLE \_\_\_\_\_

WITNESS \_\_\_\_\_ FOR \_\_\_\_\_

WITNESS \_\_\_\_\_ FOR \_\_\_\_\_

VOLUME OF SPECIMEN #1 \_\_\_\_\_ ML/OZ #2 \_\_\_\_\_ ML/OZ

CONFIRMING LABORATORY RESULTS \_\_\_\_\_ FOR \_\_\_\_\_

DISCIPLINARY PROCEEDINGS \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

REMARKS \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

CONTINUITY OF EVIDENCE - URINE SPECIMEN

Place of Voiding \_\_\_\_\_ Date \_\_\_\_\_

Employee's Social Security # \_\_\_\_\_

Voiding ordered by \_\_\_\_\_ Time \_\_\_\_\_ AM PM Date \_\_\_\_\_

Date voided \_\_\_\_\_ Time voided \_\_\_\_\_ AM PM

Official Monitor \_\_\_\_\_  
Print Rank and Name Signature

Employee's Witness (if any) \_\_\_\_\_  
if none, write N/A

Monitor's Witness (if any) \_\_\_\_\_  
if none, write N/A

NOTE: After voiding, the employee will secure the cap of the specimen bottle, initial and wrap evidence tape along the top of the bottle, along the cap and down the other side, place the specimen bottle in a plastic evidence bag, and surrender it to the Monitor. The Monitor will seal the specimen bag in the presence of the individual being tested.

Specimen placed in Evidence Refrigerator. Time: \_\_\_\_\_ AM PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Specimen removed from Evidence Refrigerator. Time \_\_\_\_\_ AM PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Specimen transported from \_\_\_\_\_ Place of Voiding to D.O.C. Laboratory.

Time: \_\_\_\_\_ AM:PM. Date: \_\_\_\_\_ By: \_\_\_\_\_  
Print Rank & Name

Specimen received at Department Laboratory. Time of Arrival \_\_\_\_\_ AM/PM

Date \_\_\_\_\_ By \_\_\_\_\_  
Print Name & Title Signature

Specimen placed in Evidence Refrigerator. Time: \_\_\_\_\_ AM/PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Specimen removed from Evidence Refrigerator. Time \_\_\_\_\_ AM/PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Copy to Laboratory Representative. Original must be returned to Internal Affairs by the person who transported the specimen to the Department Laboratory. Failure to properly complete and date all sections of this form may result in an inability to process this specimen.

**"Frozen Sample"**  
**CONTINUITY OF EVIDENCE - URINE SPECIMEN**

Place of Voiding \_\_\_\_\_ Date \_\_\_\_\_

Employee's Social Security # \_\_\_\_\_

Voiding ordered by \_\_\_\_\_ Time \_\_\_\_\_ AM/PM Date \_\_\_\_\_

Date voided \_\_\_\_\_ Time voided \_\_\_\_\_ AM/PM

Official Monitor \_\_\_\_\_  
Print Rank and Name Signature

Employee's Witness (if any) \_\_\_\_\_  
if none, write N/A

Monitor's Witness (if any) \_\_\_\_\_  
if none, write N/A

**NOTE:** After voiding, the employee will secure the cap of the specimen bottle, initial and wrap evidence tape along the top of the bottle, along the cap and down the other side, place the specimen bottle in a plastic evidence bag, and surrender it to the Monitor. The Monitor will seal the specimen bag in the presence of the individual being tested.

Specimen placed in Evidence Refrigerator. Time: \_\_\_\_\_ AM/PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Specimen removed from Evidence Refrigerator. Time \_\_\_\_\_ AM/PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Specimen transported from \_\_\_\_\_  
Place of Voiding to D.O.C. Laboratory.

Time: \_\_\_\_\_ AM/PM. Date: \_\_\_\_\_ By: \_\_\_\_\_  
Print Rank & Name

Specimen received at Department Laboratory. Time of Arrival \_\_\_\_\_ AM/PM

Date \_\_\_\_\_ By \_\_\_\_\_  
Print Name & Title Signature

Copy to Laboratory Representative. Original must be returned to Internal Affairs by the person who transported the specimen to the Department Laboratory. Failure to properly complete and date all sections of this form may result in an inability to process this specimen.

CONTINUITY OF EVIDENCE - URINE SPECIMEN

Place of Voiding \_\_\_\_\_ Date \_\_\_\_\_

Employee's Social Security # \_\_\_\_\_

Voiding ordered by \_\_\_\_\_ Time \_\_\_\_\_ AM PM Date \_\_\_\_\_

Date voided \_\_\_\_\_ Time voided \_\_\_\_\_ AM PM

Official Monitor \_\_\_\_\_  
Print Rank and Name Signature

Employee's Witness (if any) \_\_\_\_\_  
if none, write N/A

Monitor's Witness (if any) \_\_\_\_\_  
if none, write N/A

NOTE: After voiding, the employee will secure the cap of the specimen bottle, initial and wrap evidence tape along the top of the bottle, along the cap and down the other side, place the specimen bottle in a plastic evidence bag, and surrender it to the Monitor. The Monitor will seal the specimen bag in the presence of the individual being tested.

Specimen placed in Evidence Refrigerator, Time: \_\_\_\_\_ AM PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Specimen removed from Evidence Refrigerator, Time \_\_\_\_\_ AM PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Specimen transported from \_\_\_\_\_ to D.O.C. Laboratory.  
Place of Voiding

Time: \_\_\_\_\_ AM/PM. Date: \_\_\_\_\_ By: \_\_\_\_\_  
Print Rank & Name

Specimen received at Department Laboratory, Time of Arrival \_\_\_\_\_ AM/PM

Date \_\_\_\_\_ By \_\_\_\_\_  
Print Name & Title Signature

Specimen placed in Evidence Refrigerator, Time: \_\_\_\_\_ AM/PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Specimen removed from Evidence Refrigerator, Time \_\_\_\_\_ AM/PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Copy to Laboratory Representative. Original must be returned to Internal Affairs by the person who transported the specimen to the Department Laboratory. Failure to properly complete and date all sections of this form may result in an inability to process this specimen.

**"Frozen Sample"**  
**CONTINUITY OF EVIDENCE - URINE SPECIMEN**

Place of Voiding \_\_\_\_\_ Date \_\_\_\_\_

Employee's Social Security # \_\_\_\_\_

Voiding ordered by \_\_\_\_\_ Time \_\_\_\_\_ AM/PM Date \_\_\_\_\_

Date voided \_\_\_\_\_ Time voided \_\_\_\_\_ AM/PM

Official Monitor \_\_\_\_\_  
Print Rank and Name Signature

Employee's Witness (if any) \_\_\_\_\_  
if none, write N/A

Monitor's Witness (if any) \_\_\_\_\_  
if none, write N/A

**NOTE:** After voiding, the employee will secure the cap of the specimen bottle, initial and wrap evidence tape along the top of the bottle, along the cap and down the other side, place the specimen bottle in a plastic evidence bag, and surrender it to the Monitor. The Monitor will seal the specimen bag in the presence of the individual being tested.

Specimen placed in Evidence Refrigerator, Time: \_\_\_\_\_ AM/PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Specimen removed from Evidence Refrigerator, Time \_\_\_\_\_ AM/PM

Date: \_\_\_\_\_ By \_\_\_\_\_  
Print Rank & Name Signature

Specimen transported from \_\_\_\_\_ to D.O.C. Laboratory.  
Place of Voiding

Time: \_\_\_\_\_ AM/PM, Date: -- --, By: \_\_\_\_\_  
Print Rank & Name

Specimen received at Department Laboratory, Time of Arrival \_\_\_\_\_ AM/PM

Date \_\_\_\_\_ By \_\_\_\_\_  
Print Name & Title Signature

Copy to Laboratory Representative. Original must be returned to Internal Affairs by the person who transported the specimen to the Department Laboratory. Failure to properly complete and date all sections of this form may result in an inability to process this specimen.

APPENDIX E  
SUGGESTED BIBLIOGRAPHY

## BIBLIOGRAPHY

### REPORTS

Maine Commission to Examine Chemical Testing of Employees, Report to the State of Maine, 112th Legislature (Dec. 31, 1986).

Dr. James Mastrich, Report to the Cabinet Task Force on Drug Testing (May 21, 1989).

Dr. James Mastrich and Bernard Beidel, Report to the Occupational Advisory Committee, Governor's Advisory Council on Alcoholism, New Jersey Division of Alcoholism (Oct. 1985).

Dr. Jim Mastrich, Report to the National Association of Manufacturing at Park Plaza, New York City (Oct., 1986).

John P. Morgan, M.D., Report to the Cabinet Task Force on Drug Testing (May 2, 1989).

New Jersey Department of Corrections, Report of Results of Drug Testing of Law Enforcement Personnel to Fred DeVesa, Executive Assistant Attorney General of New Jersey, Legal Affairs Director, (Apr. 9, 1989).

New Jersey Department of Corrections, Report on Voluntary Admission for Drug Abuse Rehabilitation to Fred DeVesa, Executive Assistant Attorney General of New Jersey, Legal Affairs Director, (Sept. 28, 1989).

New Jersey Division of State Police, Report of Results of Drug Testing of Trainees and Sworn Members to Fred DeVesa, Executive Assistant Attorney General of New Jersey, Legal Affairs Director, (Apr. 13, 1989).

### ADMINISTRATIVE MATERIALS

Cal. Admin. Code, Dept. Personnel, Art. 29, §§599.960 - 599.966.

Cal. Admin. Code, Dept. Personnel, Initial Statement of Reasons, Art. 29, §§599.960 - 599.966.

Md. Regs. Code tit. 6, §1.09.

N.J. Employee Advisory Service, Dept. Personnel, Summary, Employee Assistance Program (1987).

U.S. Dept. Health and Human Services, Summary of 1988 National Household Survey on Drug Abuse (1989).

The White House, National Drug Control Strategy Pub. No. 040-000-00542-1 (1989).

BOOKS AND PERIODICALS

Adler, Drug Testing: Employers are Walking a Fine Line, 122 N.J.L.J. 443 (Thurs. Aug. 18, 1989).

American Federation of Labor and Congress of Industrial Organizations, Pub. No. 177, Drug and Alcohol Testing on the Job; Safety with Personal Dignity (1987).

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R) (3d ed. 1987).

Bensinger, Drug Testing in the Workplace, 498 Annals Am. Acad. 43 (1988).

Irving, Drug Testing in the Military - Technical and Legal Problems, 34(3) Clin. Chem. 637 (1988).

Kane, Matthew, Price, Substance Abuse in the Workplace: Practice and Legal Considerations (Drinker, Biddle & Reath 1988).

Masi, Drug Free Workplace: A Guide for Supervisors (1987).

National Institute on Drug Abuse, U.S. Dept. Health and Human Services, Pub. No. (ADM) 88-1442, Employee Drug Screening and Detection of Drug Use By Urinalysis (1988).

Naval Military Personnel Command, Navy Urinalysis Drug Screening Program (Mar. 1989).

Newman, The Dilemma for Business: The Case Against Random Urine Testing in the Workplace, Narc. Officer (Oct. 1988).

Parish, Relation of the Pre-employment Drug Testing Result to Employment Status: A One-Year Follow-up, 4 J. Gen. Internal Med. 44 (1989).

Schwartz, Hawks Laboratory Detection of Marijuana, 254 JAMA 788 (1985).

U.S. Dept. Health and Human Services, Pub. No. (ADM) 87-1477, Interdisciplinary Approaches to the Problem of Drug Abuse in the Workplace; Consensus Summary (1987).

H. Weinstein, Drug Tests: Privacy v. Job Rights, The Los Angeles Times, Sun. Oct. 26, 1986 (1986 photo-reprint 1989).

H. Weinstein, Drug Test Shows Positive - Now What?, Los Angeles Times, Wed. Oct. 29, 1986 (1986 photo-reprint 1989).

CASES

Allen v. Passaic, 219 N.J. Super. 352 (Law Div. 1986).

Capua v. City of Plainfield, 643 F. Supp. 1519 (D.N.J. 1986).

