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STATE OF MAINE
112TH LEGISLATURE
SECOND REGULAR SESSION

REPORT
OF THE
MAINE COMMISSION TO
EXAMINE CHEMICAL TESTING
OF EMPLOYEES

DECEMBER 31, 1986

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PREFACE TO THE COMMISSION REPORT

This study was conducted by the Maine Commission to Examine Chemical Testing of Employees, as created by Resolves 1985, chapter 86. The members of the Commission included:

- Edith Beaulieu, Commission chair, State Representative;
- Jim McGregor, Commission vice-chair, Bath Iron Works;
- Ken Allen, Assistant to the Speaker of the House;
- Lynn Duby, Crisis & Counseling Centers;
- Paul Falconer, Cianbro Corporation;
- Edward Gorham, AFL-CIO;
- Thomas Johnston, Esq.; Eaton, Peabody, Bradford & Veague;
- Robert Mittel, Esq.; Mittel and Hefferan;
- R. Gordon Roderick, United Paperworkers International, Union Local 449; and
- John Tuttle, State Senator.

Gilbert W. Brewer and Margaret J. Reinsch served as staff attorneys for the Commission.

The Commission held 10 meetings between June 25, 1986, and December 29, 1986, when it concluded its deliberations. In the interim, the Commission heard from substance abuse testing experts, employee assistance and rehabilitation program representatives, legal experts, management and labor representatives and law enforcement officers. The subjects of these meetings, and the speakers at each, are reproduced in Appendix A of this report. In addition, the Commission's staff collected and distributed to the Commission members a vast amount of background information in the form of reports, studies and articles. It is from this testimony and information that the Commission has drafted this report. The process was not an easy one, and the questions which it raised admitted of no easy answers. Although the Commission has issued a divided report, we are unanimous in our belief that each member of the Commission has worked hard to understand the subject, to keep an open mind, to compromise where possible and finally, to make the decision which he or she felt was in the best interests of the citizens of the State of Maine. Those personal decisions are respected by all members of the Commission.

The Commission would like to extend its thanks to the many persons and agencies which assisted the Commission through this long and arduous process. In particular, the Commission would like to thank Barbara Sparks and Cathy St. Pierre of the Office of Alcoholism and Drug Abuse Prevention; Kevin Parker, Director of the State Employee Assistance Program; Albert Anderson of the Alcohol and Drug Abuse Planning Committee; and the several medical personnel and testing experts for their assistance. The Commission would also like to thank those nationally-recognized experts who volunteered their time and services and traveled great distances to share their insight and opinions with the Commission.

INTRODUCTION

The Resolve which created the Commission to Examine Chemical Testing of Employees recognized that substance abuse in society as a whole is an increasing problem, and that workplace safety may be endangered by substance abuse. Questions as to the propriety and accuracy of testing were also raised. The Resolve therefore directed the Commission to examine the issues involved in the testing of employees for the use and abuse of alcohol and controlled substances, including:

- Intrusion upon privacy interests of employees;
- The safety of employees and co-workers;
- The impact of the use of alcohol and controlled substances upon the physical and emotional health of the employee;
- The accuracy and effectiveness of urinalysis, blood analysis and other methods of testing; and
- The standards appropriate for determining the existence of impairment.

The Resolve also directed the Commission to meet as necessary to study the issues through examination of data from Maine and other states, to consult with recognized experts, to conduct public hearings and to submit its findings and recommendations, along with any suggested legislation, to the First Regular Session of the 113th Legislature no later than December 31, 1986. This report is the product of all the Commission's activities and contains the findings and recommendations required of it by the Resolve.

A few explanatory notes are helpful at this point. The Commission determined at the first meeting in June that the title of the Commission, the Commission to Examine Chemical Testing of Employees, may not be perceived as adequately indicating the entire mandate it was given. The Commission, therefore, described its duties as the examination of chemical testing in the workplace, so as not to leave out those persons in upper and top management who might feel they are not included in the term "employees."

Second, the Commission finally settled on the term "substance abuse test" as a catchall phrase for all chemical or drug tests, including urinalysis, blood analysis, breath analysis and any other form of determining whether a person has used alcohol or other drugs. In addition, the Commission learned early in the study process that most people do not readily think of "alcohol" when faced with the term "drug,"

although alcohol is considered by experts to be a type of drug. To avoid confusion in this report, therefore, the Commission has tended to use the term "substance of abuse" to include alcohol and other drugs, whether legal or illicit, and "substance abuse" to refer to the improper use of alcohol or other drugs.

The Commission, after lengthy deliberations, was unable to reach a unanimous decision on its findings and recommendations. This report, therefore, is actually a divided report, containing both majority and minority findings and recommendations. The members of the Commission Majority are:

Edith Beaulieu;
Kenneth Allen;
Lynn Duby;
Edward Gorham;
Robert Mittel; and
R. Gordon Roderick.

Endorsing separate findings and recommendations are the Minority members of the Commission:

Jim McGregor
Paul Falconer
Thomas Johnston.

The report is arranged as follows. The Majority Report is first. It is divided into three sections: The Scope of the Problem; Substance Abuse Tests and Alternatives; and Recommendations. The first two sections are each broken down into two subsections: A. Evidence and Testimony received by the Commission; and B. Findings made by the Majority based on that evidence and testimony. The Findings and Recommendations of the Majority are printed on blue paper. Suggested Legislation is included in the Majority Recommendations and is reproduced in Appendices B and C of this report.

The Minority report follows the Majority report and is divided into four sections: Preface to the Minority Report, Evidence and Testimony, Finding, and finally, Recommendations. The Finding and Recommendations of the Minority are printed on yellow paper. Suggested legislation is included in the Minority recommendations and is reproduced in Appendix D of this report.

REPORT OF THE MAJORITY OF THE
COMMISSION TO EXAMINE CHEMICAL
TESTING OF EMPLOYEES

MEMBERS

Rep. Edith Beaulieu
Kenneth Allen
Lynn Duby
Edward Gorham
Robert Mittel -
R. Gordon Roderick

I. EXECUTIVE SUMMARY

Due to the length of the Majority Report of the Commission to Examine Chemical Testing of Employees, the Majority has decided to provide this executive summary as a concise restatement of the Majority's position; it is not intended to be a substitute for the complete discussion contained in the full report. The summary briefly describes the reasoning and factual support behind the Majority's conclusions; for a more detailed exposition of the Majority's position, please refer to the full Majority report.

The Majority of the Commission to Examine Chemical Testing of Employees, after lengthy and deliberative consideration of the evidence offered to the Commission, has decided to recommend a complete prohibition of the use of substance abuse tests in the workplace, with the sole exception of the use of breathalyzers. This decision was not reached easily nor without careful consideration of all relevant factors. The issues involved in the decision were complex and not susceptible of simple resolution, however, the Majority has decided to recommend the complete prohibition based on the following reasons.

The evidence presented to the Commission showed that current substance abuse tests suffer from many limitations. Since urinalysis is the primary test method used by employers, the Commission focused on the particular problems involved in its use. The evidence showed that the tests, although well-suited for use in the clinical applications for which they were developed, are not effectively transferred to use in the workplace.

The accuracy of the test results is disputed, with optimal accuracy rates in the range of 80% to 97% for most tests, and approaching 99% with the more expensive gas chromatography/mass spectrometry test method. However, these figures do not reflect potential error due to other factors, such as malfunctioning or miscalibrated test equipment, and more important, human error in conducting the test, interpreting the results or in handling the samples.

Urinalysis tests are also limited in that they cannot determine the present impairment of a test subject when he or she is tested. All that a positive urinalysis test result indicates, assuming that it is an accurate result, is that the test subject has at some unknown time ingested a certain substance in some unknown amount; it cannot determine whether an individual is currently impaired due to the use of that substance.

The results of urinalysis tests can vary from person to person, and even from hour to hour in the same person, due to a multitude of factors. These factors include the type of substance ingested, the metabolic rate of the individual, the body weight and general health of the individual, excretory patterns, diet, and adulteration or dilution of the sample. These variations cause further problems in attempting to interpret the significance of a positive urinalysis test result.

Additional evidence was presented which showed that the use of substance abuse tests in the workplace carries with it the risk of creating or aggravating other problems not directly associated with the tests themselves. The use of the tests aggravates management-labor friction in the workplace, contributing to a poor working environment. The use of the tests is subject to abuse by unscrupulous employers, although an acknowledged minority. Finally, the establishment of workplace substance abuse testing programs results in substantial financial costs to employers and creates the possibility of increasing an employer's liability exposure for inaccurate test results.

Other evidence presented to the Commission showed that workplace testing programs unduly intrude into an employee's rightful expectations of personal privacy. The test procedure itself requires every test subject to submit to a process which many find embarrassing at best, and degrading at worst. This is particularly true where an observer is required to watch the actual passage of urine, a requirement which is universally recommended by testing authorities to prevent adulteration or dilution of the urine sample.

Urinalysis tests can also be used to derive personal information from an individual's test sample that is unrelated to the question of whether the test subject has a substance abuse problem or not. For example, the tests can be used to determine whether an individual is pregnant, has heart disease or diabetes, is taking any number of legally prescribed medications for a host of physical and mental ailments, and other such personal information which an employee may not wish to be disclosed to his employer.

Evidence was offered to show that it will be extremely difficult, if not impossible, to keep the identity of test subjects and the results of their tests confidential from the employee's co-workers. This means that any worker who is tested will be branded as a drug user, whether or not that accusation is true.

Based on this evidence, the Majority of the Commission has concluded that the use of substance abuse testing is not justified in the Maine workplace. This conclusion was reached for the following reasons.

There are three primary reasons that have been offered to justify the use of substance abuse tests in the workplace. They are:

1. Testing is justified as a tool to combat rampant illegal drug use in our society;
2. Testing is justified as a means to protect an employer's legitimate interest in ensuring that his employees are not impaired on the job and are working efficiently in return for their salaries; and
3. Testing is justified as a safety measure in preventing impaired workers from posing a threat to themselves, other workers and the general public while on the job.

The Majority rejects these proffered justifications for the following reasons.

The first of these justifications, that testing may legitimately be used to combat general substance abuse problems in society, confuses the legitimate role of an employer in our society. The Majority acknowledges that our nation is suffering from a deplorably high rate of substance abuse, but questions whether employers are the proper agencies to resolve that problem. Our society has established mechanisms to enforce its lawful prohibitions; they are known as law enforcement agencies. The Majority cannot condone the mass "deputization" of employers to use their economic leverage to force compliance with laws through methods unavailable to proper law enforcement agencies under the Constitution. We believe it is a dangerous precedent to authorize private citizens to perform acts normally reserved to governmental entities which must act within the constraints imposed by the Constitution as part of either the "checks and balances" system, or the guarantee of civil liberties contained in the Bill of Rights. In addition, the use of substance abuse tests in the workplace essentially reverses the venerable rule of Anglo-American jurisprudence that an accused is presumed innocent until proven guilty. Testing programs require the accused employee to "prove" that he is actually innocent by passing a substance abuse test.

The second justification, that tests can protect an employer's legitimate economic rights, is also rejected by the Majority. Although the Majority agrees that an employer is justified in expecting that his employees will report to work unimpaired and perform their assigned tasks productively and efficiently, we do not agree that substance abuse testing furthers this interest. An employer can adequately protect his economic interests in the work performance of his employees by simply ensuring their adequate supervision. If an employee's productivity drops off, or if he or she begins to take an inordinate amount of leave or sick time, the employer is fully

capable of recognizing that problem without testing. Any interference with an employer's legitimate economic expectations will be manifested by objective signals which can easily be detected and documented by the employer. The use of substance abuse tests in this context will not help to solve any work performance problem; at best, all that a test can do is to reveal that an employee is using certain substances which may or may not be the true cause of the objective problems observed by an employer.

However, the employer's economic interest is not dependent upon the actual cause of an employee's work performance problems. Many other factors can contribute to decreased productivity or excessive use of employee benefits, including the use of cigarettes, marital or financial problems at home, or even 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, however, the employer's interest remains the same; he wants the employee's performance to meet his justified expectations. This interest can be adequately served without testing by simply confronting the employee with his record of inadequate performance. If the employer has a functioning employee assistance program, he can refer the employee to it for further diagnosis and treatment. The use of substance abuse testing adds nothing to the employer's ability to recognize and address inadequate work performance, whether due to substance abuse or any other reason.

The Majority similarly rejects the final justification for workplace testing programs, that an employer may test his employees to ensure safety on the job. The primary problem with this approach is that it fails to recognize the inherent limitations of substance abuse testing. With the exception of the breathalyzer, which can determine current impairment due to alcohol, substance abuse tests do not measure current impairment of a test subject. If a worker is tested for drug use, and the test returns positive, that result does not indicate that the worker is presently impaired or constitutes a safety threat on the job. Removal of all test subjects who test positive will not contribute to a measurably safer workplace.

The strongest argument to justify the use of substance abuse testing is that it may increase workplace safety by acting as a preventive or deterrent measure against substance abuse on the job. The theory is that if a worker knows that he may be tested and that his use of an illegal drug will be detected, he is less likely to use that substance in the future. Although the validity of this supposition is open to debate, given the demonstrated endurance of substance abuse in the face of centuries of opposition, it still cannot justify the imposition of workplace testing upon the great majority of innocent employees.

There was no evidence presented to the Commission showing that drug use is a substantial workplace problem in Maine. In fact, a survey of Maine businesses showed that both management and labor perceived the workplace to be relatively drug-free. Where a problem was perceived, the major component of that problem by far appeared to be alcohol. This study echoed the results of other national studies which found that alcohol abuse is by far the greatest substance abuse problem. Further evidence was presented to indicate that in over 14 months of hearings, the Commission on Safety in the Maine Workplace has not been presented with a single mention of a safety problem in the Maine Workplace due to substance abuse from any management or labor representative.

Some arguments were raised that certain particularly sensitive positions, such as school bus drivers, heavy equipment operators and others, still might justify the use of substance abuse tests because of the potential for more wide-spread harm in the event of an accident due to worker impairment. Even in this area, however, the Majority was unable to discover any evidence to justify the invasion of worker privacy. In the 1984-85 school year, Maine school buses were involved in 192 accidents, 110 of which were caused by driver error; not a single accident involved the use of any substance of abuse.

The Majority believes that an individual's right to privacy, a right recognized by society as lying at the core of our social system, cannot be outweighed by mere speculation that other important interests might be served by the imposition of workplace testing. We must be presented with more definite proof of the value of workplace substance abuse testing before we can justify the wholesale invasion of workers' privacy.

We find this result to be particularly true where the interests served by testing must be weighed against not only the privacy rights of employees, but also the potential risks inherent in testing. The evidence shows that workplace substance abuse testing runs a host of risks which can adversely affect many persons. These problems include the following: False accusations of employees based on incorrect test results; unequal treatment of equally-situated workers whose test results differ based on any one of a multitude of factors known to influence test results; increased strife in labor relations due to the imposition of workplace testing programs; possible abusive use of tests by unscrupulous employers; the use of tests to determine other personal information unrelated to substance abuse; and increased costs and liability exposure of Maine employers.

The conclusion of the Majority is further buttressed by the fact that an attractive alternative to tests is available and has already demonstrated its ability to cope with employee substance abuse as well as many other employee problems that may adversely affect their work performance and lead to safety risks in the workplace. This alternative is the implementation of active employee assistance programs. An employee assistance program operates on a voluntary or mandatory referral basis, and evaluates individual employees on a personal and non-intrusive manner to identify and treat sources of workplace problems. Because the focus of the program is on voluntary treatment of the person as a whole, it avoids almost all of the problems associated with test programs. Both management and labor representatives testified to the value and effectiveness of a good employee assistance program, and studies were presented to the Commission evidencing the programs' cost-effectiveness.

For these reasons, which are explained at greater length in the full Majority report, the Majority has recommended a complete ban on substance abuse testing programs in the workplace, with the exception of the use of a breathalyzer. This exception was made in recognition of the breathalyzer's ability to determine present impairment due to alcohol, and the generally non-intrusive nature of the test procedure. The Majority further recommends the increased use and support of employee assistance programs as an effective alternative to the current testing "fad."

II. SCOPE OF THE PROBLEM

A. EVIDENCE AND TESTIMONY

1. National level

The problem of substance abuse has caught the attention of the public and the media, with the words "epidemic" and "crisis" becoming commonplace. Substance abuse and drug trafficking are the subject of news articles almost daily, and both Congress and President Reagan have launched "get tough" campaigns. The President issued an executive order on September 15, 1986, mandating a drug-free workplace and directing the use of drug testing for illegal drugs to reach that goal.

The National Household Survey, conducted by the National Institute on Drug Abuse (NIDA), indicates that 19% of Americans over 12 years of age have used illicit drugs during the last year. In the 18 to 25 year old population, representing those entering the workforce, 65% have used illicit drugs; 44% in the last year.¹ NIDA's survey results specifically indicate that 64% of this age group have tried marijuana; roughly 20% used marijuana daily for at least one month during their adolescence; 28% have tried cocaine; and 98% have used alcohol.²

Information on substance use in the workplace is difficult to obtain from surveys. Employers are reluctant to make public any data they have collected concerning substance use in their workplace because it may reflect negatively on the perception of the quality or safety of the products or services they provide. Employees, in turn, are reluctant to report instances of substance abuse to their employers or at their place of work for fear of endangering their job security.

A survey by the American Management Association and Arizona State University concluded that one in 10 blue- and white-collar workers have used illegal drugs in the workplace.³ Experts usually estimate that between 5% and 13% of the workforce of 110 million currently has a substance abuse problem.

Several NIDA-sponsored surveys examined the relationship between drug use and work-related variables. The studies show that current marijuana users have high rates of job turnover, especially when they are also drinking or using other substances. The rates of substance use among young adult males was found to vary with the occupation. For example, 30% of farm workers used marijuana last year while 49% of service workers used it. Overall, 5% of the men surveyed reported being high on the job on alcohol, 8% on marijuana, and 2% on cocaine.⁴

Speakers before the Commission cited national figures showing that between 10% and 13% of the general population has a substance abuse problem. A witness who had helped develop the testing program for the Navy testified that drug use is on the increase all over the world. When surveyed in 1980, 27% of Navy personnel said they had been high on duty. Almost 48% tested positive in urinalysis testing. That percentage has dropped to 4% with the implementation of a comprehensive program of which testing is a part.⁵ This marked decrease in positive test results is not necessarily due to reduction in drug usage. It has been suggested that Navy personnel have simply changed their drug of preference to one which is less easily detectable - switching from marijuana to cocaine, for example, because of cocaine's shorter retention time in the body.⁶ Also, after years of testing, the members may be more adept at avoiding accurate testing, so the number of negative test results could be misleading. The decrease in positive test results could also be due to the increased education and rehabilitation efforts undertaken by the Navy. The Navy does not, however, include alcohol as a substance of abuse to be tested for through urinalysis, although the witness testified that he recognizes that a testing program should include alcohol.⁷

Several witnesses who spoke before the Commission at the public hearings cited the growing use of substance abuse testing as evidence of substance abuse problems in the workplace. Nearly 25% of the Fortune 500 companies use testing, up from only 10% three years ago.⁸ The most widespread use of testing appears to be for pre-employment screening.

Further evidence on the scope of the problem was presented, showing that the President's Commission on Organized Crime determined that drug trafficking is "the most serious organized crime problem in the world today."⁹ Seeing drug supply and demand as "mutually dependent aspects of a single global problem," the Commission determined that drug testing in certain "critical positions" is important, and recommended that government and private sector employers consider the appropriateness of a testing program for job applicants and current employees.¹⁰

Substantial evidence has been collected describing the debilitating effects of substances of abuse. It is clear that being under the influence of alcohol, other drugs or both, negatively affects job performance concerning judgment, dexterity and interpersonal relationships. Industry has long used fitness-for-duty as a criterion for employment; medical examinations, often including dexterity tests, to ensure that workers are free from medical conditions which could affect job performance are commonly used. Many companies are using substance abuse testing as the next step in promoting workplace safety by weeding out what they perceive as unnecessary risks.

In general, most experts agree that employee substance abuse can possibly affect a business in the following ways:

- increased absenteeism and tardiness;
- lowered productivity;
- strained relations among workers;
- negative effects on non-users covering up for fellow employees;
- theft of company and co-worker property to support drug habits;
 - embezzlement;
 - sale of trade secrets;
- possible legal difficulties for employers;
- higher use of medical benefits;
- domestic and financial difficulties for employees;
- industrial accidents;
- higher worker turnover.

There are also health and productivity losses caused by other substances and conditions, such as cigarettes and other tobacco products, and other problems not associated with the workplace. One witness cautioned the Commission to not place all of its focus on cocaine, and reported the American Medical Association's statistics on causes of death. On an annual basis, 300,000 - 350,000 people die as a result of cigarette smoking. That is to be compared with the 200,000 - 250,000 deaths caused annually by the use of alcohol, and the 536 deaths due to cocaine use.¹¹

Several studies have been conducted in an attempt to quantify what costs substance abuse is placing on business and industry. The estimates range from \$25 billion to nearly \$100 billion annually.

A study conducted by the Firestone Tire & Rubber Co.¹² concluded that a substance abuser:

- is almost 4 times as likely to be involved in a plant accident;
- is five times more likely to file a Worker's Compensation claim;

- works at 2/3 of his or her potential;
- misses work more often;
- uses 3 times the level of sick benefits;
- is 2.5 times more likely to be absent from work for more than a week;
- is repeatedly involved in grievance procedures.

The Employee Assistance Society of North America conducted a study limited to the effects of alcohol abuse, and compiled the following findings.¹³

- Absenteeism for alcohol abusers is 3.8 - 8.3 times the normal.
- Alcoholics have a 2 - 3 times greater risk of being involved in an industrial accident.
- Up to 40% of industrial fatalities and 47% of industrial injuries can be linked to alcohol abuse and alcoholism.
- Grievance procedures by workers appealing alcohol or other drug-related firings cost employers an average of just over \$1,000 each.
- Non-alcoholic members of alcoholics' families used 10 times as much sick leave as normal.

Another study differentiated between costs attributable to alcohol problems and those caused by other drug problems. Of a total of an estimated \$39.1 billion in productivity losses per year, alcohol-related losses amount to \$30.8 billion in a year, while other drug-related losses account for only \$8.3 billion annually.¹⁴ Other studies echo this very high incidence of alcohol problems as compared with other drug problems.

The reliability of estimates of the costs to business are questioned, however, for several reasons. The costs approximated are intangible, and the methods of information-gathering are often questioned.¹⁵ In addition, estimates are usually produced by associations and people dependent on high figures, such as treatment providers and support groups, and test manufacturers and marketers.

2. State level

From the time of its formation, the Commission has believed that information concerning the presence or absence of a substance abuse problem in Maine workplaces was crucial to the outcome of the study. No comprehensive surveys have been undertaken to produce such data.

The Labor-Management Steering Committee on Substance Abuse in the Workplace did carry out a survey on the perception of whether a substance abuse problem exists. The Steering Committee, working through the Alcohol and Drug Abuse Planning Committee, sent questionnaires to (1) all chief executive officers of non-governmental companies/agencies that had at least one union local and (2) all union locals of these companies. This included 192 companies with 209 sites, and 188 unions with 330 locals. The results that were reported are based on usable questionnaires from 96 company sites and 77 union locals. Strict confidentiality of survey replies was ensured to encourage accurate estimates by respondents. Management replies were further cross-checked against labor replies from the same workplace, and vice-versa, to compare management's and labor's perceptions of the substance abuse problem in a workplace; this procedure added another layer of protection against falsified or inaccurate estimates.

The results show that a large percentage of both management and labor perceive there to be no problems with substance abuse in the workplace. The majority of the respondents who did feel that there was a substance abuse problem estimated it as involving 5% or less of the employees. The survey indicates that alcohol is perceived to be by far a greater problem than any other substance.¹⁶

The only other evidence pertaining to the existence and scope of workplace substance abuse problems available to the Commission was provided by witnesses at the public hearings held in November. Although the Maine Chamber of Commerce and Industry was unable to provide any statistics concerning substance abuse in Maine, they pointed out that there was no evidence showing that substance abuse patterns in Maine are any different from the general national trends. One paper company representative estimated that 6-10% of incoming workers have substance abuse problems; 250 pre-employment tests at that company resulted in 6% positive samples. These tests, however, were not conducted in Maine.¹⁷ Another industrial company found 4.2% positive results in 1,300 pre-employment tests.¹⁸ Another company, which tests current employees at random, had one positive result out of about 300 tests; test results for applicants showed 20 positive results from around 200 applicants.¹⁹ The percentage of positive tests at yet another company was 18.5% for pre-employment testing. The company representative noted, however, that the percentage of

positive test results from pre-employment screening at their plants located around the country are often as high as 30%.²⁰ This company does not test for alcohol use or impairment.

Evidence was presented by a major employer in the State which has recently instituted a program to test current employees when there is a "reasonable basis" to test. To date, 30 employees have been requested to take a urine test; 7 refused. Of the 23 who did submit to the test, 16 tested positive (6 for alcohol and 10 for other drugs).²¹ These test results show distinct differences from discipline imposed for substance abuse-related problems before the testing program was initiated. During the period of 1978-1985, a total of 14 employees were disciplined: 1978 - 0 disciplined; 1979 - 6 disciplined; 1980 - 3 disciplined; 1981 - 3 disciplined; 1983 - 1 disciplined; 1984 - 0 disciplined; 1985 - 1 disciplined.²²

When one company in Maine conducted interviews to replace striking workers, of the 700 applicants tested, 81 tested positive for substances of abuse other than alcohol.²³ However, upon questioning, the company spokesman admitted that many of these applicants were interviewed and tested in other states, including, at least, New Hampshire, Vermont, New York and Massachusetts.

Labor representatives testified that employers have always been able to deal adequately in the past with employees who exhibited signs of substance abuse problems in the workplace without the use of testing, either by confrontation, referral to voluntary rehabilitation or employee assistance programs or simply terminating the offending employee's employment. The witnesses claimed that the recent interest in workplace testing has really only developed in the past year because of the media attention and the accompanying atmosphere of "hysteria." They also questioned why employers' testing programs almost always focus on illegal drug use, ignoring alcohol, which is universally recognized as the greater problem.

The Commission received further evidence supporting claims that workplace drug testing is being implemented without the necessary planning and consideration. The director of a testing laboratory which currently does employee testing related the case of an employer who recently visited the testing facility.²⁴ The employer brought in a sample of urine and asked the laboratory to "test it for drugs." The employer did not know which particular drugs should be tested for or even which could be tested for. He was unfamiliar with the procedure for testing, the proper method of sample collection and did not know what he would do with the results; all that he knew was that the lab did substance abuse testing and he wanted it done for his workplace.

B. FINDINGS

Based on the evidence and testimony presented to the Commission, the Majority makes the following findings.

1. Extent of substance abuse problem. The evidence presented indicates that a serious substance abuse problem exists throughout the country, and that Maine is not immune to the problem's pervasiveness. Although the Majority regrettably admits that such a problem is present, we question the statistics which show the extent to which the problem has invaded the workplace. The cost and number estimates in those surveys are based on intangible factors which are very difficult to measure or discover. Many of the organizations producing the information have a vested interest in large numbers because these same organizations sell testing and substance abuse programs. Their purpose, which is both commendable and necessary, is to provide programs to deal with substance abuse. However, the more cases of substance abuse reported, the more likely employers will feel that there must be a problem in their workplaces, and the more likely they will be to seek the services of the testing companies or service providers. A witness from a testing laboratory candidly admitted that there is a lot of money to be made in the testing business alone.²⁵ In addition, the use of exaggerated numbers when describing substance-abusing populations catches the public's attention and sells newspapers, magazines and broadcasts. This can become a self-feeding cycle: The testing companies and providers report the number of requests for services to the media; the media reports the increasing interest in substance abuse testing; an employer reads or hears the report, and then assumes that, because there seems to be a problem in other places, there must be a problem in his workplace; the employer calls a testing firm to set up a testing program for his employees; the testing firm adds the request to the list, and reports increasing interest in testing, which the media in turn reports. All this can occur without any in-depth analysis of the existence of a substance abuse problem in any particular workplace.

The Majority considers the evidence offered by several companies regarding the results of their pre-employment screening to be of marginal value at best. First, these statistics do not reflect actual substance abuse in the workplace. Second, the figures often include job applicants who are not part of the Maine workforce. Third, the results of pre-employment screening tests vary widely from employer to employer; this factor causes further problems in evaluating the usefulness of the figures as an indication of the statewide substance abuse problem in the

workplace. Finally, it is extremely difficult to evaluate the accuracy of the screening results without knowing several critical factors, including:

- what types of screening tests were used;
- whether those results were confirmed by other means;
- the procedures employed to collect the samples and transport them through the various phases of the test process; and
- the quality of the testing laboratory's equipment and personnel.

In short, it is impossible to gauge the validity and value of these statistics as evidence of the extent of a substance abuse problem in the Maine workplace.

No evidence presented to the Commission definitively shows that the acknowledged general substance abuse problem directly transfers into the Maine working environment. The Commission heard little evidence of workers actually using and abusing substances while on the job. Nor does Maine experience support the national statistics concerning workers whose substance abuse problems negatively affect their work. In fact, the survey compiled by the Alcohol and Drug Abuse Planning Committee indicates that just the opposite is true; both management and labor perceive little if any effect of substance abuse on job performance in Maine.

The Majority also 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.

2. Extent of workplace testing programs. The Majority finds that businesses are increasingly embracing substance abuse testing as a "quick fix" solution for the perceived problem of rampant substance abuse. Testing programs are being implemented without a reliable indication that a substance abuse problem exists in that workplace, and most employers are reluctant to try other, possibly more effective, solutions when they can simply employ a company to test the workers.

III. SUBSTANCE ABUSE TESTS AND ALTERNATIVES

A. EVIDENCE AND TESTIMONY

Most of the Commission's time and efforts were directed toward understanding current substance abuse tests, how they are used and what their effects are. The Commission reviewed a voluminous amount of reports and articles and received a great deal of testimony from several speakers relating to substance abuse tests and their role in the workplace. In addition, the Commission devoted one meeting exclusively to receiving testimony from representatives of employee assistance programs (EAPs) concerning their views on the use of substance abuse tests and the role of EAPs in the workplace. This section of the report contains a summary of this information arranged according to subject matter. Information related to substance abuse tests is presented first, followed by information on their perceived effects in the workplace, and finally, information on employee assistance and rehabilitation programs.

1. Substance abuse tests.

There are several different types of tests available that can identify the presence of a substance of abuse or one or more of its possible metabolites. Most of the public attention has focused on the use of urine tests, and indeed, urine tests are the type of test most often used by employers for workplace testing of employees. There are four major urinalysis testing procedures; although others do exist, these four are the most predominant and widely-used.

Most of these tests can be used to determine the presence or absence of a wide variety of substances, including common substances of abuse. However, some tests will identify only certain illegal substances of abuse; in other words, they will not identify certain legal prescription drugs at all, nor can they be used to detect evidence of other substances or physical conditions. On the other hand, all of the tests may produce positive results for other certain legal prescription drugs; for example, codeine will show up in a drug test as an opiate. However, the tests are incapable of determining, on their own, whether an individual is using the drug as prescribed or abusing it or a similar illegal drug in some improper manner.

The first method of urine testing is known as thin-layer chromatography (TLC). TLC is a testing technique that separates different molecules of substances which are present in a mixture. The method depends upon the known characteristics of certain substances to migrate through a solvent to a characteristic area of the thin-layer chromatography plate used in the test. Results are extremely dependent upon the skill and ability of the test operator who must be able to recognize the migration and color pattern

characteristic of the substance of abuse and distinguish it from similar migration patterns of other substances. Referring to this aspect of the TLC test, one journal reported that "... whether or not a sample is called positive instead of negative depends on the technician's subjective feeling."²⁶ It is generally recommended that when TLC is used as a screening test, all positive results should be confirmed by a more accurate testing method. The test gives only qualitative results; it cannot provide the specific concentration of a substance. Additionally, TLC is not as sensitive as some of the other screening tests. This means that it is prone to giving "false negative" results; a "false negative" is a test result which indicates that a drug is not present when in actuality it is.²⁷ The method's primary advantages are that it is relatively cheap, simple to perform and can identify a wide variety of substances with a single test.

A second type of substance abuse test is known as the radio-immunoassay test method (RIA); it includes the popular commercially marketed "Abuscreen" test system.²⁸ This type of test determines the presence or absence of certain substances by measuring the rate of binding to antibody receptor sites sensitive to the substance in a reagent mixture. That rate is compared to the binding rate of a mixture containing a known concentration of the substance being tested for. The comparison reveals the presence or absence of the substance and can give a quantitative estimate of the concentration in the urine (usually measured in nanograms per milliliter -- a nanogram is one billionth of a gram). The RIA test method requires sophisticated equipment and an experienced operator; it is generally performed only in larger laboratories. The test is relatively inexpensive, approximately \$10 - \$30 per test (the price is lower as volume goes up), and the accuracy rate is higher than TLC. One manufacturer claims a "confidence rate" of 95%, but other experts have disputed those claims.²⁹ It is recommended that all positive RIA tests also be confirmed by a more accurate testing method.

The third testing method is the enzyme-immunoassay test (EIA), known better by its major manufacturer's tradename, EMIT.³⁰ The EMIT test is generally recognized as the most widely-used urinalysis method in the workplace today.³¹ It is based on a principle very similar to the RIA method but is simpler to perform. In fact an employer can purchase the necessary equipment and with a little training perform the tests right on the job site. This obviously creates an advantage in that results are quickly available and costs can be reduced to as low as \$10 - \$20 per test. EIA has relatively the same claimed "accuracy rates" as the RIA method, but due to its high sensitivity, may be somewhat more susceptible to cross-reactivity with substances other than what is being tested for.³² In addition, one study of the EMIT system's accuracy rates produced confirmation figures ranging from 80% to 95%. This study indicates that between 5% and 20% of the

specimens which tested positive under the EMIT test actually did not contain any drug.³³ Further, the Commission received information that the EMIT system is unusually reliant upon the skill of the technician performing the test.³⁴ It is recommended that all positive EMIT tests also be confirmed by a more accurate testing method.

The final major method of substance abuse urinalysis is known as gas chromatography/mass spectrometry (GC/MS). GC/MS is based on the fact that molecules of known substances will exhibit characteristic spectra patterns when excited. The test sample is subjected to this test and the resultant spectrum is compared with the spectra of known substances of abuse. This has been referred to as "finger-printing" of molecules; the principle is very similar.³⁵ The test is capable of determining the presence or absence of a substance and its concentration, if the substance is present, with great precision. The testimony was unanimous that GC/MS provides the most precise substance identification scientifically possible at the present time. Its accuracy rate, when properly performed, is estimated to approach 99% to 99.9%. However, the test is quite complex and the equipment extremely sophisticated and expensive. It is performed only in the largest labs and a great deal of training is required in order to properly conduct the test. As might be expected, it is also the most expensive test method, costing approximately \$40 - \$60 per test, although it may be less expensive in volume.³⁶ Because of its relative expense and the complex nature of the test, GC/MS is rarely used as a screening test but is generally used as a confirmatory test upon samples which test positive under one of the previous screening methods.

Although various studies have been conducted showing that the various screening tests, in actual application, have accuracy rates ranging from 97% to 80%, or below,³⁷ the Commission also received evidence that claimed "confidence" or "accuracy" rates have to be considered with caution.³⁸ The "confidence" or "accuracy" rate of a test is actually a reflection of two separate test factors. The first measure is known as a test's "sensitivity;" this measure reflects the test's ability to detect certain substances, particularly at low concentrations. For instance, a 95% sensitivity rate means that a test will accurately identify a given substance in 95 out of 100 positive samples. The second measure is known as a test's "specificity;" this measure reflects the test's ability to distinguish between chemically similar substances. For instance, a 95% specificity rating means that a test will accurately reject 95 out of 100 samples that do not contain the substance tested for, even if similar substances are present. Sensitivity reflects a test's ability to avoid false negative test results (results which indicate that a substance is not present when it actually is); specificity reflects a test's ability to avoid false positive test results (results which indicate that a drug is present when actually it is not).

Unfortunately, very few manufacturers break down their "confidence rate" statistics in this manner. For this reason, it is difficult to assess the "accuracy" rates of tests with any real confidence.

Test methods other than the commonly-used urinalysis tests discussed above are available for application in the workplace, although almost all employers have concentrated on the previous urinalysis tests. One well-known test method is the breathalyzer, used to detect the presence of alcohol by testing a sample of an individual's breath. Of course a breathalyzer is limited in that it can only identify a single substance of abuse -- alcohol. However, it is relatively economical and is accurate enough to be accepted by the courts as proof of intoxication, even "beyond a reasonable doubt" when used in criminal trials.

Blood tests can also be used to identify substances of abuse in a person's body, although their effectiveness varies widely according to the substance sought to be identified. For instance, they are very difficult to use to identify the presence of marijuana in blood.³⁹ Additionally, unlike the urinalysis methods described above, the taking of a blood sample requires the presence of licensed medical personnel.

Other tests are currently being developed that may prove useful in the future in identifying substances of abuse. One method that has received a great deal of publicity, and been met with an equal amount of skepticism, is known as the "Veritas" test machine.⁴⁰ This machine attempts to pinpoint the presence of drugs by measuring the test subject's brain wave patterns and comparing them to patterns characteristic of certain substances of abuse. The machine has been promoted as a non-intrusive test method that will enable employers and clinicians to measure current impairment based on the actual effects of a substance on the test subject's brain. As mentioned, the developer's claims have yet to be accepted by the medical community. Another test that is being developed would identify a person's recent ingestion of marijuana by testing a sample of their saliva. This method too suffers from some difficulties and is not widely used. Other tests attempt to measure substances of abuse from a sample of an individual's hair. All of these tests have not reached the general level of acceptance that urinalysis test methods have and are rarely employed in the workplace.

However, although urine tests have received general acceptance for their accuracy by the medical community, their use in the employment field has come under attack by various parties. Generally, the argument is made that urine test methods were developed for use in a clinical setting as opposed to the employment area. One witness testified that, from a testing laboratory perspective, the issues involved in workplace drug testing were far different than the clinical setting.⁴¹

Clinical uses of substance abuse tests generally involve one of 2 areas. First, a test may be used toxicologically, to identify substances that may have poisoned an individual. Obviously the need here is to obtain results very quickly, even at the sacrifice of some accuracy, since the situation is so urgent. Additionally, these cases generally involve very high levels of drug concentrations which are relatively easy to detect. The second clinical use of substance abuse tests is therapeutic and involves the diagnosis of substance abuse problems in patients during a rehabilitation program. Even in this situation, accuracy rates are not the major consideration since there is not a lot at stake if a result is incorrect; the emphasis is on cheap, relatively reliable and easily obtainable results.

However, the Commission was further told that in the workplace, where an individual's livelihood may be dependent upon the outcome of his test, the need for accuracy becomes of the utmost importance.⁴² Additionally, workplace substance abuse testing involves much lower residual levels of the drug than in the toxicological cases, further aggravating the accuracy problems.

The witness further advised the Commission that urine tests were developed as a clinical tool, and that although they function quite well in that capacity, one should proceed very carefully in simply transferring their use to the workplace.⁴³ For example, the current urinalysis tests were designed to function as only one tool of many to be used in making a diagnosis of substance abuse problems in a clinical setting; in fact, the use of urinalysis tests is not even considered the most important diagnostic tool in a clinical setting.⁴⁴ The actual diagnosis is made upon several other factors as well, such as the medical history of the test subject and a physician's examination. Many treatment programs do not use substance abuse tests at all, relying solely upon other indicators of a substance abuse problem.⁴⁵

Attacks have been made on specific aspects of urinalysis testing methods as well. The following information relating to problems associated with workplace substance abuse testing was made available to the Commission.

A primary objection to workplace substance abuse testing is that current tests are unable to show impairment at the time the test is taken. Evidence on this subject was virtually unanimous. Most of the popular urinalysis testing methods actually do not analyze the urine to determine the presence of the substance of abuse. Rather, they measure the presence of a metabolite of that substance. Once the substance is ingested by an individual, his body metabolizes that substance, and most of what is actually excreted in the urine is no longer the original drug, but subsequent metabolites of the drug. Amphetamines and alcohol are the two primary exceptions in that they are excreted by the body unchanged. It is difficult to

accurately relate the level of drug metabolites in urine to impairment since individual metabolic rates differ, and the substance levels in urine can be affected by many different factors.

Even if a testing method, such as GC/MS, were to test for the presence of the actual drug (assuming some of the substance remains unmetabolized by the body), it would still be impossible to correlate the presence of the drug itself to actual impairment at that time. This is again due to the fact that different persons metabolize substances at different rates. There has been no scientific study that has established a urine concentration level for any drug, or its metabolites, that has received general acceptance as a presumptive level of impairment. All of the urine testing experts who testified before the Commission agreed that the possible variations involved in urine testing render such a task nearly impossible; there are so many factors that can influence the concentration of substances of abuse in an individual's urine, that a standard level of presumptive impairment becomes meaningless in practical application. In fact, it is possible that the same individual could test negative in the morning, and positive in the evening without ingesting any drug during the interim.⁴⁶ Further, if an individual has ingested a drug only very recently, he will test negative because the drug has not yet been metabolized and reached his urinary system, but he will at the same time be very much impaired by the drug.⁴⁷ Science is presently incapable of relating urine concentration levels of substances of abuse, or their metabolites, with actual impairment.⁴⁸

The only standard of impairment generally accepted at present is the 0.10% blood alcohol concentration level; note that this standard is set upon blood concentration levels. Due to the possible variations inherent in urine testing, it is extremely difficult, and perhaps impossible, to establish any presumptive level of impairment based on a urine test. Blood tests provide a much more accurate picture of current impairment because they measure the substance as it is still circulating throughout the body, presumably having the desired effect upon the individual as it does so. However, presumptive blood concentration levels for substances other than alcohol have remained stubbornly elusive.⁴⁹ At the present time, there is no commonly accepted standard of impairment for any substance of abuse other than the 0.10% blood alcohol standard.

The high accuracy rates claimed by drug testing kit manufacturers have also been questioned. First, it was pointed out that these estimates are based on "ideals." The rate claimed by the manufacturers actually represents the highest possible accuracy rate, assuming that the test procedure is performed perfectly under optimal conditions.⁵⁰ However, it goes without saying that we live in an imperfect world. It is unlikely, to say the least, that a test will be operated perfectly, time after time, particularly where a large number of tests are performed.

In addition, these accuracy rates fail to take into account human error in other phases of the test. The military's early attempts at handling urine samples has been compared to a "Keystone Kops" adventure, with horror stories of bungled tests and lost samples.⁵¹ The United States Army has admitted that it mislabeled or contaminated the tests of over 60,000 soldiers, many of whom were discharged.⁵² The Navy reinstated approximately 4,000 sailors because of problems with its testing program.⁵³ Similarly, the Air Force was forced to notify 6,500 military personnel who were discharged from service or faced drug charges that their positive drug tests may have been wrong.⁵⁴ The complete urine testing process is a complicated series of procedures beginning with collection of the sample, and continuing with the actual test process, the interpretation of the results, communication of the results to the employer and all of the handling steps in between. The addition of a confirmatory test, as unanimously recommended by even the screening test manufacturers, adds another step to an already complex process. It is possible to operate a urine testing program smoothly, and minimize the disruptions described above; witness the Navy's successes in reducing its recognized error rate in recent years.⁵⁵ But given human fallibility, a test program can never be 100% error-free. Even the GC/MS testing method, widely hailed as the most accurate method available with accuracy rates approaching 99%, is not perfect. Many factors can influence the results of a GC/MS test. For example, temperature, pressure and storage of urine samples have to be rigidly controlled; the machine must be thoroughly cleaned between tests to avoid contamination.⁵⁶ An error in any of these steps may have a dramatic effect upon the test results.

Manufacturers and some test supporters counter that even if small error rates are unavoidable, most of those false results will be false negatives; that is, the test result indicates that a drug is not present when in fact it is present.⁵⁷ This type of false result is not nearly as potentially calamitous to the individual as a "false positive" test result. This occurs when no drug is actually present but the test indicates that it is. This type of result can brand an innocent person as a drug user and, in the workplace testing context, possibly result in the loss of his or her livelihood. In addition, even if a false positive result obtained under a screening test is later determined to be inaccurate by a confirmatory test, a worker's reputation in the workplace and in the community may already be harmed, family problems may already have occurred, and an employer may remain suspicious that the first result was "really" the correct one.

Some of the popular urine tests are more susceptible to false positive results than others; the immunoassay tests appear to be particularly prone to providing these results.⁵⁸ Although defective or malfunctioning test equipment can cause a false positive result, there appear to be two primary causes of false positives. First, a false positive can result from human error in operating the test or in interpreting the test results. The second major cause of false positive results involves the presence of a substance that is chemically similar, but not identical, to the substance being tested for. This "counterfeit" substance can react to the chemical solvent or reagent used in the test in a manner similar to and difficult to distinguish from the true drug. This process is known as "cross-reactivity." