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# Private Sector

Workplace — brief conceptual paper

① Employers commit public workplace

Clear policy statements

EAP

Sup training

Also regard for rights & privacy

preliminary discussions w/  
organized labor —  
testing in limited way

yes — Jane Kirkland —

fewer answers than questions

— Rehab available

— legal implications

— obligations under law

— desire to cooperate

asking for  
inventory

— Set up time w/ Ken Blalock  
Catalog — NAM + Upcoming Conference

**U.S. Department of Labor**

Assistant Secretary for Policy  
Washington, D.C. 20210

**August 22, 1986**



MEMORANDUM FOR DR. CARLTON TURNER

FROM: MICHAEL E. BAROODY

SUBJECT: Attached Paper

Per our conversation, I wanted to make sure this was in your office by COB today. I will send copies to the Task Force members on Monday.

The attached outline is intended to be both broad and general. It is the work of the Task Force rather than an update of existing DOL material.

Attachment



**AUG 22 1986**

MEMORANDUM FOR: DRUG USE PREVENTION WORKING GROUP  
FROM: DRUG-FREE WORKPLACE TASK FORCE  
SUBJECT: Elements of Private Sector Programs

INTRODUCTION

In our charge from the Working Group, we have been asked to help develop a plan for the federal workforce, and for encouraging the non-federal workforce to follow the federal lead. Though a final federal plan has not been agreed to, we suggest below some common key elements for private sector programs.

The Task Force takes note, however, of three distinct categories within the broader term "private sector": federally regulated industries, federal contractors and all others.

One issue the Task Force feels strongly about is the necessity to consider whether these different categories of private sector firms should be dealt with differently. For example, should federal contractors be required (rather than encouraged) to implement programs as a condition of doing business with the Federal Government? The Task Force intends to address this issue, but as yet has no answers to offer.

I. ELEMENTS OF A SUCCESSFUL PROGRAM

A. Public Awareness

1. Employer Commitment to Drug-Free Workplace
2. Clear Public Statements (e.g., in Advertising, as in "Equal Opportunity Lender," etc.)

B. Employee Awareness

1. Policy Statement Re: Unacceptability of Drug Use in the Workforce
2. Communicate Effects on Safety and Health
3. Communicate Effects on Productivity (Including Absenteeism)

C. Employee Assistance Program (EAP)

1. Joint Effort by Labor and Management
2. Stress Rehabilitation Over Punishment
3. Aspects of a Successful Program
  - a. Establish a uniform system of policies and procedures;
  - b. Take early positive intervention action;
  - c. Confidentiality; and
  - d. Be viewed as a cost effective program.

D. Supervisor Training

1. Recognize Warning Signs
2. Assistance Techniques
3. Referral to EAP
4. Criteria for Testing

E. Employee Rights

1. Safeguards
2. Communicate these to Employees
3. Establish Reasonable Criteria for Tests

II. EXAMPLES OF PRIVATE PROGRAMS (Attached BNA document summarizes others)

A. Washington Metropolitan Area Transit Authority

Initially imposed unilaterally by management, 95 percent of 140 terminated workers were rehired after contests. Labor and management then negotiated a policy which dovetailed with the existing EAP. Realizing that many drug users were unwilling to come forward, the plan now allows for employees who test positive to enroll in the EAP and return to work. The plan has withstood court challenge.

B. Mining Committee on Substance Abuse

With urging from the Mine Safety and Health Administration, mining industry and labor representatives began work in 1985 on an industry-wide committee to stem the hazards of alcohol and drug abuse in the Nation's mines.

The main thrust of the committee's approach is to support EAP's which will rehabilitate workers and restore them to productive work. At present, the group is at work on a training videotape, a resource manual and other promotional materials conveying their message.

C. Trucking Industry - Teamster Program

Rather than oppose drug testing, the International Brotherhood of Teamsters have sought to include an approach in their collective bargaining agreement. Pursuant to the National Master Freight Agreement, the Teamsters established a joint labor management program of rehabilitation and drug testing. Noting that "abuse of alcohol and drugs among our members is the exception rather than the rule," they have formalized "state of the art employee protections" to protect the innocent. These include, among others, probable suspicion testing linked to job performance, and strict chain of possession procedures.

D. Johnson and Johnson

This large pharmaceutical firm has established a holistic approach to employee assistance, including nutrition, marital and family counseling and financial planning.

The drug abuse aspect of the program includes the following:

1. Awareness publicity and training, geared particularly toward new hires
2. In-house counseling service, staffed by professional counselors and experts in the drug abuse area
3. Treatment services provided; these are based on the severity of addiction, with some cases treated in-house, others referred to professional treatment centers



4. The cost of in-house assistance is borne by the company
5. No apparent sanctions are associated with the employee's participation in counseling or assistance efforts

### III. CONSIDERATIONS/LIMITATIONS

- A. Constitutional protections
- B. Existing collective bargaining agreements
- C. Linkage to job performance
- D. Handicap and racial discrimination statutes and regulations
- E. Benefit costs and flexibility
- F. Privacy encroachments (i.e., as with employee records)

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This outline relied in part on Alcohol and Drugs in the Workplace: Costs, Controls and Controversies, Bureau of National Affairs, Washington, D.C., 1986, as well as on information supplied by the Mine Safety and Health Administration, the Occupational Safety and Health Administration, Bureau of Labor-Management Relations and Cooperative Programs and the International Brotherhood of Teamsters.

We have approached the AFL-CIO and they have committed their cooperation in identifying other successful programs. We will continue as a Department to build an inventory of programs.



## CASE STUDIES

*As this report documents, many strategies are used today to attack employee substance abuse, ranging from alcohol and drug use restrictions, to employee assistance programs, to drug testing and undercover surveillance operations.*

*Employers are the most common sponsor of such efforts, and 12 of the following case studies focus on employer-sponsored efforts. Unions are also involved — sometimes to the point of taking the leadership role — and two of the 14 case studies focus on union-administered programs. Unions are working together with employers on several other programs.*

*These case studies describe a wide range of strategies used to attack employee drug and alcohol problems. In many cases, multiple strategies are used. However, these case studies do not represent every method to attack substance abuse on the job. They do represent a cross-section of efforts as implemented by a cross-section of employers. Synopses of the case studies follow:*

***Adolph Coors Co.:*** In the brewing tradition, Coors permits employees to consume beer during the workday, but the company has imposed limits on that activity. Coors bars use of illegal drugs while on the job, and educates employees about their dangers. It runs an employee assistance program. The company does not conduct drug testing, but does ask job applicants about on-the-job drug and alcohol use during pre-employment polygraph examinations.

***Advanced Micro Devices:*** This Silicon Valley-based semiconductor manufacturer uses undercover surveillance and locker inspections to detect drug use and drug possession in the workforce. Company policies bar sale, use, or possession of illegal drugs on company property, and violation can result in dismissal. An employee assistance plan also is offered at the 14,000-employee firm.

***Amalgamated Insurance Co.:*** This New York City-based insurance firm is closely connected with the Amalgamated Clothing and Textile Workers Union. It administers a "Health Assistance Program" which serves substance abusing clothing industry employees and families around the country, many of whom work in smaller firms. Referrals may be made by supervisors or local union business agents.

***Bath Iron Works:*** The largest private employer in Maine has implemented both a substance abuse counseling program for its workers and drug testing for job applicants and employees. The management-imposed testing program is opposed by BIW's unions, who have filed a grievance over the policy. The unions question the unilateral implementation and several aspects of the policy itself.

***Capital Cities/ABC:*** After the death of an employee due to a drug overdose, this communications corporation broke with its tradition of local autonomy for its many print and broadcasting properties and implemented a company-wide substance abuse policy. The program includes an EAP, employee and managerial education efforts, and possible use of drug tests, drug-sniffing dogs, and undercover operations.

ALCOHOL AND DRUGS

*Chessie Systems:* Firm rules against on-the-job drug and alcohol use are combined with an employee assistance program at this major rail line. In addition, under Operation Red Block, a union-sponsored program, workers with on-the-job drug and alcohol problems can avoid automatic dismissal by enrolling in a treatment program. All job applicants must pass blood and urine drug screens. Alcohol and drugs are prohibited at any time on company property.

*Daniel International:* A "Drug Awareness Program" was developed by this South Carolina-based construction company employing more than 30,000 persons. It includes an employee education effort, prohibitions against the sale, use, or possession of illegal drugs on company property, and dismissals for policy violations. In special circumstances, the firm uses drug screens, employee searches, and drug-sniffing dogs.

*General Motors/United Auto Workers:* A joint employer-union EAP was established on a company-wide basis in 1972. Through referral and counseling, it addresses drug and alcohol problems, in addition to other personal difficulties. General Motors also uses drug screens in some circumstances, and has allowed undercover detectives to pose as employees during police drug investigations. Shop rules bar consumption, possession, or sale of drugs on company property and time.

*Georgia Power:* This 15,000 employee utility company does not tolerate drug use on or off the job. Since 1983, it has conducted drug tests on a pre-employment, a fitness-for-duty, and several other bases. It also uses drug-sniffing dogs to search lunchboxes, cars, and other property for drugs. In addition, the firm conducts an employee education effort and maintains an EAP for workers who volunteer for assistance.

*New York State:* A network of more than 200 EAPs is utilized by the State of New York to attack substance abuse and other personal problems. The referral services, covered by collective bargaining agreements, are available to some 200,000 state employees. A for-cause drug testing program is in force for some 3,000 state court employees. Drug testing also is being considered by the State Police.

*Northwestern Bell:* In a joint labor-management effort, the firm makes counseling and referral services available to its 17,000 employees. Under an agreement with the Communications Workers of America Local 7201, the firm covers 100 percent of the treatment costs for chemical dependency. Drug testing and a ban on working-hours alcohol use are being considered by union and management officials.

*Philadelphia AFL-CIO/Blue Cross-Blue Shield:* The "assistance program," as this EAP is called, provides referral and counseling services to Philadelphia-area union members and their families. Other individuals may utilize the program on a no-charge basis. It is supported by contributions from labor, business, community, and government organizations. The program emphasizes early intervention and follow-up care.

*United Grocers, Inc.:* This 1,100-employee company, based in Portland, Ore., has used undercover surveillance and arrest operations to attack on-the-job employee use and sale of cocaine, marijuana, and alcohol. Ability testing for drug and alcohol impairment, and blood and urine tests, can be ordered on suspicion of substance abuse. An EAP program is offered.

*Unocal:* Formerly known as Union Oil of California, Unocal directly employs some 21,000 workers. An offer of employment is contingent upon passing a urine screen. Drug tests are also ordered for current employees when probable cause exists, and during physicals for certain safety-related personnel. The company-sponsored EAP does not offer treatment for drug problems.



DRUG-FREE WORKPLACE

Chairman: Michael E. Baroody  
Assistant Secretary for Policy  
Department of Labor  
523-6181  
(Patrick Cleary, 523-9073)

Objectives:

- o Develop implementation plan to create a drug-free workplace for all Federal employees.
- o Develop action items to encourage state and local government to follow the Federal government's example.
- o Develop action items to solicit commitments from government contractors to establish drug-free work environments.
- o Develop strategy options to mobilize management and labor leaders in the private sector to fight the problem of drug abuse in the workplace.
- o Identify and describe model programs for private sector implementation.

Status:

- Dick/Sharyn - Meeting with Task Force on Thursday (8/21/86) at 3:00 pm.
- CT call to Baroody on 8/19/86 pm

THE WHITE HOUSE

WASHINGTON

August 11, 1986

MEMORANDUM FOR THE DRUG USE PREVENTION WORKING GROUP

FROM: CARLTON TURNER

SUBJECT: Drug Abuse Policy Action Plans

On August 4, 1986, President Reagan announced "six major goals of what we hope will be the final stage in our national strategy to eradicate drug abuse" and "lead us toward a drug-free America." The goals included:

- Drug-Free Workplaces
- Drug-Free Schools
- Expanded Treatment
- Improved International Cooperation
- Strengthened Drug Law Enforcement
- Increase Public Awareness and Prevention

On August 5, 1986, the Domestic Policy Council established a Drug Use Prevention Working Group to develop action plans to meet the President's goals for demand reduction, i.e., drug-free workplaces, drug-free schools, expanded treatment, and increased public awareness and prevention. The Working Group is to finalize its report to the Domestic Policy Council by September 5, 1986.

As Working Group Chairman, I am establishing five task forces to address the various objectives:

1. A Legislative Review Task Force to coordinate legislative proposals and ensure compliance with the President's policy and goals.
2. A Drug-Free Workplace Task Force to develop action plans for implementing a strict no-illegal-drug-use policy for the Federal workforce and for encouraging state and local governments and the private sector to follow the Federal lead.
3. A Drug-Free Schools Task Force to ensure that a policy of being drug free is adopted by every educational institution, from grade schools to universities.

ALSO  
COPY OF  
RR Speech

4. A Treatment Task Force to develop an action plan for improved treatment for drug users and improved methods for identifying drug users, with the primary objective of determining how to provide effective treatment to drug users as early in their use cycle as possible.
5. A Private Sector Prevention Task Force to develop an action plan for expanding drug abuse prevention, with emphasis on community-based programs and initiatives. The Task Force should prepare recommendations for organizational and procedural changes within the Federal government to provide innovative direction to Federal efforts and to be creative and effective in encouraging and supporting private sector efforts.

It should be noted that a communications strategy is being developed by the White House Public Affairs Office as a separate activity. Input will be requested by the Drug Abuse Policy Office from the public affairs offices of the various agencies.

The objectives of the Working Group and its task forces will be to develop a series of actions items which contribute directly to the President's goals with a specific target of making illegal drug use unacceptable in every segment of our society.

The action items will be presented to the Working Group on Monday, August 18, 1986. At that time, the Working Group will decide which actions should be developed for inclusion in the report to the Domestic Policy Council.

You are reminded that all discussions and materials related to Working Group or task force activities are considered Presidential documents, subject to Executive Privilege, and cannot be shared with any person outside the Working Group.





**DRUG-FREE WORKPLACE TASK FORCE**

Michael E. Baroody, Chairman  
Assistant Secretary for Policy  
Department of Labor

David Armor  
Principal Deputy Assistant Secretary  
Force Management and Personnel  
Department of Defense

Patrick Cleary  
Executive Assistant to the Assistant Secretary for Policy  
Department of Labor

James Colvard  
Management Advisor to the Director  
Office of Personnel Management

Robert Cynkar  
Deputy Assistant Attorney General  
Federal Programs and Consumer Litigation  
Civil Division  
Department of Justice

Shelton Jackson  
Deputy Director  
Office of Economics  
Department of Transportation

Boykin Rose  
Executive Office of U.S. Attorneys  
Department of Justice

Michael B. Seaton  
Director  
Office of Safeguards and Security  
Department of Energy

Robert Sweet  
Domestic Policy Council

J. Michael Walsh  
National Institute on Drug Abuse  
Department of Health and Human Services

Gail Webber  
Budget Examiner, Federal Payment  
Office of Management and Budget

D

## Marijuana's "Day-After" Effects Interfere With Pilots Performance

airplane pilots who smoke marijuana may have trouble performing standard landing maneuvers as long as 24 hours after smoking a joint, concludes a new study by Stanford University Medical School and Veterans Administration researchers.

The study is believed to be the first to examine marijuana's day-after, or "carryover," effects on people who perform complex tasks, said Dr. Jerome Yesavage, Stanford assistant professor of psychiatry and behavioral sciences.

And it is thought to be only the second scientific study to examine marijuana's effects on pilots, he added, despite the fact that "during the past 10 years, there have been documented cases of marijuana use by flight trainees and pilots involved in fatal accidents . . . including a commercial landing crash at Newark airport in 1983."

Yesavage stressed that the research is preliminary and that more detailed studies are needed to clearly document how drugs affect airline pilots' performance. He is currently examining how pilots perform at various times following consumption of alcohol.

Yesavage said that the marijuana report's results should alert those concerned with airline safety to a potentially growing problem of drug-related mishaps.

But the study's implications extend beyond the airline industry, said Yesavage, who is based at the Palo Alto Veterans Administration Medical Center.

"These results suggest concern for performance of those entrusted with complex behavioral and cogni-

tive tasks within 24 hours after smoking marijuana," he said. "Such results may be applicable to other tasks such as operating complicated heavy equipment, railway trains and switching procedures."

Although computer measurements of the pilots' landing maneuvers showed significant impairment in their performance 24 hours after smoking marijuana, the pilots themselves felt no drug hangover and reported normal alertness and mood. This suggests that a marijuana smoker's evaluation of whether or not he can do his job safely may not be objective, Yesavage said.

Yesavage and his colleagues reported their findings in the *American Journal of Psychiatry*, 142: 1325, 1985.

The ten experienced private airplane pilots recruited for the study carried out landing maneuvers in a computerized flight simulation laboratory located at the Palo Alto Veterans Medical Center.

Measurements of their manipulations of landing controls and of landing accuracy were carried out both before and after the pilots smoked a cigarette containing 19 milligrams of marijuana's active ingredient, tetrahydrocannabinol (THC).

The cigarette is "the equivalent of a strong social dose," the researchers said.

The pilots — all experienced marijuana smokers — were then tested at intervals approximately one hour, four hours and 24 hours following their smoking.

At each testing interval, the re-

searchers found significant impairments in a variety of landing tasks compared to the pilots' baseline pre-pot performance.

Particularly striking, said Yesavage, was the finding that impairments persisted even at 24 hours.

Similar studies examining post-alcohol performance of pilots and others entrusted with complex tasks are also needed, Yesavage said. The "bottle to throttle" guidelines — eight hours for commercial pilots and 12 hours for military pilots — may be outdated, he warned.

Studies have shown that 12 hours after an alcohol blood level of 0.1 percent, normal volunteers show impaired performance on cognitive "problem solving" tests and 24 hours after drinking alcohol people still test lower than normal on tasks involving balance and equilibrium.

Pilots' actual performance of flight tasks following alcohol consumption is just now being studied by Yesavage and his group.

"The major concern is that subtle hangover effects from drugs should be carefully documented in order to establish safe guidelines for people carrying out complicated tasks," Yesavage said.

Some questions have been raised about the study's methodology. According to Dr. Sidney Cohen of the Council's Scientific Advisory Board, "The methodology used was appropriate and scientifically valid since the pilots ability to perform was measured both before and after their exposure to marijuana."

E

## DRUG-FREE FEDERAL WORKPLACE

### Presidential Statements (August 1-6, 1986)

- o Create balance between pressuring the illegal drug user to quit and offering helping hand.
- o Need to set example at highest levels of government, ask the same from private sector labor and management leaders.
- o Will request more money if justified.

### Conditions of Testing:

#### **Presidential Statements:**

- o Favors voluntary testing but believes mandatory testing is justified for employees in positions involving public safety or national security.

#### **DOJ Executive Order A:**

- o Authorizes agency heads to test any current employee in a sensitive position, with extent and criteria of testing to be determined by agency head.
- o Mandates agency head to establish a program to test for illegal drug use by any employee when there is a reasonable suspicion of illegal drug use; in an examination of an accident or unsafe practices; or during or after admission to a rehabilitation program.
- o Mandates agency head to establish a program to enable any employee to volunteer for testing.
- o Allows agency head to establish pre-employment testing for applicants to all positions and mandates agency head to establish pre-employment testing for all applicants to sensitive positions.

### Procedures:

#### **DOJ Executive Order A:**

- o Employees to be notified 60 days prior to implementation of drug testing program that testing will be conducted, that counseling and rehabilitation are available, and the procedures for obtaining such assistance.
- o Allows employee to submit medical documentation of legal drug use.
- o Contains provisions for timeliness, retesting, confidentiality but further guidelines needed.

- o Programs to be conducted in accordance with scientific and technical guidelines promulgated by HHS.

Rehabilitation:

**DOJ Executive Order A:**

- o Mandates that all employees currently using illegal drugs who cannot voluntarily cease such activity on their own must seek counseling or rehabilitation services from their agency.

Disciplinary Action:

**Presidential Statements:**

- o Does not favor punitive action, e.g., would rather "see a voluntary program in which we can say to...people who might be detected in such a program, or if they want to come forward.... that they won't lose jobs and there won't be punishment...That there would be is an offer of help."
- o Cites military example.

**DOJ Executive Order A:**

- o Does not require removal from employment or discipline for employees undergoing counseling or rehabilitation from their agency and employees who have been identified as users of illegal drugs under a voluntary testing program as long as they thereafter refrain from using illegal drugs.

[NOTE: "Does not require" = would permit]

- o Does not require an agency to maintain any person in a sensitive position if the agency determines that the person's use of illegal drugs makes it inappropriate for the person to remain in a sensitive position.

- 
- o Mandates the agency head to either initiate action to remove from the service or discipline any employee who is found to use illegal drugs.
  - o Allows the agency head, in his discretion, to transfer to a non-sensitive position any employee who is found to use illegal drugs.
  - o Mandates the agency head to remove or transfer any employee from a sensitive position who is found to use illegal drugs and (a) refuses counseling or rehabilitation services; or (b) does not refrain from using illegal drugs after the

first identification as a drug user.

- o Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the first test by admitting the use of illegal drugs.



Alcohol, Drug Abuse, and  
Mental Health Administration  
Rockville MD 20857

**DRAFT**

Suggested Approach:  
Management of the Drug-Using Employee

The most sensitive issue surrounding urine screening for drugs is deciding how to deal with the employee who uses drugs. Urine testing is only a tool, but can be an effective component of a well thought out and comprehensive substance abuse program. There must be concern for both the worker and the workplace.

Part of the beneficial impact of a urine testing program is that it sends a message to employees that drug use will not be tolerated. This message will be diluted if there is no penalty associated with an employee's first positive urine. On the other hand, immediate dismissal of a drug-using employee ignores at least three important points. One is that business has found it is cost effective to rehabilitate drug-using employees. Second is that firing an employee with a drug problem may clean up the employer's workplace, but does little for our society which gains an unemployed drug user. Third, it does not seem to fit with the President's stated commitment to helping people.

We recommend a combination of penalty and, if the employee is willing to quit using drugs, probation. Assistance should be offered as needed. The employee must be confronted and told that drug use is incompatible with continued employment. Employees who voluntarily admit drug use prior to discovery by urine testing should be placed on probation and offered help. Probation would include periodic urine testing (at the employee's expense?) Subsequent offenses would carry additional penalty.

In some sensitive positions, a first offense may disqualify a worker from job continuation. Where possible, reassignment should be considered, coupled with the same probationary follow up that exists for other less sensitive jobs.

Each Federal department and agency should be held responsible for establishing its own internal program and guidelines but all should be submitted to a central policy office for approval to avoid major discrepancies in the way workers are handled.



# DRAFT

## Anonymous Assessment of Illicit Drug Use by Federal Employees

### Background

In order to properly respond to any workplace problem, good management requires some assessment of the magnitude of the problem prior to the development of problem solving actions. Some assumptions have been made as to the extent of illicit drug abuse in the Federal Workforce based on National Surveys of the US population, however, with the exception of the DOD few Federal Agencies have attempted to ascertain the extent of drug abuse among their employees. Such an assessment would be extremely valuable in formulating policies and procedures for the Federal Workforce and could be used as a baseline against which the effectiveness of various strategies could be measured.

The use of urinalysis testing as the method of assessment presents significant problems in obtaining a truly representative sample. A volunteer population would clearly be biased toward underestimating the problem. Mandatory participation would more closely approach a true assessment, however, the issues of employee rights, morale, logistics, right to refusal etc. make this a difficult option.

### Procedure

Using a mandatory participation policy, a stratified sample could be selected and tested on a single occasion. Having a continuing assessment program would most certainly become widely known and change individual behavior. It is recommended that the focus of a urinalysis test assessment be on the young male population (ages 17-35) which has proven to be the group most likely to be using illicit drugs. The anonymity of the assessment must be guaranteed, and considerable efforts must be made to assure personnel of the confidentiality of their participation. Collection and assay of specimens should probably be done by contract outside the Federal system. The specimens should be assayed for: Marijuana, Cocaine, Other Stimulants, PCP, and Opiates to properly assess the extent of illicit drug use.

### Outcome

The results of such an assessment using mandatory urinalysis should produce a relatively accurate picture of recent drug use by the Federal employees who are most likely to use drugs. A good case could be made, however, that a paper and pencil survey of all employees would be less costly, less embarrassing, and would give a better estimate of general use of illicit drugs (ie not only use within the last few days). The Department of Defense experience indicates good correlations between paper and pencil surveys and urinalysis testing.

## Federal Personnel Manual System

FPM Letter 751-

Published in advance  
of incorporation in FPM

RETAIN UNTIL SUPERSEDED

**SUBJECT:** Tables of Suggested Actions for  
Correcting Employee Misconduct

Washington, D. C. 20415

Heads of Departments and Independent Establishments:

1. This FPM letter states the policy of the Office of Personnel Management on agencies publishing tables of suggested actions for correcting employee misconduct. It includes a sample table (see attachment) which may be used by agencies for guidance in developing or modifying a table of suggested actions. However, it should be noted that the sample table is offered only as guidance by example. It is not meant to be construed by agencies or third parties as a Government-wide table, or as reflecting a judgment by OPM on what offenses should or should not be included on a table for a particular occupation or agency or what range of penalties should be used for a listed offense.

2. A published table of suggested actions offers several important benefits. Such a table transmits a clear message that misconduct has adverse consequences, and that those consequences are both certain and foreseeable. It benefits employees by informing them of their agency's standards and expectations regarding conduct. It also promotes uniformity in imposing discipline, ensuring that treatment of like offenses is reasonably consistent. Equally important, such a table can be instrumental in aiding supervisors in overcoming the natural human reluctance to confront the unpleasant circumstances inherent in disciplining employees and thereby helps ensure that actionable offenses are met with some standard minimum corrective action. Thus, unwanted behavior is more apt to receive the early attention that prevents minor offenses from growing into major conduct problems. Also, a table of suggested actions helps to ensure that an employee is not protected against action simply because he or she occupies a high level position within the agency. In addition to providing this supportive environment for good supervision and management, such a table assists agency internal auditors and OPM personnel management evaluators in reviewing the effectiveness of the agency's disciplinary program.

3. For these reasons, OPM strongly encourages each agency to publish a table or tables of suggested actions as a guide for correcting employee misconduct. An agency which does not have a published table may adopt or modify for its own use the sample table attached to this letter, or may wish to develop a table that takes into account the particularities of the agency. Departments or other large organizations may wish to establish separate tables for their components if differences in mission or operating environment so warrant.

Donald J. Devine  
Director

Attachment

**Inquiries:** Appellate Policies Division, Office of Planning and Evaluation,  
Office of Policy and Communications, (202) 254-5200  
**Code:** 751, Discipline

**Distribution:** FPM

Preface to the  
Guide for Correcting Employee Misconduct

The table of penalties provided below is being included with this FPM Letter only for the purpose of giving guidance by example to agencies developing or modifying their own tables. The Office of Personnel Management recognizes the possibility of variation from the table in the assessment of penalties for particular offenses depending on such factors as grade level and type of position occupied by the offending employee. Such variations are appropriate and to be expected. For example, while an oral admonishment might be appropriate discipline for a lower level employee committing a first offense of falsifying a travel voucher, a penalty up to and including removal would be more appropriate for an employee occupying a position with significant fiscal responsibility such as auditor or IRS agent. For that reason, this table is not offered as a Government-wide table of penalties nor should agencies or third party adjudicators interpret the table as representing OPM's judgment concerning actionable offenses or the range of appropriate penalties for listed offenses.

In establishing or modifying a table of penalties, agencies are reminded to be aware of their rights and obligations under the Federal Labor-Management Relations Statute, 5 U.S.C. Chapter 71.

As further guidance, OPM suggests that an agency consider including as part of its table of penalties a narrative section covering the following areas:

1. The agency's issuance should state that its table is meant as a guide to disciplining employees and that a penalty greater or lesser than one listed in the table may be appropriate. That is, the use of a particular penalty should not be necessarily mandatory because it is listed in an agency's table. This does not mean, however, that deviations from the table should be frequent. A carefully crafted table will establish the correct penalty in most cases. Equally important, the table should make clear that, even for offenses where removal is not listed for a first offense, removal on a first infraction nevertheless may be assessed for an aggravated offense. As discussed under item 3 below, selecting a proper penalty requires balancing the mitigating and aggravating factors in the particular case. It should be noted that penalties for certain offenses are prescribed in statute. [For example, see 31 U.S.C. 638a(c)(2) concerning misuse of Government vehicles]. It is suggested that the table indicate which penalties are mandatory.

2. The agency's issuance should also state that its table is not meant to be an exhaustive listing of all offenses.

3. The agency's table should include a discussion of the general categories of mitigating and aggravating factors to be considered when selecting a penalty. For guidance in this area, the agency should refer to the decision of the Merit Systems Protection Board in Curtis Douglas, et. al. v. Veterans Administration, MSPB Docket No. SF075299024, April 10, 1981, pages 32-33 (Slip Opinion).

4. An agency's table should include information on the period of time over which offenses are cumulative for purposes of assessing progressively stronger penalties. This period is often referred to as the "reckoning period" and may vary for different offenses. For example, in assessing a penalty for current tardiness an agency may not wish to count tardiness that occurred long ago. However, for offenses reflecting character traits such as dishonesty, an agency may wish to specify a lengthy or indefinite reckoning period. Information concerning reckoning periods may be included in a narrative section preceding the table, or a separate column may be added to the table indicating the reckoning period for each listed offense.

5. In conjunction with the discussion on reckoning periods, mentioned in item 4 above, the agency may wish to include a provision that a specified number of infractions, even for unrelated offenses, over a given period may trigger consideration of removal whether or not removal is listed for any of the offenses individually.

6. In addition to the above, the agency may wish to include a statement that oral admonishments can not be considered disciplinary actions for purposes of citing the past disciplinary record, but that such admonishments may be considered under the Douglas factors when assessing a penalty. [See item 3, above.] Also, agencies may wish to include explanations covering whether days listed are calendar days or work days, whether the table applies to probationers, and whether the term "reprimand" means a written reprimand.

GUIDE TO CORRECTING MISCONDUCT  
TABLE OF SUGGESTED ACTIONS

**THIS MATERIAL FOR INSTRUCTIONAL PURPOSES ONLY**  
**PLEASE REFER TO THE PREFACING REMARKS ABOVE**

Nature of offense	1st offense	2nd offense	3rd offense
<b>1. Attendance-related offenses</b>			
<p><b>a. Unexcused Tardiness</b></p> <p>This includes delay in reporting at the scheduled starting time, returning from lunch or break periods, and returning after leaving work station on official business.</p> <p>Penalty depends on length and frequency of tardiness.</p> <p>4th offense typically may warrant 5-day suspension to removal.</p>	Oral admonishment	Oral admonishment to 1-day suspension	Oral admonishment to 5-day suspension
<p><b>b. Absence without leave (AWOL)</b></p> <p>These penalties generally do not apply to AWOL charged for tardiness of 1/2 hour or less. (See §1a above.) This offense includes leaving the work station without permission.</p> <p>Penalty depends on length and frequency of absences. Removal may be appropriate for a 1st or 2nd offense if the absence is prolonged.</p>	Reprimand to 5-day suspension	1-day to 14-day suspension	5-day suspension to removal
<p><b>c. Failure to follow established leave procedures.</b></p>	Reprimand to 5-day suspension	1-day to 5-day suspension	5-day suspension to removal

FOR  
INSTRUCTIONAL  
USE  
ONLY

Nature of offense	1st offense	2nd offense	3rd offense
<b>2. Breach of safety regulation or practice</b>			
a. Where imminent danger to persons or property is not involved.	Reprimand to 1-day suspension	1-day to 14-day suspension	5-day suspension to removal
b. Where imminent danger to persons or property is involved.  "Persons" includes "self". Penalty depends on seriousness of injury or potential injury and extent or potential extent of damages to property. Safety regulations may include requirements to report accident or injury	Reprimand to removal	30-day suspension to removal	Removal
<b>3. Breach of security regulation or practice</b>			
a. Where restricted information is not compromised and breach is unintentional	Reprimand to 5-day suspension	1-day to 14-day suspension	5-day suspension to removal
b. Where restricted information is compromised and breach is unintentional	Reprimand to removal	30-day suspension to removal	Removal
c. Deliberate violation	30-day suspension to removal	Removal	
<b>4. Offenses related to intoxicants</b>			
Actions involving these offenses should be reviewed to insure the requirements of drug & alcohol abuse programs are met	<u>FOR</u> <u>INSTRUCTIONAL</u> <u>USE</u> <u>ONLY</u>		
a. Alcohol-related:			
(1) Unauthorized possession of alcoholic beverages while on Government premises or in duty status	Reprimand to 5-day suspension	5-day to 14-day suspension	14-day suspension to removal
(2) Unauthorized use of alcoholic beverages while on Government premises or in duty status	Reprimand to 14-day suspension	14-day to 30-day suspension	30-day suspension to removal
(3) Reporting to or being on duty while under the influence of alcohol	Reprimand to 30-day suspension	14-day suspension to removal	Removal
(4) Sale or transfer of an alcoholic beverage while on Government premises or in a duty status or while any person involved is in a duty status	Reprimand to removal	Removal	

Nature of offense	1st offense	2nd offense	3rd offense
<b>b. Drug-related:</b>			
(1) Unauthorized possession of a drug or controlled substance while on Government premises or in a duty status	5-day to 30-day suspension	14-day suspension to removal	Removal
(2) Unauthorized use of a drug or controlled substance while on Government premises or in a duty status	14-day to removal	30-day suspension to removal	Removal
(3) Reporting to or being on duty while under the influence of a drug or controlled substance	30-day suspension to removal	Removal	
5. Making false, malicious or unfounded statements against coworkers, supervisors, subordinates, or Government officials which tend to damage the reputation or undermine the authority of those concerned	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
6. Abusive or offensive language, gestures or other conduct [Also see "Discourtesy", ¶7 below]	Reprimand to 10-day suspension	5-day suspension to removal	30-day suspension to removal
7. Discourtesy  Penalty for 4th offense within one year may be 14-day suspension to removal	Oral admonishment to 1-day suspension	Reprimand to 5-day suspension	1-day to 10-day suspension
FOR INSTRUCTIONAL USE ONLY			
8. Stealing, actual or attempted; unauthorized possession of Government property or property of others  a. Where substantial value is not involved  b. Where substantial value is involved	Reprimand to removal  14-day suspension to removal	Reprimand to removal  Removal	5-day suspension to removal
9. Using Government property or Government employees in duty status for other than official purposes  Penalty depends on the value of the property or amount of employee time involved, the nature of the position held by the offending employee, and other factors.  For misuse of Government vehicles, see ¶27 below.	Reprimand to removal	1-day suspension to removal	14-day suspension to removal

Nature of offense	1st offense	2nd offense	3rd offense
10. Misuse of official Government credential	Reprimand to removal	5-day suspension to removal	14-day suspension to removal
11. Deliberate misrepresentation, falsification, exaggeration, concealment or withholding of a material fact, or refusal to testify or cooperate in an official proceeding.	Reprimand to removal	1-day suspension to removal	5-day suspension to removal
12. Loss of or damage to Government property, records, or information [Also see §28]  Penalty depends on value of property or extent of damage, and degree of fault attributable to employee	Reprimand to 14-day suspension	Reprimand to removal	14-day suspension to removal
<u>FOR INSTRUCTIONAL USE ONLY</u>			
13. Offenses relating to fighting  Penalty depends on such factors as provocation, extent of any injuries, and whether actions were defensive or offensive in nature.			
a. Threatening or attempting to inflict bodily harm	Reprimand to 14-day suspension	14-day to removal	30-day suspension to removal
b. Hitting, pushing or other acts against another without causing injury	Reprimand to 30-day suspension	30-day to removal	Removal
c. Hitting, pushing or other acts against another causing injury	30-day suspension to removal	Removal	
14. Delay in carrying out or failure to carry out instruction in a reasonable time	Reprimand to removal	Reprimand to removal	5-day suspension to removal
15. Insubordinate defiance of authority, disregard of directive, refusal to comply with proper order	Reprimand to removal	5-day suspension to removal	Removal
16. Sleeping, loafing, or failure to attend to duties			
a. Where no danger to persons or property is involved	Oral admonishment to 1-day suspension	Reprimand to 5-day suspension	5-day suspension to removal
b. Where danger to persons or property is involved	Reprimand to removal	14-day suspension to removal	30-day suspension to removal

Nature of offense	1st offense	2nd offense	3rd offense
17. Negligent performance of duties			
a. Where wastage or other cost is insubstantial	Oral admonishment to reprimand	Reprimand to 5-day suspension	5-day to 30-day suspension
b. Where wastage or other cost is substantial	1-day to 5-day suspension	5-day suspension to removal	30-day suspension to removal
18. Offenses related to gambling			
a. Participating in an unauthorized gambling activity while on Government premises or in duty status	Oral admonishment to reprimand	1-day to 5-day suspension	5-day to 30-day suspension
b. Operating, assisting, or promoting an unauthorized gambling activity while on Government premises or in a duty status or while others involved are in a duty status	14-day suspension removal	Removal	
<u>FOR INSTRUCTIONAL USE ONLY</u>			
19. Participating in a strike, work stoppage, slowdown, sickout, or other job action	Removal		
20. Indebtedness where agency operations or reputation are affected	Oral admonishment to reprimand	Reprimand to 5-day suspension	5-day suspension to removal

Offenses related to Supervisory/Managerial  
Observance of Employee Rights

21. Sexual harrasment	Reprimand to removal	5-day suspension to removal	30-day suspension to removal
22. Discrimination based on race, color, sex, religion, national origin, age, marital status, political affiliation, or handicap	Reprimand to removal	5-day suspension to removal	30-day suspension to removal
23. Interference with an employee's exercise of, or reprisal against an employee for exercising, a right to grieve, appeal or file a complaint through established procedures	Reprimand to removal	5-day suspension to removal	
24. Reprisal against an employee for providing information to an Office of Inspector General (or equivalent) or the Office of Special Counsel, or to an EEO investigator, or for testifying in an official proceeding	30-day suspension to removal	Removal	



Nature of offense	1st offense	2nd offense	3rd offense
25. Reprisal against an employee for exercising a right provided under 5 U.S.C. Chap. 71 (governing Federal labor-management relations)	Reprimand to removal	5-day suspension to removal	30-day suspension to removal

## Offenses proscribed in statute

26. Finding by MSPB of refusal to comply with MSPB order or of violation of statute causing issuance of Special Counsel complaint [5 U.S.C. §§1206(g)(1) and 1207(b)]	Reprimand to removal
27. Directing, expecting or rendering services not covered by appropriations [5 U.S.C. 3103]	Removal
28. Prohibited political activity a. Violation of prohibition against political contributions [5 U.S.C. 7323] b. Violation of prohibition against campaigning or influencing elections [5 U.S.C. §§7324 and 7325]	Removal  30-day suspension to removal
29. Failure to deposit into the Treasury money accruing from lapsed salaries or from unused appropriations for salaries [5 U.S.C. 5501]	Removal  <u>FOR</u> <u>INSTRUCTIONAL</u> <u>USE</u> <u>ONLY</u>
30. Soliciting contributions for a gift for a superior; making a donation as a gift to a superior; accepting a gift from an employee receiving less pay [5 U.S.C. 7351]	Removal
31. Action against national security [5 U.S.C. 7532]	Suspension or removal
32. Willfully using or authorizing the use of a government passenger motor vehicle or aircraft for other than official purposes [31 U.S.C. 638a(c)(2)]	1-month suspension to removal
33. Mutilating or destroying a public record [18 U.S.C. 2071]	Removal

**U.S. Department of Labor**

Solicitor of Labor  
Washington, D.C. 20210



August 22, 1986

MEMORANDUM FOR: Richard K. Willard  
Chairman, Legislative Review Task Force  
Drug Use Prevention Working Group

FROM: George R. Salep *GRS*

SUBJECT: Comments on August 18 Preliminary Report

I have undertaken an initial review of the materials provided us, and have several comments. I am enclosing a revision of your draft Executive Order which has been edited to the extent necessary to take account of these comments.

1. Fourth Amendment Considerations; Statutory Nexus Requirements.

We agree with your position that a program which limits mandatory testing to sensitive jobs stands the best chance of passing muster under the Fourth Amendment. These jobs involve national security, the protection of health and safety of the public and other similarly sensitive jobs. In our view, requiring each agency head to specifically identify the positions in each agency which will fall into any of these categories would strengthen the argument that the selection is constitutionally permissible. In addition, this process of agency designation will help ensure that the nexus between an employee's private drug use and his or her job performance is properly established for purposes of Civil Service Reform Act disciplinary requirements.

2. Due Process and Privacy Considerations.

While we also believe your analysis of due process and privacy rights implications may well be overly optimistic, the procedural protections in the proposed Executive Orders included with your preliminary report will no doubt help to defend any such order against constitutional challenges on due process or privacy grounds. Such arguments would be strengthened, in our view, by specifically guaranteeing an employee a right to a retest upon request, and ensuring privacy in the production of a sample for testing.

As a practical matter, we think it would also be wise to take into account the criminal process implications that will flow from a program of federal drug testing. It is my understanding that federal agencies may be under a legal

obligation, pursuant to 28 U.S.C. 535 (Investigation of Crimes Involving Government Officers and Employees) to refer to appropriate law enforcement personnel any positive drug test indicating use of an illegal substance. Moreover, such tests might be considered as probable cause for the issuance of search warrants. I believe we should explore these matters further in our discussions.

### 3. Rehabilitation Act Obligations.

The Rehabilitation Act requires that a reasonable accommodation be made for the handicapped. While your analysis quite properly draws a distinction between the obligation owed to an "addict" and the obligation owed to a "recreational user," the point where the latter begins to transform into the former is not always apparent. Moreover in some cases, a characteristic of the employee's addiction may be an inability to acknowledge the addiction and the need for professional help. Accordingly, interpretation of the Act's obligations to require reasonable accommodation in employment only to those who voluntarily admit their problem appears likely to invite serious legal challenge.

We believe our efforts could withstand legal challenge if an Executive Order provided appropriate job protection and rehabilitation assistance not only to those whose drug abuse problem is revealed for the first time through voluntary admission or other conduct, but also to those whose problem is revealed through testing. In order to ensure that the person is entitled to protection under the Rehabilitation Act (i.e., is dependent on drugs rather than simply a "recreational user"), we would suggest a certification by a family physician or supervisor that the employee has a physiological or psychological drug dependency. Moreover, as a matter of policy we believe a first-time determination of drug abuse, by testing or otherwise, should not be grounds for removal from employment, although lesser forms of personnel action would be appropriate in such cases.

While the Rehabilitation Act applies to pre-employment applicants as well as employees, it would not appear that it would be "reasonable" to require the federal government or any employer to hire an applicant who is not undergoing rehabilitation or to pay for rehabilitation of an applicant's addiction. It might be appropriate in the spirit of our efforts, however, to encourage flexibility when an addict-applicant is in a rehabilitation program already, and to ensure that positive test results are not used as a per se rejection tool should an individual apply for another federal job at a later time. Whether a

pre-scheduled, single drug test for all job applicants, paid for by the federal government and performed to its specifications, is likely to provide useful information in a cost-effective manner is another practical question.

#### 4. Status of Existing Collective Bargaining Provisions.

An additional legal issue not covered in your memorandum is whether an Executive Order can alter conflicting practices and procedures in an existing collective bargaining agreement. The statutory authorities cited in your draft Executive Order as the basis for Presidential action in this area refer to statutes granting him authority to "regulate" the criteria for hiring and for the conduct of employees. If this is so, then on its face 5 U.S.C. 7116(a)(7) would make it an unfair labor practice to enforce any obligation of the new order that is in conflict with an existing collective bargaining agreement. Absent a sound legal argument to the contrary, we would recommend that any new Executive Order simply take cognizance of existing agreements and thus avoid disruptive and lengthy litigation with federal employee unions on this point.

I am enclosing for your consideration a proposed Executive Order that would conform with the suggestions noted above, together with a copy of your proposed order on sensitive employees (most of which is included verbatim, or with minor editing, in our revision). Our revision includes one additional suggestion not discussed above: that the testing program be extended to include abuse of otherwise legal (prescription) drugs which would substantially impair the ability of an employee to carry out sensitive duties.

Enclosures

cc: Peter J. Wallison  
Carlton Turner

Executive Order No. \_\_\_\_\_ of August \_\_, 1986

Drug Free Federal Employment

WHEREAS drug abuse, on or off duty, by federal employees in sensitive positions is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust given to such employees as servants of the public who must set an example for other employees and the public;

WHEREAS drug abuse, on or off duty, by federal employees in sensitive positions evidences an unreliability, an instability, and a lack of judgment that is inconsistent with access to sensitive information, and renders such employees susceptible to coercion, influence, and irresponsible action under pressure so as to pose a serious risk to national security, the public safety, and the effective enforcement of the law;

WHEREAS drug abuse, on or off duty, by federal employees in sensitive positions can pose a serious health or safety threat to members of the public and to other federal employees;

WHEREAS drug abuse, on or off duty, by federal employees can impair the efficiency of federal departments and agencies by undermining public confidence in their functions, creating suspicion and distrust among employees, and result in increased absenteeism and in less reliable and decreased production;

WHEREAS drug abuse, on or off duty, can be ascertained by a program of random testing carried out under appropriate due process and privacy safeguards;

WHEREAS drug abuse, on or off duty, is primarily the responsibility of the abuser, but employers have an obligation under the law to make reasonable accommodation;

WHEREAS the laws governing the conduct of civil servants provide procedures for agency actions terminating employees on the basis of conduct;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including Sections 3301(2) and 7301 of Title 5 of the United States Code, and as President of the United States, and deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the federal service, it is hereby ordered as follows:

Section 1: Drug Free Workplace

- (a) All federal employees are required to refrain from drug abuse as defined by this order.
- (b) Drug abuse by federal employees in sensitive positions whether on duty or off duty is contrary to the efficiency of the service.
- (c) Persons who engage in drug abuse are not suitable for federal employment in sensitive positions.

Section 2: Drug Testing for Employees in Sensitive Positions

- (a) The head of each agency shall identify as sensitive those positions which, in the judgment of the head of the agency, involve national security, the protection of health and safety of the public, and other similar positions requiring a high degree of public trust and reliance.
- (b) The head of each agency shall establish a drug testing program, consistent with the standards set forth in this order, and other relevant rules, regulations and collective bargaining agreements and obligations, for all employees in sensitive positions. The extent of and related criteria for such testing shall be determined by each agency head, based upon the degree of sensitivity of the agency's mission and its employees' duties and the available resources for a testing program.

Section 3: Drug Testing Procedures

- (a) Agencies shall notify all employees in positions to be designated as sensitive: (i) that their positions have been designated as sensitive; (ii) that drug abuse is prohibited, and the definition thereof; (iii) that testing for drug abuse is to be conducted, and the procedures therefor; and (iv) that counseling and rehabilitation are available, and the procedures for obtaining such assistance.
- (b) Agency testing procedures shall provide for the privacy of employees in providing specimens for testing, for an immediate retest upon request of an employee, and for notification of employees to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

- (c) Programs shall contain procedures for timely submission of request for retention of records and specimens; procedures for retesting; and procedures to protect the confidentiality of test results and related medical and rehabilitation records.
- (d) Programs shall be conducted in accordance with scientific and technical guidelines promulgated by the Secretary of Health and Human Services after consultation with the Director of the National Institute on Drug Abuse.

Section 4:       Rehabilitation

- (a) All employees may seek drug abuse counseling or rehabilitation services from their agency on a voluntary basis, consistent with existing rules, regulations and any relevant collective bargaining provisions.
- (b) An employee in a sensitive position who is found to be engaged in drug abuse shall have the opportunity, only after the first such determination of drug abuse, to obtain drug abuse counseling or rehabilitation services, upon certification by a physician or supervisor that the employee may have a physiological or psychological drug dependency.
- (c) The Director of the Office of Personnel Management shall ensure that the contract negotiated with any carrier of health plans offered Federal employees under chapter 75 of title 5, United States Code shall include the provision of drug abuse counseling and rehabilitation services.

Section 5:       Transfer and Removal Actions

- (a) Any employee in a sensitive position engaged in drug abuse counseling or rehabilitation may be transferred to available non-sensitive duties until certification of successful completion of such counseling or rehabilitation.
- (b) Any employee in a sensitive position engaged in drug abuse not eligible for counseling or rehabilitation, or who has not successfully completed a counseling or rehabilitation program in 3 months or such additional time as the agency head may in his discretion provide, shall be subject to appropriate personnel action; provided, however, that a first determination of drug abuse shall not be grounds for removal from employment.

- (c) The results of a drug test conducted pursuant to this order and information developed by the agency in the course of the drug testing of the employee shall be admissible in evidence in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in administrative or disciplinary proceedings. Positive test results are preliminary results until confirmed as positive (by both initial and confirmatory testing) or by an admission of the employee.
- (d) The determination of an agency that an employee in a sensitive position is engaged in drug abuse may be made on the basis of any appropriate evidence, including direct observation, conviction of a criminal offense involving drugs, administrative inquiry, or the results of an authorized testing program. Positive drug test results are not conclusive and may be rebutted by other evidence that an employee has not engaged in drug abuse.
- (e) Any action to remove an employee who is engaged in drug abuse shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

Section 6: Applicable Agreements

To the extent this order is applicable to employees covered by collective bargaining agreements, any existing agreement shall for its duration control agency action involving rehabilitation, testing, and personnel actions to the extent of any direct conflict.

Section 7: Applicants for Employment

- (a) Applicants for federal employment may be required to take a drug test of the same type as required for federal employees in sensitive positions, and with the same rights as those employees concerning retesting, submission of related medical evidence, and confidentiality.
- (b) Applicants whose test results indicate drug abuse may not be hired, except that agencies shall give reasonable consideration to those applicants who are already enrolled in rehabilitation programs.
- (c) Applicants whose test results indicate drug abuse may reapply for other positions at a future time,



and shall not be prejudiced by the results of any such test except where a history of drug abuse may be relevant to the specific sensitive nature of a position.

Section 8: Definitions

- (a) This order applies to all agencies of the Executive Branch.
- (b) For the purposes of this order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services as defined in 5 U.S.C. 2101(3); the United States Postal Service; or any employing unit or authority of the federal government, other than those of the judicial and legislative branches.
- (c) For the purpose of this order, the term "drug abuse" means: (1) the use of any controlled substance, as defined by section 802(6) of Title 21, United States Code, the possession of which is unlawful under chapter 13 of that title, unless that substance is possessed or used pursuant to a valid prescription or is otherwise authorized by law; or (2) the use of any drug, regardless of use pursuant to lawful prescription, which results in the inability to substantially perform sensitive responsibilities of positions designated pursuant to section 2(a) of this order.

Section 9: Effective Date

This order shall become effective on the date of its issuance.

RONALD REAGAN

THE WHITE HOUSE

August \_\_, 1986

U.S. Department of Justice

Civil Division

Domestic Policy Council  
Deliberative Document

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 18 1986

**TO:** Carlton E. Turner  
Chairman, Drug Use Prevention Working Group  
Domestic Policy Council

**FROM:** *RPW* Richard K. Willard  
Chairman  
Legislative Review Task Force

**RE:** *Preliminary Report of the Legislative Review Task Force*

On Thursday, August 14, the Legislative Review Task Force met to consider legislative and regulatory options to implement the mandate of the Domestic Policy Council to identify steps to achieve drug-free schools and workplaces. Our initial focus was on the federal workplace. We conclude that the President has the authority to issue an executive order prohibiting drug use by federal employees and instituting a drug testing program to ensure compliance with this goal. At the same time, we believe that it would be advisable to present Congress with legislation to eliminate possible statutory impediments to programs for achieving a drug-free workplace. Such legislation could also eliminate possible federal statutory barriers to programs for achieving drug-free schools and private workplaces.

Attached are the following documents: Tab A: Draft Executive Order Covering All Employees; Tab B: Draft Executive Order Covering Only Sensitive Employees; Tab C: OPM Draft Bill; and Tab D: Task Force Draft Bill. Prior versions of these drafts have been distributed to the task force and were discussed at our August 14 meeting. Some changes have been made in response to comments on the prior drafts. However, because of the shortness of time, we have not been able to obtain final agreement on these drafts from agencies participating in the task force.

**I. Existing Legal Constraints on a Drug Testing Program**

**A. Constitutional Issues**

As an initial matter we are confident that there is no federal constitutional impediment to a carefully devised program of drug testing.

The Fourth Amendment is probably not violated by a wide variety of drug testing programs that can be devised. For example, pre-employment physical testing for applicants to certain federal jobs has been required for years without any successful Fourth Amendment challenge. Moreover, drug tests, undertaken pursuant to a condition of employment that employees be drug-free, may be voluntary searches not violating the Fourth Amendment or permissible reasonable searches. Even if a court concludes that the Fourth Amendment applies, the analysis would then involve a balancing of the government's interest in conducting testing against the intrusion on the employees' reasonable expectation of privacy. We believe that a program of mandatory testing for "sensitive" jobs, involving national security and public health and safety, meets this balancing test.

The Fifth Amendment is not implicated by drug testing to ensure compliance with a "drug-free" workplace requirement. The Fifth Amendment privilege against self-incrimination does not apply in the civil context, and has been held not to bar a coerced blood test, since the privilege prohibits only compelled "communications" or "testimony," not physical or real evidence. Schmerber v. California, 384 U.S. 757 (1966).

Finally, there is no substantive due process or privacy right to use illegal drugs. Cf. Bowers v. Hardwick, 54 U.S.L.W. 4919 (U.S. June 30, 1986). Apart from the search-and-seizure issue, there is no constitutional protection for applicants or employees who wish to use illegal drugs.

#### B. Statutory Issues

Existing federal statutory constraints are more troublesome, but we believe that substantial measures to achieve a drug-free federal workplace can be adopted without new legislation.

The Civil Service Reform Act, 5 U.S.C. § 2302(b)(10), prohibits discrimination against any employee or applicant on the basis of conduct that does not impair the efficiency of the service. The Merit Systems Protection Board frequently has sustained the removal of federal employees due to the possession or use of illegal drugs. If remaining drug-free were made an express condition of employment the nexus between off-duty conduct and service efficiency would not have to be proven in each case. <sup>1</sup>

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<sup>1</sup> However, a recent decision of the Merit Systems Protection Board indicates the difficulty which the government can have in establishing the nexus requirement. In Elijah Merritt, 6

(continued...)

The Drug Abuse Office and Treatment Act, 42 U.S.C. § 290ee-1, provides that "[n]o person may be denied or deprived of Federal civilian employment ... solely on the ground of prior drug abuse," except for certain national security and sensitive positions. While this might be cited by a rejected job applicant, we believe that drug testing programs designed to identify current drug abuse do not contravene the Act. Moreover, the Act does not prohibit the dismissal of an employee "who cannot properly function in his employment." 42 U.S.C. § 290ee-1(d).

The Rehabilitation Act of 1974, 29 U.S.C. §§ 791 et. seq., prohibits discrimination against, and requires accommodation of, persons who are "handicapped," which under current interpretation includes drug addicts. However, we think the law may be satisfied if employee drug addicts are given the opportunity for treatment before suffering adverse employment action. Most importantly, the Act offers no protection for "recreational" users and requires no tolerance for continued drug use after an opportunity for rehabilitation is provided.

Finally, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq. some courts have invalidated facially-neutral employment practices on the ground that they have a "disparate impact" on a particular group. However, the Supreme Court has recognized that, even where evidence establishes a prima facie case that a business practice has such impact, it may be rebutted by a showing that the practice is job related. See New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) (rejecting challenge to transit authority's refusal to hire persons in methadone maintenance program as transit police). Apart from the difficulty plaintiffs would have in showing that a "drug-free" requirement has a statistically significant adverse impact on a particular group, a persuasive argument can be made that the requirement is per se a valid condition of government employment.

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<sup>1</sup>(...continued)

M.S.P.R. 585 (1981), a guard employed by the Bureau of Prisons was found to be smoking marijuana off duty. Despite the serious problem of drug smuggling in federal prisons, the Board concluded that there was not a sufficient connection with the "efficiency of the service" to justify removal. As noted above, we believe that an executive order, with an elaborate statement of findings, will make it significantly easier to establish the requisite nexus in such cases.

## II. Proposed Legislation

As noted above, we believe that the President could implement a mandatory drug testing program for employees in sensitive positions without the need for legislation. While there will undoubtedly be legal challenges, we are reasonably confident of our ability to defend a carefully designed program of drug testing. Although legislation would be helpful in overcoming some legal obstacles, we believe the problem is serious enough to warrant attention without waiting for Congress to act.

At the same time, we recognize that all quarters in Congress are anxious to enact legislation to combat the drug problem, and may legislate in this area even without an administration bill. Since the issue is going to be joined in any event, we do recommend that the administration have a bill ready for transmittal to Congress at the same time that we issue any executive order. Eventually, we have to be prepared for our opponents to attempt to block any drug testing program through riders on appropriations bills or other must-pass legislation. An administration bill would put our opponents on the defensive as well as set the terms of debate on the issue.

Attached to this memo are the two bills which have been discussed by our task force: the OPM draft and the Justice bill. The OPM bill amends two statutory provisions which might be used to challenge a drug testing program, the nexus requirement in the Civil Service Reform Act, and the Rehabilitation Act. In addition, it expressly provides that an individual who uses drugs may not be employed in the executive branch. The Justice proposal is a more elaborate statute, which contains an express authorization for drug testing, amends another arguably relevant statute, the Drug Abuse Office and Treatment Act, and provides that no federal statute would bar drug testing in the private work-place and in educational institutions.

## III. Proposed Executive Orders

The Executive Orders we propose invoke the President's authority (explicitly recognized by Congress in 5 U.S.C. § 3301), to determine which persons are suitable to become or remain federal employees. The order at Tab A covers all employees, but authorizes a broader mandatory testing program for sensitive positions. The Order at Tab B covers only employees in certain sensitive positions.

As drafted, the recommended orders raise several policy questions including: (a) the scope of drug testing for sensitive and non-sensitive positions; and (b) penalties for discovered

drug users and the extent to which rehabilitation programs will be available.

#### A. Scope of Drug Testing

Both orders authorize mandatory drug testing programs for employees in sensitive positions, with the extent and criteria for the program left to the discretion of the agency head.

Sensitive positions are defined to include categories of employees who if impaired or compromised because of illegal drug use are likely to do the most serious harm to the government. Determining which positions are to be considered sensitive is a policy matter open to some discussion. We have endeavored to include all employees whose positions are considered to be of substantial importance to the government's mission. The categories, to some extent, may overlap. This will maximize the sensitive employees covered and will, in the case of an employee who fits several categories, enhance our chances of prevailing in litigation.

As presently drafted, these categories of sensitive positions probably include about 1.2 million of the 2.8 million civilian employees in the federal workforce. The majority of the covered employees work in the Department of Defense and have access to classified information at the "Secret" or "Top Secret" level. The only way to substantially reduce the scope of the order would be to exclude employees with access to "Secret" information.

One category of sensitive positions no longer included in our draft are employees in the Performance Management and Recognition System (PMRS). These are supervisory employees in grades GM-13 to GM-15 who are eligible for merit pay, numbering 120,000 government-wide.

In addition to mandatory testing of sensitive employees, the order at Tab A also permits more limited testing programs for non-sensitive employees. Such employees may only be tested voluntarily, if involved in an accident, if there is a reasonable suspicion of drug use, or as a follow-up to a rehabilitation program. Agency heads are given discretion to decide whether to test applicants for non-sensitive positions.

#### B. Penalties and Rehabilitation

The draft at Tab A requires that federal employees identified as illegal drug users be fired or disciplined. Both orders require that employees in sensitive positions be fired or transferred to non-sensitive positions.

Both orders allow an exception to the requirement of removal or discipline for employees who volunteer for testing or come forward and identify themselves prior to being caught. These employees are to be referred to employee assistance coordinators and channelled to treatment or counselling, depending on the employee's medical condition. These employees will be subject to follow-up testing, and removal or discipline is authorized if they are later found to be using illegal drugs. We have crafted the provisions in this way to assure the availability of rehabilitation efforts for those employees who are ready to become accountable for their actions, but to avoid providing a loophole for those employees who would otherwise continue their illegal use of drugs until or unless they are caught.

It is important to keep in mind that most illegal drug users in the workplace are not yet addicts and do not need rehabilitation or medical treatment. Thus it is misleading to design a program on the assumption that illegal drug users are "victims" who need "treatment." The best way to achieve a drug free federal workplace is for employees to simply stop using illegal drugs before they become addicts or need treatment. Even the best rehabilitation programs offer only a limited chance of long-term success. Prevention--not rehabilitation--is the best goal.

#### C. Remaining issues for Resolution

1. Should the definition of illegal drugs include unauthorized use of all controlled substances or only those listed on Schedules I and II. (HHS)

2. Should the definition of illegal drug use require that the individual knowingly and intentionally use the illegal drug? Should an agency have to prove knowing or intentional use in order to remove an employee? What about an employee who is "slipped a mickey"? (HHS)

Attachments

A BILL

To amend title 5, United States Code, to exclude individuals who illegally use controlled substances from employment in the executive branch, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Employee Drug Abuse Prevention Act of 1986".

Sec. 2. (a) Section 2302(b)(10) of title 5, United States Code, is amended by striking out "United States" and inserting in lieu thereof "United States; and nothing in this paragraph shall be construed to permit or require the employment of an applicant or employee who illegally uses a controlled substance".

(b)(1) Subchapter V of chapter 73 of title 5, United States Code, is amended by inserting after section 7352 the following new section:

"§7353. Illegal use of controlled substances

"An individual who illegally uses a controlled substance, as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), may not be employed in the executive branch. The Office of Personnel Management shall prescribe regulations to implement this section."

REGS  
ED  
Statute

(2) The analysis for chapter 73 is amended by inserting

of the US  
in any  
branch of  
part.

after the item relating to section 7352 the following new item:

"7353. Illegal use of controlled substances."

Sec. 3. Section 7(7)(B) of the Rehabilitation Act of 1973 (29 U.S.C. 706(7)(B)) is amended--

(1) by striking out "second sentence" and inserting in



-2-

lieu thereof "second and third sentences"; and

(2) by adding at the end thereof the following new sentence: "For the purposes of section 501 of this Act, such term does not include an individual who illegally uses a controlled substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)).".

Sec. 4. The amendments made by this Act are effective on the date of enactment of this Act.

Date

August 12, 1986

Deliver to:

Subject:

OPM draft bill, Federal Employee Drug Abuse Prevention  
Act of 1986

Reporting Unit:

OLA

Referred to:

Advisory Units:

CRM, DAG (Blau)

ORAL COMMENTS BY 8/12/86

Reporting Unit please prepare report addressed to:

Budget

H. Jud.

S. Jud.

H.I. & F.C.

Comm.

H. G.O.

S. G.O.

Advisory Unit please prepare memorandum to:

Reporting Unit, copy to J.E. Perkins, Rm. 1139, Main Justice Bldg.

Attn. J.E. Perkins, Rm. 1139, Main Justice Bldg.

Advisory Units please respond in time to permit Reporting Unit to comply with deadline of:

30 days

15 days

other

Department File No:

Return Attachments

Miscellaneous Information:

Kimberly Allan, 633-4047



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503  
August 6, 1986

LEGISLATIVE REFERRAL MEMORANDUM

TO: **Legislative Liaison Officer -**  
Department of Agriculture  
Department of Commerce  
Department of Defense  
Department of Education  
Department of Energy  
Department of Health and Human Services  
Department of Housing and Urban Development  
Department of the Interior  
Department of Justice  
Department of Labor  
Department of State  
Department of Transportation  
Department of the Treasury  
Equal Employment Opportunity Commission  
Environmental Protection Agency  
National Aeronautics and Space Administration  
Small Business Administration  
U.S. Information Agency  
Veterans Administration  
U.S. Postal Service

SUBJECT: OPM draft bill "Federal Employee Drug Abuse Prevention Act of 1986."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than Wednesday, August 13, 1986.

Questions should be referred to Hilda Schreiber (395-7362), the legislative analyst in this office.

*Naomi R Sweeney*

Naomi R. Sweeney for  
Assistant Director for  
Legislative Reference

Enclosures

B-434

CHC for JEP

Crim DAG

> oral comments by 8/12.

rec'd  
8/8/86  
LW

Aug 7 2 54 PM '86  
LEGISLATIVE REFERENCE