Caruso v. Ward, 72 N.Y.2d 419, 530 N.E.2d 843, 534 N.Y.S.2d 142 (1988).

Committee for G.I. Rights v. Calloway, 518 F.2d 466 (D.C. Cir. 1975).

Copeland v. Philadelphia Police Dept., 840 F.2d 1139 (3d Cir. 1988), cert. denied, U.S. 109 S. Ct. 1636 (1989).

Div. 241 Amal. Transit U. v. Suscy, 538 F.2d 1264 (7th Cir. 1976).

Everrett v. Napper, 833 F.2d 1507 (11th Cir. 1987).

Egloff v. N.J. Air National Guard, 684 F. Supp. 1275 (D.N.J. 1988).

F.O.P. v. Newark, 216 N.J. Super. 461 (App. Div. 1987).

Harmon v. Auger, 768 F.2d 270 (8th Cir. 1985).

Hennessey v. Coastal Eagle Point Co., No. W-003611-86(N.J. Super., Ch. Div., Apr. 28, 1989).

Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989).

Horsemen's Ass'n v. Mass. Racing Comm., 4 I.E.R. Cases 147 (Mass. 1989).

Jones v. MacKenzie, 833 F.2d 335 (D.C. Cir. 1987), cert. granted, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1633, \_\_\_ L. Ed.2d \_\_\_ (1989).

Lovvorn v. City of Chattanooga, Tenn., 846 F.2d 1539 (6th Cir. 1988).

Matter of Carberry, 114 N.J. 574 (1989).

McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987).

National Air Traffic Controller's Ass'n v. Burnley, 700 F. Supp. 1043 (N.D.Cal. 1988).

National Employees Treasury Union v. Von Raab, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1384, \_\_\_ L. Ed.2d \_\_\_ (1989).

National Federation of Federal Employees v. Weinberger, 818 F. 2d 935 (D.C. Cir. 1987).

New Jersey v. T.L.O., 469 U.S. 325 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

Odenheim v. Carlstadt - East Rutherford Reg. Sch., 211 N.J. Super. 54 (Ch. Div. 1985).

Policeman's Benevolent Ass'n. of New Jersey v. Twp. of Washington, 850 F. 2d 133 (3d Cir. 1988), cert. denied, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1637, \_\_\_ L. Ed. 2d \_\_\_ (1989).

Poole v. Stephens, 688 F. Supp. 149 (D.N.J. 1988).

Rushton v. Nebraska Power Dist., 844 F.2d 562 (8th Cir. 1988).

Shoemaker v. Handel, 795 F. 2d 1136 (3d Cir. 1986), cert. denied, 479 U.S. 986, 107 S. Ct. 577, \_\_\_ L. Ed. 2d \_\_\_ (1989).

Skinner v. Railway Labor Exec. Ass'n, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1402, \_\_\_ L. Ed. 2d \_\_\_ (1989).

Transport Workers' Union of Philadelphia v. S.E.P.T.A., No. 88-1160, 88-1206 (3d. Cir., Sept. 1, 1989).

#### EXECUTIVE ORDERS

Executive Order No. 12, 564, 3 C.F.R. 224 (1986) reprinted in 5 U.S.C.A. § 7301 App. at 44-46 (1989).

Maryland Executive Order No. 01-01.1989.05, 16 Md. Reg. 900 (1989).

New Jersey Executive Order No. 191 (1988).

New Jersey Executive Order No. 204 (1989).

#### LEGISLATIVE MATERIALS

Public Law No. 100-690, Title V (1988).

New Jersey Assembly Bill No. 2201 (1988).

New Jersey Assembly Bill No. 3065 (1988).

APPENDIX F

DEPARTMENT OF ENVIRONMENTAL PROTECTION



STATE OF NEW JERSEY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
OFFICE OF THE COMMISSIONER  
CN 402  
TRENTON, N.J. 08625-0402  
(609) 292-2885  
Fax # (609) 984-3962

October 18, 1989

MEMORANDUM

TO: Frederick P. DeVesa  
Executive Assistant Attorney General  
Director, Legal Affairs

FROM: Christopher J. Daggett, Commissioner

SUBJECT: Proposed Policy and Report of the Drug Testing Task Force  
Dated September 1989

I'd like to take this opportunity to commend the members of the Drug Testing Task Force for their dedication to this difficult and often unpopular issue. While I am supportive of the overall policy as proposed, I would like to raise a concern before the proposed policy is presented to the Governor.

At the September 27, 1989 meeting, the Task Force voted to require that applicants being promoted to sensitive positions must be tested. I feel that testing applicants for promotion from one sensitive position to another should be discretionary, not mandatory. Given the on-going discretionary testing for cause permitted under the procedure I see no need for testing prior to promotion.

With regard to treatment of frozen specimen, I believe the applicant or employee retrieving the frozen specimen should be given, in writing, clear chain of custody procedures to follow. I am pleased that at the October 10th meeting the Task Force decided to add language to the Procedures section indicating that frozen specimens will be treated in accordance with procedures established by the employing Department.

Thank you for your consideration on these issues.

c: Task Force Members

APPENDIX G

DEPARTMENT OF HUMAN SERVICES



State of New Jersey  
DEPARTMENT OF HUMAN SERVICES

CAPITAL PLACE ONE  
222 SOUTH WARREN STREET  
TRENTON, NEW JERSEY 08625

WILLIAM WALDMAN  
Acting Commissioner

MEMORANDUM

TO: Frederick P. DeVesa, Executive  
Assistant Attorney General  
Legal Affairs Director

FROM: William Waldman *William Waldman*  
Acting Commissioner

DATE: October 17, 1989

RE: Draft Drug Testing Policy - Comments

As the Acting Commissioner of the Department of Human Services, I have only recently had an opportunity to review the Drug Testing Policy which will be sent to Governor Kean.

It is obvious that a great deal of work went into this draft and that it reflects the majority viewpoint. Many of the minority viewpoints, however, are more in-keeping with the philosophy of the Department of Human Services. I have attached the Department's overview on this subject for the report.

WW:17  
Attachment

OCT 18 1989

RECEIVED

STATE OF NEW JERSEY

STATEMENT OF THE DEPARTMENT OF HUMAN SERVICES

William Waldman  
Acting Commissioner  
October 13, 1989

## Statement of the Department of Human Services

The Department of Human Services, along with the rest of state government, agrees that a drug-free workplace is a laudable goal. Drug abuse is a serious problem which costs an enormous amount in terms of dollars and productivity and which destroys lives.

The Department of Human Services agrees with the Departments of Health, Personnel, and the Public Advocate that this policy, as written, is more punitive in approach than necessary, and does not adequately address rehabilitation alternatives for the workers who use drugs. While the majority sees the drug problem exclusively as a criminal justice issue, it is also a health problem which requires that we look at our employees who use drugs as people who require help. (See Appendix C - Employee Assistance: An Alternative to Punishment, Introduction prepared by Department of Human Services).

This department administers the state's mental health system and the welfare system. Our mission has always been to help those who cannot help themselves and to provide support, counseling, and treatment to those who require it. We believe that people can be rehabilitated and that our employees deserve the same opportunities as those we serve.

2.

We have taken the time to train our employees and to invest in them. We agree that discipline is required, but that discipline should be individualized, and treatment and rehabilitation opportunities made available so that, if at all possible, the employee may return to work.

APPENDIX H

DEPARTMENT OF PERSONNEL



State of New Jersey  
DEPARTMENT OF PERSONNEL  
DIVISION OF APPELLATE  
PRACTICES AND LABOR RELATIONS  
CN 312  
TRENTON, NJ 08625  
Telephone: (609) 984-0118

CHARLES A. HANRY, Ph.D.  
ACTING COMMISSIONER

PETER J. CALDERONE  
DIRECTOR

October 18, 1989

Frederick P. DeVesa  
Executive Assistant Attorney General  
Legal Affairs Director  
Hughes Justice Complex  
CN 081  
Trenton, New Jersey 08625

Re: Cabinet Task Force on Drug Testing in the Workplace

Dear Fred:

Enclosed, for inclusion in the Report of the Task Force, please find a separate report of the Department of Personnel.

Sincerely,

A handwritten signature in cursive script, appearing to read "Henry Maurer".

Henry Maurer  
Legislative Specialist

Enclosures

## Report of the Department of Personnel and Appendix

The Cabinet Task Force on Drug Testing in the Workplace was given the daunting task of advising the Governor on a drug testing policy for State employees that "equitably balances employee rights with the State's vital interest in public safety and in promoting and maintaining a drug-free workplace." An enormous amount of work was done by the Task Force in fulfilling this charge. No one can fault the Task Force for lack of diligence or lack of commitment to a drug-free workplace. However, important recommendations by the "majority"\* of the Task Force to the Governor are seriously flawed: in their emphasis on a punitive approach, in their lack of guidance on uniform rehabilitation programs, and in their standard for testing non-sensitive positions. These issues are so substantial that the Department of Personnel must decline to support the Task Force report as a package for a viable Drug Testing Policy.

While these comments are submitted on behalf of the Department of Personnel, our disagreements with provisions of the proposed policy are shared by several Task Force members. On at least two important issues (providing a narrower standard for

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\* The discussion between minority and majority of the Task Force is imprecise. For instance, if an agency representative did not attend a meeting or did not vote on an item, this fact is not indicated. One is incorrectly lead to believe that where an agency has not expressly stated an objection, that agency is in the majority. In any event, this majority-minority procedure emphasizes the lack of consensus on many major issues.

testing of non-sensitive employees and providing an opportunity to discharged sensitive employees to return to employment in a non-sensitive position discussed more fully below), this Department's position was joined by representatives of departments which have approximately half of the employees of all the departments represented on the Task Force. Thus, on key issues, this statement may represent the viewpoint of agencies constituting a "substantial minority" or "majority" of affected employees in Task Force Departments, based on the proportion of the State workforce in those agencies.

Before discussing the substantive concerns with the policy, we must mention some fundamental problems with the process by which the policy was produced. One of the charges of the Task Force was to study and report on the role of organized labor regarding the State's uniform guidelines on drug testing. A subcommittee of the Task Force was formed very late in the Task Force deliberations to address this issue. The result, as shown by the report, is conspicuously lacking in substance. It is noted that one union leader addressed the Task Force as a whole, and that the subcommittee met on one occasion with labor representatives. Nothing is reported regarding the views of these labor representatives or the outcome of these meetings, except a note that the Governor should circulate the report and give union representatives an opportunity to express views on the policy. However, the appropriate time for full consultation was during the process of formulating this policy.

### Drug Test Consequences

With regard to the substance of the policy, we take issue with a number of specific provisions which reflect a punitive approach to achieving a drug-free workplace. Our approach is decidedly different, not because we are "soft" on drugs, but rather because curbing drug use is one element, albeit a most critical one, of enhancing employee performance. Our focus is on achieving a productive workplace, where employee problems are identified early, and employees with problems are directed to sources for help. The State has a substantial investment in the recruitment, training and health of each employee in its workforce. The costs of removing employees are enormous. Early intervention and effective rehabilitation should therefore be the focus of our efforts.

Based on this approach, we believe the policy is flawed in its provisions for the consequences of a confirmed positive drug test. The policy requires that disciplinary action be taken in all cases of a confirmed positive drug test for both sensitive and non-sensitive employees, and provides that disciplinary action can range from a written reprimand to discharge, based on a list of factors. The ultimate disciplinary action of discharge can be averted through a series of steps, listed in Section VIII, 1a. However, the alternative to discharge is available, in effect, to non-sensitive employees only, since Section VIII, 1c, provides that discharge is not precluded for sensitive employees even if they are willing to complete those steps. Once discharged, the policy does

not offer any path back to employment with the State. We note that current regulations, N.J.A.C. 4A:4-6.1, generally provide for disqualification from appointment for anyone previously removed from public service for disciplinary reasons.

We believe that, while disciplinary action is sometimes appropriate as a consequence of a confirmed positive drug test, disciplinary action for non-sensitive employees should not ordinarily be based on the results of a confirmed positive drug test alone. For employees in sensitive positions, separation from the sensitive position is generally expected, but lifetime disqualification from public employment should not be the usual consequence of a positive drug test.

Such an approach is consistent with the policies of some other states to which we can look for guidance. For example, in Kansas, a non-probationary State employee who tests positive for drugs for the first time is granted a leave of absence to participate in a rehabilitative program. Refusal to participate in, or failure to successfully complete, such a program results in a removal proceeding. Vermont law requires that any employee who tests positive for drugs be referred to, and successfully complete, an assistance program. The employee may be suspended for the period of time necessary to complete the program (up to a maximum of three months). The employee may not be removed from employment unless he or she fails to successfully complete a program or if he or she tests positive for drugs at the conclusion of the program.

In Maryland, if a State employee tests positive for drugs, the appointing authority is to refer the employee to the State Employee Assistance Program; the employee's conduct, rather than the results of the drug test, establish grounds for disciplinary action. The appointing authority may require the employee to submit to periodic testing. A second positive test will result in a 30-day suspension of the employee. A third positive result warrants removal (similar to professional sports' programs). Iowa law requires that an employee's first confirmed positive drug test must result in a referral for substance abuse evaluation rather than disciplinary action. Failure of the employee to successfully complete substance abuse treatment, or refusal by the employee to undergo such treatment, will result in discipline up to and including removal.

Based on these examples, a reasonable policy for non-sensitive employees might provide that disciplinary removal is appropriate: (1) based on conduct other than results of a drug test; (2) when there is failure to complete a treatment program recommended after a previous drug test; or (3) upon failure of a second drug test. In contrast, the Task Force policy, which calls for disciplinary action ranging from written reprimand to discharge in all cases, would emphasize an unnecessarily punitive approach.

For employees in sensitive positions who are subject to disciplinary removal based solely on drug testing results, we should recognize the benefit of rehabilitation and return to State employment in another capacity. Accordingly, a sound policy would

provide such employees with the opportunity for participation in a treatment and aftercare program through the Employee Advisory Service (EAS). Upon successful completion of the program, the former employee should be considered qualified for State employment in a non-sensitive position. The Department of Personnel was joined in urging such an addition to the policy by the Departments of Health, Higher Education, Human Services and the Public Advocate.

#### Incentives for Voluntary Rehabilitation

A sensible policy on drug testing would be one which encourages participation by any employee, whether in a sensitive or non-sensitive position, in voluntary rehabilitation efforts. Again, a consensus within the human resources community and the helping professions supports this view. While the Task Force policy includes a voluntary alternative program, the provisions do not offer a true incentive. The policy states that disciplinary action in these situations "would not ordinarily be taken." Thus, an employee with a drug abuse problem would be in fear by coming forward and seeking assistance before the situation escalates. The Department of Personnel, joined by the Department of Health, believes that an effective policy should clearly state that in these situations, disciplinary action will not be taken and the State should encourage employees with a drug abuse problem to seek rehabilitation and assistance. Thus, in no case should an employee who voluntarily seeks assistance be disciplined for coming forward with the problem.

State Employee Advisory Service

Another critical inadequacy of the policy is its failure to provide a uniform route for rehabilitation of State employees with drug problems. For employees who receive a confirmed positive drug test and are not subject to disciplinary removal, the policy should have provided for a mandatory referral to the State Employee Advisory Service (EAS) and the mandatory completion of a program recommended and approved by the EAS as a condition for continued employment. A review of the literature distributed to the Task Force, the presentations made by several experts, as well as the policies of several other states show a consensus regarding the crucial role of employee assistance programs. Indeed, we have yet to see a drug abuse or testing policy adopted by a public or private sector organization having an employee assistance program that does not require utilization of that program. The Task Force policy, however, does not provide a central role for the State's employee assistance program. Rather, each State agency would be free to send its employees to any licensed rehabilitation program, with or without EAS evaluation or approval.

The Department of Personnel, joined by the Department of Law and Public Safety, urged a more definitive role for the EAS. The reasons are clear. EAS is the statutorily established agency in State government for employee assistance services. See N.J.S.A. 11A:6-26(b). Employer referral of State employees to EAS is provided by regulation (N.J.A.C. 4A:6-4.10) in the case of any problem which affects job performance, which certainly

includes drug abuse. Assessment of the nature and scope of the employee's problem is essential prior to referral. An employee may be addicted to more than one substance and therefore require more specialized treatment. The type of program recommended may vary according to the employee's individual situation, including family circumstances and nature of employment. EAS counselors are trained to make these individual assessments prior to referral to treatment programs. Programs for the treatment of drug abuse vary widely in quality and success rates. EAS recommendations are based on the track record of these programs. Referrals to drug treatment programs directly from an appointing authority may lead to good results - or may lead to employee participation in a program which is a costly failure and calls into question the State government's entire effort to address drug abuse in the workplace. Finally, all experts in the field of drug rehabilitation agree that mere referral to a treatment program is not enough. Monitoring of progress, sometimes for periods up to two years, is essential. Follow-up programs available through EAS are vital to the rehabilitation of the employee.

We note the concerns raised by some Task Force members regarding the ability of EAS to provide timely and efficient service to State employees with drug abuse problems, as well as its referral of employees to rehabilitation programs that may not be covered by employee health insurance plans. These concerns are well founded, but rather than suggesting improvements to the program, the Task Force concentrated its efforts on bypassing the EAS. With regard to EAS resources, the Task Force should have

clearly and forthrightly recommended enhancement of EAS as a vital component in the "war" against drugs. Insurance coverage for drug treatment programs, especially for employees who are members of Health Maintenance Organizations (HMO's) is undoubtedly a serious problem. Again, the role of the Task Force should have been to find solutions. Consistent with its mandate as stated in Executive Order No. 191, the Task Force should have recommended regulations or the enactment of legislation, if necessary, which mandates coverage of drug abuse treatment programs by all health insurance carriers, including HMO's.

#### Standard For Drug Testing

The final category of substantial disagreement with the Task Force recommendations is an area central to the Task Force purpose: determining when to impose drug testing. With regard to current employees, the "reasonable suspicion" standard may be justified for employees holding sensitive positions. But for the bulk of the State workforce who are in non-sensitive positions, the Department of Personnel, joined by the Departments of Environmental Protection, Human Services and the Public Advocate, urged a narrower, more specific standard.

In public employment, there is a threat to public safety when drug use occurs among certain categories of employees, such as operators of public transportation vehicles, persons who are authorized to carry weapons, and those who investigate criminal behavior. Drug use by many other State employees, while clearly

undesirable and inconsistent with an effective public service, does not pose the same threat. For State employees in the "sensitive" positions described above, legal as well as practical justification can be presented for imposing a drug testing program. For employees who do not have these "sensitive" positions, the State will be hard pressed to justify the need for drug testing, unless it is firmly linked to work performance, in the face of likely challenges by employee representatives and others.

There is an additional problem with a drug testing policy which applies the same standard for "cause" testing to both sensitive and non-sensitive employees. Based on the policies of other public entities, as well as the sample "Basis for Suspicion" form appearing in Appendix D, "reasonable suspicion" would likely be based upon certain facts or observations concerning the employee, including such matters as poor attendance, declining work performance, erratic behavior and conflicts with co-workers and supervisors. Supervisors and co-workers are not diagnosticians, especially of drug abuse problems. Such symptoms could be signs of other problems: alcohol abuse, misuse of legal drugs, family problems, depression, etc. But under a drug testing standard as presented in Task Force policy, State government supervisors might be forced or tempted to make the assumption that such problems arise from illegal drug use. A negative drug test may provide legal exoneration, but the employee, however, has been stigmatized as a "possible" drug user in the eyes of his or her co-workers, and/or supervisors.

Sending employees who exhibit certain, often ambiguous, signs to be tested for drugs is also contrary to the message given over the years to supervisors through our Certified Public Manager (CPM) program: namely, don't diagnose the problem; rather, get the employee to recognize that there is a work-related problem and then refer the employee to the Employee Advisory Service, which has counselors trained to diagnose problems and recommend methods of treatment.

For these reasons, a "reasonable suspicion" standard should not be used for non-sensitive positions. Drug testing of the non-sensitive employee should be the extraordinary, not the ordinary, response to workplace problems. For non-sensitive employees, drug testing generally should be used only in the rare case when the employee shows clear signs of duty impairment that pose a danger to the employee or others.

Testing of applicants for sensitive positions makes sense. Unfortunately, the Task Force definition of applicant is not clear. The Department of Personnel, joined by the Department of Environmental Protection, had suggested that, for purposes of uniformity and consistency, the applicant testing policy should apply to all individuals seeking employment in sensitive positions, whether or not they currently hold other employment with the State. Specifically, we proposed that the scope of the applicant testing policy, include those seeking promotion, transfer or other movement from a non-sensitive position. However, the Task Force policy, as explained in the Commentary to Section V, would require testing of

any current employee seeking "appointment" to a sensitive position. Thus, testing would be required for an employee in a sensitive position seeking promotion to another sensitive position (since this may be considered an "appointment"), but an employee transferring from a non-sensitive position to a sensitive position with the same job title could avoid the testing requirement (since such a transfer would not be considered a new "appointment"). Thus, a clearer definition of "applicant" would be useful.

New Jersey State government, as the largest single employer in the State, should have a comprehensive drug abuse policy, with a testing component. The Department of Personnel stands ready to provide its resources in developing a policy which would serve as a model for other employers in this State and across the nation. The recommendations contained in this separate Report represent views of this Department and also those of other State agencies and professionals in this State and across the country. We hope that these views are carefully considered in the formulation of a policy on drug abuse.

Appendix to the Report of the  
Department of Personnel

Response to Employee with a Drug Problem

The following chart outlines recommended responses to certain situations:

	<u>Employees in sensitive positions</u>	<u>Employees in non-sensitive positions</u>
Employee voluntarily seeks assistance for drug abuse	Employee must complete EAS-approved treatment and aftercare program; employee moved from sensitive position during program; leave of absence given if necessary; no disciplinary action.	Employee must complete EAS-approved treatment and aftercare program; leave of absence given if necessary; no disciplinary action.
Employee tests positive for illegal drug use (first time)	Transfer or demotion from sensitive position; possible separation; but opportunity for EAS participation and reemployment in non-sensitive position	Mandatory referral to EAS; required to complete EAS-approved program; possible discipline for conduct other than drug test result.
Employee refuses or fails to complete treatment program	Separation	Separation
Employee tests positive (second time)	Separation	Separation

APPENDIX I

DEPARTMENT OF PUBLIC ADVOCATE



State of New Jersey

DEPARTMENT OF THE PUBLIC ADVOCATE

ALFRED A. SLOCUM  
PUBLIC ADVOCATE

CN 850  
TRENTON, NEW JERSEY 08625

WILLIAM GEVERS  
CHIEF OF STAFF  
TEL. (609) 292-7087

October 19, 1989

Peter N. Perretti, Jr.  
Office of the Attorney General  
Hughes Justice Complex  
CN-080  
Trenton, New Jersey 08625

Dear Attorney General Perretti:

Attached please find the Public Advocate's Minority Report  
to the Cabinet Level Task Force on Drug Testing in the Workplace.

Sincerely,

ALFRED A. SLOCUM  
Public Advocate

AAS:kmc  
Enclosure

10/19/89

3 4 5 7 8



## State of New Jersey

### DEPARTMENT OF THE PUBLIC ADVOCATE

RED A. SLOCUM  
PUBLIC ADVOCATE

CN 850  
TRENTON, NEW JERSEY 08625

WILLIAM GEVERS  
CHIEF OF STAFF

TEL (609) 292-7087  
FAX No (609) 599-9114

MINORITY REPORT OF THE PUBLIC ADVOCATE  
FROM THE MAJORITY REPORT OF  
THE CABINET TASK FORCE ON DRUG TESTING IN THE WORKPLACE

The Public Advocate submits this statement as a minority report on the central recommendations of the majority of the members of the Cabinet Task Force on Drug Testing in the Workplace. This statement supplements the Public Advocate's concerns, reflected in the Commentary, to specific portions of the Majority Report. Governor Thomas H. Kean, in Executive Order 191, expressed deep concern over the broad societal problems created by alcohol and drug abuse, particularly as those problems affect the workplace in the Executive branch of State government. In recognition of the difficulty presented by conflicting individual and societal interests, the Governor drew together a broad Task Force to study the available evidence toward the end of creating a uniform State policy that "equitably balances employee rights with the State's vital

Interests in public safety and in promoting and maintaining a drug-free workplace."

Over the course of the last year, the members of the Task Force have worked diligently in an attempt to fashion a policy that could be applied uniformly across all Executive agencies, and that would equitably and effectively address the problems of workplace drug impairment. During the year's deliberations, clear and fundamental differences of opinion among the members appeared, and were vigorously debated in an effort to strike a balance between the government's legitimate interests and the individual employee's rights. This Department finds, after close consideration of the record and of the views expressed by the other members, that the balance struck by the majority is flawed from both a legal and practical standpoint. Initially, the majority erred in construing the language of Executive Order 191 regarding the need for a "uniform drug-testing policy applicable to all State employees" to indicate that the same need for mandatory drug testing programs exists across all executive agencies. The information available to the Task Force clearly supported the more sensible interpretation of that language, that every workplace has different difficulties in ensuring workplace safety and efficiency, and that they should, therefore, evaluate the need for drug testing on the basis of their own circumstances; should they determine to engage in testing, however, they should subject their employees to testing only under the terms of a uniform, statewide testing protocol. In addition, the majority's suggested policy has

three fundamental defects: (1) It sweeps too narrowly in concentrating on urine testing as the primary mechanism to address the problems of workplace substance abuse; (2) It sweeps too broadly by requiring testing and reporting in situations that are counterproductive in terms of workplace productivity; and (3) It is unnecessarily and improperly intrusive in terms of the privacy and dignity rights of workers in New Jersey.

Legally, the proposed policy recommends a dramatic modification in the State's treatment of its workers in a way that trenches on their fundamental personal privacy rights. It is a truism that every individual has a right to privacy in his or her bodily functions and in his or her medical condition. When government advances a proposal to intrude on these privacy rights, it bears a heavy burden of establishing the primacy of its interests over those of the individual. Government may not, without a strong showing of need, require a person to void urine under supervision, or to reveal (through analysis of that urine) such private matters as pregnancy status, or the use of anti-seizure or HIV medication. The majority's legal analysis supporting its proposal takes an extremely broad view of recent interpretations of the United States Constitution, and a view, that is simply unsupported, of the recent interpretations of the New Jersey Constitution. In undertaking the balancing required under both charters, the majority weights the government's interest heavily with conjecture and hyperbolic overstatement, and sharply discounts workers' privacy

interests in intimate bodily functions and in their medical conditions.

Practically, the punitive orientation of the proposed drug testing policy runs contrary to any attempt to gain workplace productivity and safety through traditional management techniques, which rely on the mutual support and respect of supervisory and nonsupervisory employees. The proposed policy encourages and in some cases requires supervisors and coworkers to ferret out and report criminal activity -- regardless of whether that criminal activity affects a worker's ability to safely perform his or her duties. The proposed policy ignores the context of the State workplace, with its 80,000 workers, and attempts to deal with the safety and efficiency of the workplace as though the workplace is separate from and unaffected by the community in which it is set. The proposed policy emphasizes the punishment and banishment of workers who are "guilty" of the status of having a substance abuse problem, rather than the rehabilitative and therapeutic opportunities available to aid that worker to remain a productive part of State government and of society.<sup>1</sup> The proposed policy places overwhelming reliance on the ability of comprehensive and intrusive testing and reporting mechanisms to solve a deep

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1. See Robinson v. California, 82 S. Ct. 1417, 1420 (1962), in which the Supreme Court ruled it unconstitutional to punish a person for his status, rather than his actions.

medical/social/legal problem. Without producing any meaningful analysis of the scope or nature of the substance abuse problem in the State government workplace, and without providing any meaningful analysis of the overall cost of a comprehensive testing policy, the majority of the Task Force has advanced, as the linchpin of the State's response to workplace substance abuse, the mandatory testing of a broad spectrum of State employees for the residue of illegal drugs in their urine. Alternatives to this intrusive mandatory and probably expensive solution, through the enhancement of supervisory oversight and therapeutic interventions, were discussed by the Task Force, but in the Majority Report receive short shrift, notwithstanding evidence of the cost-effective and humane nature of these options.

The Public Advocate's concerns with the Majority's report are described more fully below. First, the Majority's analysis fails to address the problems of workplace substance abuse within the broader social context. Second, it fails to address the problem of substance abuse coherently, choosing instead to separate the abuse of illegal substances from the abuse of prescription drugs, over-the-counter drugs, and, most significantly, alcohol. Third, its legal analysis fails to properly balance the government's concerns against the individual rights of employees, as is required under the United States and New Jersey Constitutions. Fourth, it fails to address the available and effective alternatives to drug testing. Fifth, it fails to acknowledge the inherent

limitations on drug testing that render its protocol ineffective and dangerous.

A. The social context of a workplace policy

There can be no mistaking the seriousness of the problems caused in today's society by substance abuse. We are all aware of the violence in our cities caused by the lucrative illegal drug business, of the hundreds of millions of dollars of unnecessary medical costs caused by alcohol abuse, and the manner in which drugs have threatened basic social and moral values among all income groups in our society. The human cost is even more staggering. We see lives simply wasted due to the effects of drugs and alcohol, lives of talented people, people who had much to give to others, only to find themselves unable even to care properly for themselves or others due to the tragic effects of substance abuse. People of good will in all walks of life, whether they are cabinet officers in State government, employers, or workers concerned about their safety and the safety of those around them, all share the desire to do the right thing, to do their part to help society begin to heal the deep wounds that continue to be cut by the misuse of legal and illegal drugs.

There can also be no mistaking, however, the daunting challenges faced by any person, agency or government that sets out to attack the problems presented by substance abuse. To an extent that we can only guess at, even after a year of

deliberation, the problem of substance abuse probably has affected the workplace of the largest employer in New Jersey -- State government. Much of the evidence considered by the Task Force was anecdotal in nature; to the extent hard data was considered, it was drawn from a few executive agencies whose experiences in this regard are simply not generalizable across all of State government.

The recent history of governments' attempts to address the problem of substance abuse has taught us that it is a problem that defies simplification; it must be dealt with in a manner that acknowledges its wide effects on every aspect of life. To artificially delimit the scope of a workplace drug program by, for example, relying too much on a punitive or law enforcement orientation, is to ensure that we will be expending our time and resources on one aspect of the problem only to discover that we have ignored -- or exacerbated -- more serious problems elsewhere. Our workers -- even those victimized by substance abuse -- are members of the larger society. If we lose sight of that fact, if we attempt to treat the State workplace as an island isolated from the realities of society, we risk doing more harm than good.

We must begin to recognize that society's substance abuse problems cannot be solved solely through ever-stricter law enforcement techniques. The lure and profits associated with illegal drugs is too great. Diligent enforcement of drug laws, even to the point of incarcerating every person known to have trafficked in drugs, would not alleviate the problem; the lure

and the profit are simply too great. Through providing education and treatment, however, we can both offer help to those whose lives are being threatened, and reduce the market for the sale of illegal drugs.

It is in this social context that workplace drug testing is being advanced. It has been said that substance abuse is a "victimless crime," because no one but the abuser is harmed, and one cannot "victimize" himself. It must be recognized, however, that, as a society, we can victimize ourselves by panicking in the face of widespread substance abuse, by discarding the individual rights and freedoms that have long been at the heart of our legal system. We can similarly do great damage to the workplace environment if we abandon principles that stress the dignity of workers and the need for cooperation between management and workers. A workplace drug policy that demeans employees and attempts to separate the issue of substance abuse from the workplace will be costly, because, in treating the symptom rather than the disease, it is doomed to failure. Rather, enlightened public policy will be to encourage the rehabilitation of employees who are accurately identified as performing in an inadequate or impaired fashion, regardless of the cause, so that they may resume productive employment. In addressing the problem of chemical impairment in the workplace, care must be taken to appropriately balance the State's interest in workplace safety and productivity against the fundamental interest of workers in maintaining their privacy. We must also take care, as employers, that we

do not destroy the relationship of trust and cooperation that is a necessary component of any successful workplace. This relationship is threatened when we charge supervisors with the task of policing the activities of workers beyond that necessary for safety and efficiency in the workplace, and when we punish workers for their status rather than their actions.

#### B. The Nature of the Problem

The people of New Jersey have a right to the service of State employees ready and able to perform their jobs in a competent manner, and State agencies have a responsibility to refuse to hire or retain employees who, by reason of substance abuse problems or otherwise, are unable to perform their duties.

As the largest employer in New Jersey, State government must be concerned with the effects substance abuse has on its employees, and it must set an example of addressing the problem in a humane, lawful and prudent fashion. The Task Force heard evidence of the scope of substance abuse nationally. As is noted in the commentary to The Majority Report, the National Institute on Drug Abuse estimated that, in 1987, 18 million Americans used marijuana, 9-12 million Americans were alcoholics, 10 million Americans misused legal drugs, 6 million

used cocaine, and 600,000 used heroin.<sup>2</sup> In the comprehensive Report of the Maine Commission to Examine Chemical Testing of Employees of December 31, 1986 ("the Maine Report"),<sup>3</sup> a broad range of national surveys on the scope of substance abuse are discussed, citing equally troubling figures -- including statistics on the high cost to the health care system of substance abuse. Maine Report at 10.

The statistics on the substance abuse problems of people in the workforce are also troubling. Commissioner Coye, of the New Jersey Department of Health, estimated that 13-15 percent of the national workforce suffers from an addiction to drugs or

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2. There is some evidence that the use of illicit drugs, while still substantial, has declined in recent years. The 1988 survey by the National Institute of Drug Abuse, of drug abuse among Americans aged 12 and over showed a decrease of 37% in the current use of illicit drugs compared with a similar survey in 1985. In addition, users of any illicit drugs "within the last year" decreased about 25%. The survey did find a continued pattern of heavy use within the cocaine-using population. Statement by Louis W. Sullivan, M.D., Secretary of Health and Human Services, July 31, 1989.

3. The Maine Study Commission was created by a Resolve of the Maine Legislature, and was charged with examining the issues surrounding the testing of employees for chemical impairment in the workplace. Over the course of its deliberations, the Maine Commission heard from 43 speakers on subjects including the technical aspects of testing, the scope of the substance abuse problem, employee assistance programs, law enforcement concerns, management interests and labor interests. The Commission was staffed by two attorneys, and was provided with "a vast amount of background information in the form of reports, studies and articles." Maine Report, p. 1, Appendix A.

alcohol.<sup>4</sup> The Maine Report estimates that 5-13 percent of the national workforce has a substance abuse problem. Maine Report at 8.

Dr. Coye reported that the costs of substance abuse are high. She estimated the added health costs due to alcohol abuse at \$100 billion per year; lost productivity due to drug and alcohol abuse was estimated at \$99 billion per year. In New Jersey, 20 percent of the \$3 billion annual health care expenditure is devoted to alcohol-related illness. She also reported that there is a similar cost for drug prevention, drug-related hospitalization, lost employment and criminal justice costs.

The above information easily established that both drug and alcohol abuse is a significant national problem. A preliminary issue to be addressed prior to a discussion of the proper role in this crisis of the State as an employer is whether the policy should address both legal and illegal drugs. In creating the Task Force, Governor Kean noted that drug and alcohol abuse reduces employee efficiency and, "most importantly, jeopardizes the lives and safety of fellow

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4. Molly Joel Coye, M.D., M.P.H., Commissioner of Health, was a member of the Task Force. On April 21, 1989, she addressed the Task Force in her capacity as New Jersey's chief public health officer.

employees and citizens."<sup>5</sup> Every speaker who addressed the Task Force, and who expressed an opinion on the subject, agreed that a workplace substance abuse program should deal comprehensively with both legal and illegal drugs. The concerns for efficiency and safety with respect to workers who abuse alcohol, over-the-counter drugs, prescription drugs or illegal drugs were described as intimately connected in both effect and remedy. The information available to the Task Force clearly establishes that alcohol abuse alone poses a much greater threat to workplace health, safety and productivity than does the abuse of illegal drugs, and that abuse of over-the-counter and prescription drugs presents similar dangers.

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5. Executive Order No. 191, by which the Task Force was created, begins as follows:

Whereas, the problem of drug and alcohol abuse has reached epidemic proportions and is adversely affecting the lives and safety of our citizens; and

Whereas, the abuse of drugs and alcohol in the workplace, among other things, reduces job efficiency, increases absenteeism and sick leave, and, most importantly, jeopardizes the lives and safety of fellow employees and citizens; and

Whereas, the State of New Jersey has a vital interest in promoting a safe and drug-free workplace and in ensuring our citizens that public safety employees do not threaten life and limb due to the abuse of drugs or alcohol. . . .

Dr. Coye reported to the Task Force that the abuse of alcohol is the leading employee substance abuse problem, and that, in the study of abuse of chemical substances by employees, illegal drugs are found to constitute only a small part of the problem. She warned that a concentration on illegal drugs could deflect attention from the more serious problems presented by the abuse of alcohol, over-the-counter and prescription drugs.

Dr. James Mastrich<sup>6</sup> agreed that legal drugs present a more serious problem than do illegal drugs. In pursuing the goals of ensuring fitness for duty and the creation of a safe work environment, he warned that it would be "silly if not delusional" to create a policy around illegal drugs to the exclusion of legal drugs. Nancy Miller,<sup>7</sup> director of an employee assistance program, warned that a concentration by an employer on illegal substances has the effect of "validating"

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6. James Mastrich, Jr., Ed.D, is an employee assistance program consultant and a practicing psychologist. From 1983-87 he was Director of the Employee Assistance Program's Counseling Services at Rutgers Medical School. He addressed the Task Force on May 2, 1989.

7. Nancy M. Miller, M.S.W., A.C.S.W., C.E.A.P., is the Employee Assistance Director for United Labor Agency. She addressed the Task Force on May 2, 1989.

the abuse of legal substances.<sup>8</sup> Dr. Robert Newman,<sup>9</sup> chief executive officer of two New York City hospitals, reported that alcohol is "far and away" the primary problem in workplace substance abuse.

Materials available to the Task Force support this assessment. Following its extensive study, the majority of the Maine Commission made the following finding:

The Majority. . . calls attention to the fact that all surveys and studies emphasize that alcohol is the most common substance abused, and that the costs caused by alcohol abuse exceed the costs caused by abuse of all other substances combined by a wide margin. The Majority finds that an inordinate amount of time and effort are spent on eradicating the use of illegal drugs when the major cause of employee and employer substance abuse difficulties appears to be alcohol.

Maine Report, p. 15. A publication distributed to the Task Force from the State and Local Government Labor-Management Committee, titled "Joint Solutions to Substance Abuse: Public Employee Assistance Programs" similarly found that "[a]lcohol is, by far, the most frequently abused drug."

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8. In addition, the majority's distinction between "legal" and "illegal" drugs is somewhat artificial. Under some circumstances, for example while operating a motor vehicle, the misuse of "legal" drugs such as alcohol or over-the-counter cough medicine can constitute an unlawful act.
  9. Robert G. Newman, M.D., M.P.H., is the President and Chief Executive Officer of both Beth Israel Medical Center and Doctor's Hospital, in New York City. He has government and private sector experience in the design of substance abuse programs. He addressed the Task Force on May 2, 1989 both as a public health expert and as a major urban employer.

In light of this information, the Task Force considered whether its proposed workplace policy should address the problem of illegal drug abuse in isolation, or in the context of the broader problem of substance abuse. The Task Force Chairperson formed the Subcommittee of Workplace Alcohol Abuse to examine this question. The Subcommittee reviewed the testimony and information available to the Task Force and reported, among other things, the following facts to the Task Force:

- \* Approximately 18 million adults in the United States have alcohol abuse problems; approximately 10.6 million suffer from the disease of alcoholism.
- \* Alcohol is a factor in nearly half of all accidental deaths, suicides and homicides, including 42% of fatal motor vehicle accidents.
- \* Health care treatment costs for alcoholism were approximately \$13.5 billion in 1983; at least 500,000 Americans were reported to be in treatment for alcoholism and alcohol abuse in September 1984.
- \* Health care costs for alcohol-related accidents were estimated at \$15 billion in 1983; reduced productivity costs were estimated at \$65.6 billion.

Report of the Subcommittee on Workplace Alcohol Abuse at page

3.<sup>10</sup> The Subcommittee drew two conclusions:

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10. The Subcommittee's Report is bound with this Task Force Report. The information quoted above was drawn from the Fact Sheet for Sixth Annual Report to Congress on Alcohol and Health, from the Alcohol, Drug Abuse and Mental Health Administration, Public Health Service, U.S. Department of Health and Human Services (Fall 1987).

- Alcohol abuse creates at least as great a health, safety and productivity problem in the workplace as does the abuse of illegal drugs.
- A drug program designed to enhance workplace health, safety and productivity should address the problems related to the abuse of alcohol as well as other drugs.

Subcommittee Report at 7-8.

Notwithstanding the language of Executive Order 191, the Report of the Subcommittee on Workplace Alcohol Abuse to the Task Force, and the unanimity of the evidence available to it, the majority of the Task Force proposed a policy with the narrow scope of mandatory testing the urine of employees for residue of illegal drugs. This narrower policy may serve a law enforcement function of ferreting out employees who have used illegal drugs,<sup>11</sup> but it clearly fails to heed the overwhelming evidence that the effects of substance abuse on workplace health, safety and productivity can only be meaningfully addressed by confronting the broad spectrum of the problem -- including prescription and over-the-counter drugs and the most pervasive aspect of the problem, alcohol abuse.<sup>12</sup>

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11. We discuss more fully below the difficulties with wide-scale drug testing in serving even this law enforcement function.

12. It is ironic that common tests for alcohol use do, unlike tests for other drugs, provide some reliable indication of the level of impairment or intoxication, see "Scientific

(Footnote continues on next page)

### C. Legal Issues

Drug testing implicates substantial legal concerns under the United States and New Jersey Constitutions. While the majority finds support for its approach in recent federal decisions, there are basic unresolved issues under the United States Constitution presented by the proposed policy. Furthermore, the policy is at odds with caselaw interpreting the New Jersey Constitution and appears to conflict with basic values protected by the State charter. In the following discussion, we shall set forth in turn the principal legal issues under the United States and New Jersey Constitutions.

#### 1. United States Constitution

With regard to random testing, the critical and difficult determination under the federal Constitution -- what constitutes a sensitive position subject to random testing -- is left to another day. [VII(a)]. Although we acknowledge that the federal courts have permitted the testing of some employees in sensitive positions, it is clear that the United States Supreme Court and

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(Footnote continued from previous page)

Issues in Drug Testing," Council on Scientific Affairs, American Medical Association, reprinted in 257 J.A.M.A. 3110. 3111 (June 12, 1987), but the majority nevertheless recommends reliance on the latter, but not the former tests.

the lower federal courts have not yet sanctioned the testing of all employees the government chooses to classify as sensitive. See, e.g., National Treasury Employees Union v. Van Raab, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1384 (1989) (Court sustained urinalysis testing of Customs Service employees slated for promotions into positions that involved either interdicting illegal drugs or carrying a firearm. However, the Court remanded the case to determine "if Customs Service has defined [the category of employees likely to gain access to sensitive information] more broadly than necessary to meet the purposes" of agency program); Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989) (Drug testing permitted for Department of Justice employees holding top secret clearances, but not of prosecutors in criminal cases, and employees with access to grand jury proceedings); National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989). (Drug testing of certain employees in Army in certain positions upheld, while testing of individuals in other positions invalidated); Hartness v. Bush, 712 F.Supp. 986 (D.D.C. 1985) (Drug testing permitted for certain asserted "sensitive positions," but not for others).

These cases reveal that the line between positions that can be randomly tested and those that cannot is not very clear. Determining what is reasonableness under the Fourth Amendment is a fact-sensitive undertaking; therefore, each of the positions which will be classified as sensitive by a State agency and the

Department of Personnel will have to be carefully analyzed under the United States Constitution to determine if the position should be considered "sensitive" for random testing purposes. Since the legal contours of sensitive positions are relatively undeveloped, there is a virtual certainty, as the federal experience reflects, that such classifications will be challenged under the United States Constitution. Consequently, we think it is premature for the majority to assume that random testing of sensitive positions in general passes federal constitutional muster. If the federal experience and precedents are any guide, "sensitive" position determinations will spawn a considerable amount of litigation, and the resolution of the proper scope of random testing of sensitive positions in New Jersey under the United States Constitution will have to be refined on a case-by-case basis.

Additionally, the "reasonable suspicion" standard in the policy, at least insofar as it is applied to employees in non-sensitive positions, is far broader than that tolerated by several federal court decisions construing the federal Constitution. The policy provides that reasonable suspicion means "the existence of facts that provide a reasonable, objective basis to suspect that a drug test of an employee will produce evidence of illegal use of drugs." (VI(1)(a)). This standard essentially allows testing of the employee even if there is no indication of work-related drug use or impairment of

performance. In contrast, several federal courts that have upheld reasonable suspicion testing have only done so on the basis that "It must be conducted under circumstances exhibiting individualized suspicion of on the job impairment." Hartness v. Bush, 712 F.Supp. 986, 992 (D.D.C. 1989). For example, in National Treasury Employees Union v. Lynz, 706 F.Supp. 934, 952 (D.D.C. 1988), the district court expressly requested that the reasonable suspicion drug testing be based on "reasonable, articulated and individualized suspicion that a specific employee may be under the influence of drugs while on duty." See also, Bangert v. Hodel, 705 F.Supp. 643, 650 (D.D.C.) (Reasonable suspicion testing must be conducted under circumstances exhibiting individualized suspicion or on the job impairment).

Under the standards articulated in these decisions, the reasonable suspicion standard in the proposed policy is woefully short of federal constitutional requirements. We acknowledge that the recent Supreme Court cases in Von Raab and Skinner v. Railway Labor Executives' Association, 109 S.Ct. 1402 (1989) state that individualized suspicion of a particular employee is not required "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." Id. at 147. However, Skinner and Van Raab only determined that the governmental interest in testing without individualized suspicion for the

sensitive positions at issue in those cases outweighed privacy concerns. The Supreme Court has not yet had occasion to consider whether the individualized suspicion requirement can be discarded for non-sensitive positions, and the decisions of the lower courts remain the final word on this issue at the present time. Consequently, we take issue with the Majority's finding that "[t]here is no authority addressing reasonable suspicion testing of employees in non-sensitive positions." (Maj. Rpt. 77). There is legal authority on this critical legal question, and it creates serious doubt about the propriety of the Majority's reasonable suspicion standard.

The definition of reasonable suspicion in the policy is not only too broad but also it is hopelessly circular. It defies belief that supervisors, even with appropriate training, are going to be able to apply this test in any reasonably fair or consistent fashion when trained law enforcement officers have struggled with such a standard in even more egregious circumstances. For these reasons, we objected to the majority's failure to include an impairment standard in the reasonable suspicion test for non-sensitive positions. Such a standard would focus on job performance considerations, with which supervisors are generally familiar, rather than on an incomprehensible tautology that relies on speculation and conjecture.

In sum, the majority appears to proceed from the legal position that recent Supreme Court decisions have removed the federal constitutional cloud over drug testing. Our reading of cases interpreting the United States Constitution is less sanguine about the legality of the Task Force's policy under the federal charter.

## 2. The New Jersey Constitution

There is even greater doubt about the constitutionality of the policy under the New Jersey Constitution. The New Jersey case law directly addressing drug testing is sparse;<sup>13</sup> however, the constitutional flaws in the proposed policy are either identified or adumbrated in several decisions construing the New Jersey Constitution.

Premised on the recognition that as to certain matters each person has "a legal right to be left alone," the constitutional right to privacy recognizes "that as to each individual member of

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13. The only reported decisions are Matter of Carberry, 114 N.J. 574, (1989), where the Supreme Court declined to determine the constitutionality of a "Well-Trooper" medical examination as a means of obtaining urine for unannounced drug testing, Id. at 587, and Fr. Order of Police v. City of Newark, 216 N.J. Super. 461 (App. Div. 1987), where the court invalidated a mandatory drug testing program for all members of the Newark Narcotics Bureau as an unreasonable search and seizure under Article 1, par. 7 of the State Constitution. See also, Allen v. County of Passaic, 219 N.J. Super. 352 (Law Div. 1986).

society there are matters private, and matters public." Bednarik v. Bednarik, 18 N.J.Misc. 633, 651 (Ch. 1940). This right to privacy includes "the right of every person to be free from the scrutiny of others in respect to his private affairs. . . ." Id. As the court stressed in Bednarik:

The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all of those rights, and the public has no more license, without his consent, to invade the domain of those reserved private rights than he himself has to violate the valid governmental regulations of the organized state of which he is a citizen. [18 N.J.Misc., at 651].

The constitutional underpinnings of this right to privacy are found in Article 1, par. 1 and Article 1, par. 7.

Article 1, par. 1 of the New Jersey Constitution provides:

All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

The protections of this provision have been applied to both private employers and public entities. See e.g., Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978).

Moreover, courts in New Jersey have repeatedly recognized that

Article 1, par. 1 of the New Jersey Constitution protects the right to privacy. See e.g., McGovern v. Van Riper, 137 N.J.Eq. 24, 33 (1945) aff'd in part, 137 N.J.Eq. 548 (E. & A. 1946); Bednarik v. Bednarik, supra 18 N.J.Misc. at 650; Greenberg v. Kimmelman, 99 N.J. 552, 571 (1985) (the New Jersey Supreme Court has "found a right to privacy implicit in Article 1, par. 1 of the state constitution); In re Quinlan, 70 N.J. 10, 40, cert. denied sub nom. Garger v. N.J., 429 U.S. 922 (1976); State v. Saunders, 75 N.J. 200, 216 (1977) ("It is now settled that the right of privacy guaranteed under the Fourteenth Amendment has an analogue in our State Constitution, N.J.Const. (1947), Art. 1, par. 1 . . ."); State v. Baker, 81 N.J. 99, 114 n. 10 (1979); In re Grady, 85 N.J. 235, 250 (1981); Right to Choose v. Byrne, 91 N.J. 287, 303 (1982).

Although the precise scope of the interests protected by the New Jersey Constitutional right to privacy has yet to be fully delineated, State v. Saunders, supra, the courts in New Jersey have recognized that the right to privacy encompasses both the freedom of self-determination and freedom from interference with bodily integrity, as well as freedom from compelled disclosure of private facts. See e.g., In re Conroy, 98 N.J. 321 (1985); In re Quinlan, supra; In re Jobes, 108 N.J. 394 (1987); State v. Saunders, supra; Right to Choose v. Byrne, supra; In re Gray, supra; In re Quakenbush, 156 N.J.Super. 282 (Law Div. 1978); Bednarik v. Bednarik, supra, overruled on other grounds Cortese v. Cortese, 10 N.J.Super. 152 (App. Div. 1952); In re Martin, 90

N.J. 295, 316-318 (1982). These cases establish that Article 1, par. 1 of the New Jersey Constitution represents a clear public policy to protect both an individual's right to confidentiality as well as the right to privacy against unwarranted intrusions.

Similarly, Article 1, par. 7, which provides protection against unreasonable searches and seizures, affords an individual a zone of privacy protected by the State Constitution, Fr. Order of Police v. City of Newark, 216 N.J.Super. 477. With regard to random drug testing, this constitutional principle has been invoked to strike down a program like that proposed by the Majority. In Fr. Order of Police v. City of Newark, 216 N.J.Super. 461 (App. Div. 1987), the Appellate Division, relying upon Article 1, par. 7 of the New Jersey Constitution, held that random drug testing in the absence of individualized suspicion is violative of the search and seizure provisions of the Constitution. Finding mandatory urine testing to be a highly intrusive procedure, 216 N.J.Super. at 474, the Appellate Division held that the State's interest in testing did not overcome the intrusiveness of the search.

The majority seeks to distinguish this decision from the

random testing proposed in the policy.<sup>14</sup> However, the Majority appears to ignore that the dispositive point in Fr. Order was not the fact-sensitive issues the Majority cites (Maj. Rpt. 82-83), but the legal conclusion that, in the weighing of private and public interests, "urine testing without reasonable individualized suspicion is not a proper means to attain" the government's objectives. Id. at 475. As the Court observed in terms equally applicable to the interests asserted in the Majority's Commentary:

The abstract interest in enhancing "public confidence" is not of sufficient weight to justify sacrificing the palpable privacy interests of police officers. And surely the general public interest in enforcing drug laws cannot be permitted to set at naught the constitutional protections against unreasonable searches and seizures. Id.

The failure to acknowledge the controlling significance of Fr. Order is also reflected in the Majority's sharp discounting of the substantial privacy issues at stake. As the Appellate Division observed:

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14. Even though Fr. Order preceded the Supreme Court cases in Von Raab and Skinner, the State decision is not at all vitiated by the federal opinions, for "[s]tate law, tradition and policy have been given privacy invasions a degree of protection beyond that afforded by the federal constitution." Fr. Order, 216, N.J. Super. 477.

Government monitoring of urine involves an intrusion upon a most private kind of conduct. Both in concept and in practice, that intrusion is profoundly demeaning. Id. at 474.

While this interest was perceived by the Court in Fr. Order to be so significant that it outweighed any countervailing governmental interests, the Majority has chosen to strike a totally different balance than that mandated by Fr. Order.

Beyond this "profoundly demeaning" intrusion, a drug testing policy, whether it involves random, applicant, medical or reasonable suspicion testing, infringes upon "the right of every person to be free from the scrutiny of others in respect to his private affairs." Bednarik v. Bednarik, 18 N.J. Misc. 651. For example, urine tests can be used to discover information relating to an employee's physical or mental condition beyond the identification of illegal substances. An employee may have a very good reason to keep this information, such as legitimately prescribed medications for physical or mental disorders, from being disclosed to his or her employer. Yet, the employee will be forced to reveal this information to their employers as a precaution against non-reactivity problems. (See pages 51-54, infra); In fact, the sample "Drug Screening Medication Form" appended to the Policy requires the employee to reveal any medications which he or she has taken during the past 30 days.

Furthermore, workplace drug testing unjustifiably intrudes upon an individual employee's reasonable expectations of privacy

away from his or her job. As the Maine Commission recognized in reaching a similar conclusion:

An employer's economic interest in an employee's off-work activities is only valid when those activities affect the employee's performance in the workplace, and even then, the employer's interest is limited to restoring adequate work performance. No one can suggest that if an employee's work performance is suffering due to sexual problems at home, the employer should step in and hire a private investigator to determine the precise source of the employee's workplace problems. Similarly, an employer does not need to know precisely what substance an employee may be abusing when he continually falls asleep on his job, or his performance drops radically due to a substance abuse problem. The employer's interest in the work performance of his employee is not dependent in the least upon the actual cause of the problem . . . Whether an employee is performing poorly because he is having marital problems, or because he is suffering from a substance abuse problem, the effect upon the employer's interest remains the same. It is not the role of the employer to intervene and pry into the employee's private life away from the job so that he can advise the employee as to what is in his best interest. (Id. at 41).

A federal district court framed the issue in even starker terms:

We would be appalled at the spectre of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching.

It is George Orwell's 'Big Brother' Society come to life. [Capua v. City of Plainfield, 643 F.Supp. 150, 151 (D.N.J. 1986)].

The chemical surveillance of certain employees through random, applicant or medical drug testing is even more offensive to the right "to be free from the scrutiny of others in our private affairs," because it is conducted without individualized suspicion of wrongdoing, without regard to job performance or responsibilities, and the testing itself fails to demonstrate actual on-the-job impairment. Although job performance should be the primary, if not sole, legitimate interest of the employer, drug testing does not advance the employer's ability to recognize and address inadequate work performance, without respect to the cause. Undoubtedly, New Jersey courts, would find it constitutionally offensive for an employer to peep through windows, hide under an employee's bed, eavesdrop on conversations in a home or sift through an employee's private papers to discover evidence of an employee's off-duty activities. It is no less offensive, and probably more degrading, for an employer to extract a person's urine to engage in the same type of investigations. If the justification is that an employer can inquire into any factor that may theoretically affect an employee's performance, what would prevent an employer from using the same rationale to inquire into an employee's sexual or drinking habits, financial situation or other personal affairs?

It is obvious that the issue dividing the Task Force is not the right of an employee to use drugs. Nor is it merely a management question of the propriety of supervisors or co-employees operating as law enforcement agents to root out drugs in the workplace. Rather, the basic issue, which the Majority never directly confronts, is whether under the State Constitution the State has the authority to inquire into and surveil the details of its employees' personal lives to accomplish its workplace goals. The New Jersey decisions strongly indicate that the Majority has struck the wrong balance under the State Constitution.

Furthermore, the New Jersey Supreme Court has recognized that even where the interest supporting an incursion into privacy rights is substantial, any such intrusion must be limited by adopting the narrowest means necessary to achieve the purported purpose.

The Appellate Division held and we agree that if the governmental purpose is legitimate and substantial . . . the invasion of the fundamental right of privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose. [Lehrhaupt v. Flynn, 140 N.J. Super. at 262, 264; see Kenny v. Byrne, 144 N.J. Super. at 253] [in re Martin, 90 N.J. 295, 318 (1982)].

See also, Fr. Order, 216 N.J. Super. 470. The Majority has clearly failed to follow this constitutional mandate because the evidence before the Task Force was replete with numerous less

Intrusive means than random drug testing to address workplace performance problems.

Finally, the reasonable suspicion drug testing in the proposed policy fares no better than random drug testing when scrutinized under the New Jersey Constitution. We have already set out the federal decisions which call the reasonable suspicion standard, as defined by the Majority, into serious question. (supra at p. 20). In light of the substantial weight accorded personal privacy under the New Jersey Constitution, it is likely that state courts will apply a more rigorous standard when directly confronted with a challenge to the content of a reasonable suspicion standard in the drug testing context. Cf. Fr. Order, 216 N.J.Super. 477. It is also important to note that one state court has done just that and could serve as a persuasive authority for New Jersey courts. In Horsemen's Benev. v. State Racing Comm'n, 532 N.E.2d 644, 652 (Mass. 1989), the Supreme Judicial Court of Massachusetts has, at least in the context of license of a State Racing Commission, construed its state constitution to require that testing on reasonable suspicion contain the requisites of probable cause. The court therefore, required "reliable, specific objective facts" that "sufficient to warrant a prudent person's belief that a [person] more probably than not has used illicit drugs." Id. In this conclusion, the court found the definition of reasonable suspicion, which is similar in many respects to that of the Majority [compare Id. at 646 with Policy at VI(1

contain "vague terms [which] allow impermissibly broad discretion, . . . and are an invitation to arbitrary and discriminatory choice of subjects for testing." Id. at 652. New Jersey courts seeking to protect the strong privacy interests under the State Constitution are likely to find the circular definition in the Policy to be a similar "invitation to arbitrary and discriminatory choice of subjects for testing."

As the above discussion reveals, in an effort to attack substance abuse in the workplace, the Majority has formulated a policy that is shrouded in constitutional doubt under the United States and New Jersey Constitutions. The constitutional flaws are not marginal or of minor significance, but go to the heart of the balance struck by the majority - a balance that could substantially transform the character of our State working environment in derogation of the most fundamental constitutional rights protected in a free society.

#### D. Responses to Workplace Drug Abuse

The members of the Task Force were quickly able to agree that substance abuse presents significant societal problems, and that the State, as a prudent and responsible employer, should take steps to safeguard the health, safety and productivity of the workplace against any threat posed. The Task Force received information on a wide array of responses to the threat of workplace substance abuse, including enhanced supervision of

employees, the strengthening of employee assistance programs, the use of motor coordination tests, and education programs for employers and supervisors. The information provided to the Task Force indicated that these alternatives provided non-intrusive, cost-effective methods of addressing workplace issues.

Notwithstanding this information, the majority proposed a policy premised on mandatory urine testing, and featuring mandatory punitive responses to indications of the use of illegal drugs -- whether or not the use affected workplace performance.

As we explain more fully above, the New Jersey Constitution requires that the State demonstrate the absence of reasonable alternatives to a urine testing program in order to justify the need to subject employees to procedures that are, "in concept and in practice, . . . profoundly demeaning." Fraternal Order of Police v. City of Newark, 216 N.J. Super. 461, 470, 474 (App. Div. 1987).

The majority report advocates mandatory urine testing as a means of identifying State employees who have used illegal drugs. The broad sweep of the majority's proposed policy indicates that the identification of employees who have used drugs is advanced as a law enforcement tool, or as an end in itself, rather than as a means for ensuring workplace safety and productivity. The Court in Fraternal Order of Police, however, made it clear that mandatory testing for criminal conduct is disfavored under the New Jersey Constitution absent individualized reasonable suspicion or probable cause. 216 N.J. Super. at 470-71. It

applied a balancing test, however, to the situation in which the State as an employer advances interests in impaired job performance and public risk. Id. at 472. In such circumstances, the State seeks identification of drug users not as an end in itself, but rather as a means to serve the goals of workplace safety and efficiency. The balancing test applied by the Court requires consideration of whether reasonable alternative means are available to address the legitimate governmental interests in safety and productivity. Id. at 470.

1. Effective alternatives to urine testing exist.

Several of the witnesses appearing before the Task Force testified that methods of addressing workplace substance abuse exist, and that these methods provide effective alternatives to urine testing.

Dr. James Mastrich provided substantial information and materials on effective employee assistance programs (EAPs). He described the modern EAP as staffed by experienced mental health professionals who are able to directly counsel and refer to appropriate treatment employees with chemical dependency problems. To be effective, EAPs must be viewed in a positive light by employees -- they must not be viewed as punitive or disciplinary agencies. The importance of this emphasis was explained by Dr. Mastrich's testimony that 80% of EAP referrals are self or family referrals.

Historically, Dr. Mastrich explained, the effectiveness of EAPs has risen when they are voluntary, confidential and supported by management; their effectiveness has diminished when they have been viewed as a component of workplace discipline. The linking of drug testing, with punitive sanctions, to EAPs would diminish the effectiveness of the management response to substance abuse. An emphasis on testing and discipline would make supervisors hesitant to "accuse" a worker of substance abuse problems, and would make workers more secretive and less willing to come forward for help. In Dr. Mastrich's view, EAPs, including well-designed training programs for supervisors, are effective means of advancing safety and efficiency in the workplace. The institution of broad urine testing would limit the effectiveness of EAPs without offering any correlative gain. Broad-based drug testing offers the promise of a "quick fix," but that promise is more illusion than reality.

Nancy Miller similarly testified that her experience in EAPs demonstrates that confidential counseling, referral and treatment, they offer the best opportunity for addressing the problem of workplace substance abuse. Introducing the "quick fix" of broad-based drug testing would hamper the effectiveness of EAPs.

Dr. Robert Newman emphasized the effectiveness of education in the workplace -- particularly the education of supervisors. The key to addressing workplace substance abuse is to train supervisors to be sensitive to work performance. The supervisor,

on detecting problems in work performance, should then respond as effective supervisors have always responded -- through referral to EAPs, counseling or discipline, as appropriate in each case.

Dr. Molly Coye also emphasized traditional, effective management techniques as more effective than broad testing programs. She testified that the American Public Health Association and the American Occupational Health Association have reported that there is no scientific evidence that routine drug testing is effective in addressing the problem of workplace substance abuse, and that there is therefore no basis for finding that routine drug testing is useful in addressing problems of safety and productivity. The evidence that exists is, she said, misleading because it is anecdotal in nature and the studies have not been properly controlled. There is no reliable evidence that broad testing programs are worth the problems and cost they cause management.

In contrast, several studies considered by the Task Force detailed the effectiveness -- including the cost-effectiveness -- of EAPs and other traditional management strategies. A publication of the State and Local Government Labor-Management Committee reported:

The cooperative labor-management approach to the treatment of substance abuse has had a tremendous impact on the workplace.

- \* Sixty to 80 percent of the cases identified as alcoholism have returned to a fully productive job status.
- \* The limited statistics on all other drugs reveal that

approximately 60 percent of those who seek treatment for substance abuse recover.

- Employer investment in EAPs has yielded a return of \$3 to \$5 for every dollar spent.<sup>15</sup>

A 1985 study by the Department of Health reported similar savings from EAPs in increased employee productivity, less sick time and absenteeism, and reduced medical benefits claimed.<sup>16</sup>

The Task Force's Subcommittee on Employee Assistance, in its report titled Employee Assistance - An Alternative To Testing, reported the following to the Task Force:

EAPs are cost-effective, humanitarian job-based strategies for helping employees whose personal problems are affecting their work performance. Most basically, an EAP is in place to conserve human resources, balancing economics with empathy. It is a win-win proposition for employees and management. EAPs are confidential and nonpunitive. They affirm three important ideas:

- 1) Employees are valuable members of the team;
- 2) It is better to offer assistance to employees experiencing personal problems than to discipline or fire them; and

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15. Joint Solutions to Substance Abuse, State and Local Government Labor-Management Committee.

16. The Cost-Impact of Employee Assistance Programs, New Jersey Department of Health, Division of Alcoholism, Occupational Section (October 1985).

- 3) Recovering employees become more productive and effective.<sup>17</sup>

The Maine Commission spoke out clearly on this issue, both to express approval of EAPS in combatting the effects of workplace substance abuse and to distinguish these programs from workplace drug testing programs:

Employee assistance programs and workplace education on substance abuse are viable alternatives to workplace substance abuse testing.

\* \* \*

The Majority finds that an employee assistance program, coupled with an effective rehabilitation program, can adequately address substance abuse problems in the workplace.

\* \* \*

We reject, however, the arguments made by employers that the effectiveness of EAPS can be enhanced by the use of testing. \* \* \* All of the EAP specialists testified that a crucial factor of an EAP's success is the element of mutual trust; a testing program which forces an employee into an EAP without his consent destroys that trust, and thus will actually inhibit the effectiveness of the EAP.<sup>18</sup>

Like the witnesses before the Task Force cited above, the Maine Commission concluded that a comprehensive, cooperative management

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17. Report of the Subcommittee on Employee Assistance, bound in this Report, at page 6 (footnote omitted).

18. Maine Commission Report, supra, note 3, at 47-48.

approach utilizing EAPS is the most effective means of addressing workplace substance abuse, and that broad drug testing programs would impair the effectiveness of such a program.

2. Mandatory drug tests harm the workplace.

The danger of workplace drug testing programs go beyond their negative effects on EAPS; they threaten to overshadow all other approaches to substance abuse in the workplace. This fear has been, in large part, borne out by the deliberations of the Task Force where the focus on the development of a policy towards drug testing predominated, dwarfing all other workplace concerns. Yet, every expert who testified before the Task Force recognized that the key to fulfilling the goal of a drug-free workplace is an educated workforce that understands and can identify the signs and symptoms that might indicate that a company worker has a problem, regardless of the nature of the problem. Moreover, one cannot overestimate the importance of establishing a workplace environment where employees understand that their supervisor is (1) receptive to an employee's problems; (2) eager to offer help to overcome these problems without jeopardizing the person's job; and (3) willing to assist the employee in regaining his or her status as a healthy, productive worker.

Many factors can contribute to decreased productivity or absenteeism, including the excessive use of cigarettes or

alcohol, marital or financial problems, or work-related stress. The actual effects upon an employee's work performance in each of these cases may be indistinguishable from similar problems caused by substance abuse.

In each case, the State's performance expectations can be served, without drug testing, by training supervisors to evaluate the problem and discuss the unsatisfactory workplace performance with the employee. The supervisor can then refer the person to any appropriate employee assistance program to evaluate and address the employee's needs. This type of sensible, cooperative workplace response satisfies the State's legitimate interest in a safe and productive workplace without the need to forcibly pry into an employee's private life. The use of drug testing in the workplace adds nothing to the State's ability to recognize and address inadequate performance.

Dr. Robert Newman, a physician, a chemical dependency expert, and a major urban employer as CEO and President at Beth Israel Medical Center and Doctor's Hospital in New York, emphasized to the Task Force that people who use drugs do care about their health and well-being, and that they can be helped, especially if their seeking help would not jeopardize their employment.

The widespread reliance on drug testing encouraged by the Task Force majority is diametrically at odds with such a workplace environment. The policy does not focus on adequate performance, a principal public policy goal in the State Civil

Service Act, N.J.S.A. 11A:1-2c, but seeks to utilize drug testing to purge the workplace of illegal drugs without regard to performance-related goals. The majority considered that testing may illegitimately be used to combat general substance abuse problems in society, and formulated a policy as a method of law enforcement for the identification and disciplining (and possible criminal prosecution) of persons whose urine contains traces of drugs.

In its zeal to address substance abuse, the majority confuses the legitimate role of an employer in our society. Simply put, it is law enforcement agencies that have the responsibility under our statutes to root out criminal behavior, subject, of course, to the constraints of the Constitution in pursuing these efforts. Their role should be kept entirely separate and distinct from non-law enforcement personnel. Making supervisors or co-workers surrogates or agents for law enforcement blurs this distinction and will undoubtedly have unfortunate and damaging consequences in the workplace. In short, it is a dangerous precedent to authorize private citizens, even those in the public sector, to perform tasks normally reserved to law enforcement agencies.

Drug testing also dramatically changes the nature of the workplace environment. This point was emphasized by testimony in 1986 before the Maine Commission To Examine Chemical Testing of Employees. Specifically, the Commission heard from the Vice

President of a company that makes precision instruments that control hazardous materials in chemical plants and refineries. (Appendix E to Report). Although this witness testified that "[I]f our equipment doesn't work right - people die," his company refused to engage in drug testing for a variety of reasons. Id. at 93. The most important reason cited by this employee was "the damage it would do to the attitude of [the] entire workplace." Id. at 94. As this witness cogently explained:

It would undermine everything we try to do to earn our employees' trust and commitment. To begin with, it would be an act of distrust on our part. Instead of trusting our employees to come to work physically and mentally prepared to work, I'd be treating them like sneaky children who have to be watched constantly. And I have never seen anything turn employees off so fast as the feeling that management distrusts them. Drug testing also undercuts our policy of respecting our employees' rights by attempting to pry into their private lives and tell them what they can and can't do on their own time, in their own homes. And if we treat our employees that way we will soon go from having a group of loyal dedicated people to having employees who are suspicious and antagonistic. The lost quality and productivity this would cause are immeasurable. We have mostly good hard-working people at our company, and we can't poison our entire company atmosphere in an unreliable attempt to catch a handful of possible drug abusers.

Similarly, Dr. Newman stressed that a punitive environment, including one based on broad mandatory urine testing, is harmful

to traditional, effective management techniques. A punitive atmosphere squelches educational efforts, and limits self-referrals. It impairs traditional, effective supervisory techniques by imparting a false sense of security on supervisors and by making a supervisor hesitant to identify a problem employee. In his experience, drug testing, whenever it is implemented, causes major employee disruption because it is overzealously utilized.

In light of the particularly sharp differences of opinion about drug testing between labor and management voiced during the Task Force's deliberations, we have little doubt that drug testing will be a divisive issue in the State workforce. It pits supervisors against staff in an adversarial relationship that may be counter-productive to the effective achievement of the State's responsibilities. Supervisors will fall back on testing in order to insulate themselves from criticism for erratic behavior by an employee, and workers will be encouraged to report the slightest actions which could be related to drug use, but which may stem from other problems or concerns. It is very disturbing to think that petty office jealousies or antagonisms can now be fanned by reporting a co-worker or supervisor for reasonably suspicious behavior, and thereby trigger the possibility of a drug test. When the workplace degenerates into a place where an employee could be subjected to drug testing because of an anonymous telephone call or report, the State and the public will suffer.

Certainly, the draft policy creates a situation which is open to abuse by unscrupulous, ill-willed or merely misinformed individuals who could readily employ a drug testing program to fabricate grounds to discipline or terminate undesirable employees or harass selected employees.

Finally, the adverse effects upon the workplace would be likely even if drug testing were an infallible scientific method. However, that is simply not the case, and technical flaws in the testing and potential human errors increase the likelihood of destructive consequences for the workplace. These could include false accusation of employees based on incorrect test results, and the actual or perceived unequal treatment of similarly situated employees because of different judgmental interpretations of test results by the reviewing individuals.

Indeed, the program approved by the Majority is even more punitive than that of certain federal departments where interest in public safety is no less significant. Specifically, the United States Department of Transportation, in its plan for testing employees whose jobs have a direct impact on public health, safety or national security, has incorporated a feature that is strikingly absent from the proposed policy. An employee in these positions who test positive will be assigned non-safety or non-security duties, but may not be discharged solely because of a single positive drug test. American Federation of Government Employees, AFL-CIO v. Skinner, F.2d (1989

W.L. 102331). In contrast, the Majority's policy permits discharge of a sensitive employee after a single positive drug test and does not provide the individual with the option to work in a non-sensitive position.

E. Limits on the usefulness of drug tests

As we describe more fully above, a substance abuse policy premised on broad mandatory urine testing is counterproductive because it interferes with more tested and effective management tools for maintaining workplace safety and efficiency. We describe more fully below the legal difficulties presented by such a urine testing policy. These policy-based and legal difficulties aside, however, urine testing for illegal drug use in the workplace has three very practical drawbacks: It does not, and cannot test impairment, but rather tests for historical exposure to a drug; even with respect to testing for historical exposure, it presents a very real risk of the erroneous identification of an employee, with the attendant risk of job discipline, including discharge, public humiliation, and even referral for criminal action; and it requires, for accurate results, the disclosure by the employee of private, health related information that the employer has no legitimate interest in learning.

All authorities agree that currently available urine tests for traces of illegal drugs do not measure whether a person is presently, or even whether the person was in the past, mentally or physically impaired by exposure to the drug. As the Council on Scientific Affairs of the American Medical Association stated the issue:

Within the limits of accuracy of the tests that are used and the administrative security of the program in which these tests are carried out, drug testing only differentiates between persons who have exposed themselves to the drugs being tested for and those who have not. The results do not give any indication of the pattern of drug use (method of administration, frequency of use, time of last use, or amount used), of whether the individual abuses or is dependent on the drug, or of whether an individual is impaired physically or mentally by the use of the drug.<sup>19</sup>

Witnesses who appeared before the Task Force, including Dr. Morgan and Dr. Saperstein of the State Police Lab,<sup>20</sup> agreed that urine testing for illegal drugs simply does not test for

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19. "Scientific Issues in Drug Testing," Council on Scientific Affairs, American Medical Association, reprinted in 257 J.A.M.A. 3110, 3111 (June 12, 1987); see also "Screening for Drug Use" Technical and Social Aspects," J. Grabowski and R. Lasagna, Issues in Science and Technology (Winter 1987), p. 39.

20. Dr. Richard Saperstein, Chief Forensic Scientist at the State Police Laboratory, testified on May 2, 1989 on the technical aspects of drug testing.

Intoxication or Impairment; It tests only for exposure to an illegal substance.

Because the tests are unable to gauge whether an employee is intoxicated or impaired, they are inappropriate instruments for determining whether an employee is able to perform his or her job safely and effectively.<sup>21</sup> The use of these tests, then, to make decisions on appointment and discipline runs afoul of the public policy of this State, as encoded in the Civil Service Act:

It is the public policy of this State to encourage and reward meritorious performance by employees in the public service and to retain and separate employees on the basis of the adequacy of their performance.

N.J.S.A. 11A:1-2(c) (Emphasis added.) Similarly, the tests are ill-suited to achieve the goal set out in Executive Order 191, to ensure the health, safety and efficiency of the State workplace.

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21. Dr. Robert J. Pandina, Scientific Director of the Center of Alcohol Studies, Rutgers University, testified on April 21, 1989 before the Task Force, and indicated that in some cases drug users may suffer from a "hangover effect" even after they are no longer intoxicated. It is undisputed, however, that no urine test is capable of detecting either intoxication or "hangover" caused by illegal drugs.

In addition to this inherent limitation in drug testing, the urine tests discussed by the Task Force are subject to error in interpretation and administration. The proposed protocol anticipates the use of an initial screening by enzyme multiplied immunoassay technique (EMIT), followed by a gas chromatography/mass spectrometry (GC/MS) test. The Task Force heard evidence of two types of errors that arise through this protocol -- cross-reactivity, and human error in administration or interpretation.

In their testimony before the Task Force, both Dr. Morgan and Dr. Coye testified that urine tests for illegal drugs are subject to error in the form of cross-reactivity. This error occurs when a test indicates a positive response for an illegal drug, when the substance triggering the positive response is not an illegal drug, but rather a chemically similar legal substance. It is well-established that cross-reactivity with, e.g., poppy seeds, over-the-counter drugs, and herbal teas can cause a positive test due to cross-reactivity in one or both of the

tests.<sup>22</sup>

The second inherent problem presented by drug testing arises from mistakes made by the workers performing the tests. Even if the tests were perfectly accurate in theory, the fact that the tests are subject to human error at several stages counsels caution in relying on them for discipline and hiring decisions. Studies of the EMIT test have demonstrated that laboratory error produces a wide range in accuracy of results, resulting in higher false positives and false negatives than the test is able to produce in ideal circumstances.<sup>23</sup> The GC/MS test, which is used to confirm a positive EMIT test, is a complex test requiring "careful attention to specimen preparation" in the laboratory for correct results.<sup>24</sup>

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22. See R. DeCresce, et al. Drug Testing in the Workplace, American Society of Clinical Pathologists and Bureau of National Affairs, Inc. (1989), p. 99; "Scientific Issues in Drug Test," supra note 19, at 3113; Maine Commission Report, supra note 3, at 23; R. Struempfer, "Excretion of Codeine and Morphine Following Ingestion of Poppy Seeds," 11 Journal of Analytic Toxicology 97, 98 (1987).

23. J. Morgan, "Problems of Mass Urine-Screening for Misused Drugs," 16 Journal of Psychoactive Drugs 305, 314 (1984).

24. Drug Testing in the Workplace, supra, n. 22 at 93.

Both tests require the preparation of the sample in unadulterated conditions and the correct interpretation of the result of the test by laboratory personnel. In 1985, the Centers for Disease Control performed a study of the accuracy of 13 drug testing laboratories connected with methadone programs. The CDC reported a high error rate, including both false positives and false negatives. The laboratories evaluated by CDC produced false positive test results of up to 6 percent for cocaine and 10 percent for morphine. The false negative results were astronomical -- up to 100% for some laboratories for some drugs. The CDC concluded that the study demonstrated "widespread, serious shortcomings in the laboratories," lack of uniformity in standards, poor communications between the facility requesting the test and the laboratory, and "minimum quality control requirements."<sup>25</sup>

Commentators have noted that the expansion of drug testing over broader populations, using new laboratories, presents a real possibility that false positive results will be produced, through

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25. H. Hansen, et al., "Crisis in Drug Testing: Results of CDC Blind Study," 253 J.A.M.A. 2382, 2386 (1985).

errors as simple as contamination or mislabeling.<sup>26</sup> The tests require many human steps, and an error at any step of the way could produce an inaccurate result.

The testing, then, is technically complex and subject to human error, some of which can be moderated by regular outside evaluation and blind testing of laboratories.<sup>27</sup> In light of this possibility of error, the drug testing protocol suggested by the task force must be viewed with caution.

The third inherent problem in the drug testing protocol recommended by the majority is the requirement that employees reveal their use of medications that have no bearing on their work performance and as to which the employee retains a right of privacy. The forced disclosure of some medical condition could

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26. See M. Panner and N. Christakis, "The Limits of Science in On-The-Job Drug Screening," Hastings Center Report, December, 1986, p. 9; J. Grabowski and L. Lasagna, "Screening for Drug Use" Technical and Social Aspects," Issues in Science and Technology (Winter 1987), p. 39.

27. The CDC concluded, after analyzing the failings of the tested laboratories, that "[b]lind testing should be implemented by all those responsible for drug treatment to periodically assess the quality of service being provided." 253 J.A.M.A. at 2387. Dr. Saperstein testified before the Task Force on May 2, 1989, that the State Police laboratory has never been subjected to outside evaluation or blind testing.

cause embarrassment or, even more significantly with some conditions, such as HIV disease or seizure disorders, it could subject the employee to unlawful discrimination.

It is clear that the suggested protocol will require, for purposes of accuracy, the disclosure of properly prescribed medication.<sup>28</sup> This requirement cannot be designed out of the test; the cross-reactivity is simply a limitation on the test and must be evaluated through consideration of the employee's description of his legal, proper and private medications.<sup>29</sup>

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28. The sample form recommended by the majority contains the following question:

1. Have you taken any medication in the last thirty (30) days? \_\_\_\_\_
2. Identify the medication, \_\_\_\_\_
3. When was the last time you took the medication? \_\_\_\_\_
4. What doctor prescribed the medication?  
\_\_\_\_\_
5. What pharmacy filled the prescription?  
\_\_\_\_\_
6. What is the prescription number?  
\_\_\_\_\_

29. Drug Testing in the Workplace, supra, note \_\_\_\_\_, at 99-100.

The harm faced by the employee forced to reveal his or her legitimate prescriptions can be quite serious.

The National Prescription Audit, a nationwide marketing research service, indicates that seven of the top fifty prescribed drugs are explicitly administered to alter behavior in positive ways. These include drugs administered for anxiety, muscle spasms, seizures, and other ailments. Among the many pharmacological agents administered are those for eating disorders, narcolepsy, insomnia, and an extensive array of less frequent but important problems. The drugs administered for these disorders will appear as drug positives on more comprehensive screens. This will not be inadvertent or related to cross-reactivity.

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Testing for drugs in body fluids in the all-inclusive fashion proposed by some advocates could have a major unforeseen consequence. Individuals being treated with commonly prescribed drugs will be forced to publicly acknowledge to their employers the full range of medical and behavioral conditions related to use of therapeutic drugs in a way not previously required. At worst, individuals taking certain medications will be discriminated against by employers ill-informed about, say, the effectiveness of amphetamines as adjuncts with other drugs in controlling narcolepsy or about the effectiveness of antiseizure drugs in controlling epilepsy. At best, individuals taking diazepam for anxiety, flurazepam for insomnia, or related drugs for muscle spasms associated with back pain may be forced to provide their employers with descriptions of their current nondebilitating disorders after

testing positive for drug use.<sup>30</sup>

The Maine Commission expressed concern for this problem as one reason for rejecting urine testing in the workplace:

[T]he tests can be used to discover information relating to an employee's physical condition beyond the identification of substances of abuse. Urine tests can reveal such physical conditions as pregnancy, heart problems, diabetes, and various legitimately prescribed medications for any number of physical and mental disorders. An employee may have a very good reason to keep this information from being disclosed to his or her employer.<sup>31</sup>

In addition to the humiliation and risk of unlawful discrimination faced by the employee, the requirement that legitimate medications, and the employee's medical condition, be revealed to the employer runs afoul of the employee's right to maintain privacy over his or her medical condition. Whalen v. Roe, 429 U.S. 589, 599 (1976); see also Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979); Thornburgh v. American College of Obstetricians, 106 S.Ct. 2169 (1986). In the absence of

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30. "Screening for Drug Use: Technical and Social Aspects," supra, n. 22, at 43-44.

31. Maine Report, supra, at note 3, at 39.

"compelling state interests," the forced disclosure of private medical information is prohibited by the United States Constitution. Whalen, supra, at 606 (Brennen, J., concurring).

The three practical, inherent limitations within the urine testing protocol proposed by the majority, then, demonstrate that the testing is far from a foolproof, scientific exercise; rather, it is a process fraught with danger, and requiring subjective interpretation.

#### CONCLUSION

For the reasons stated above, the Public Advocate expresses disagreement with the analysis and conclusion set out in the Majority Report, and files this Minority Report.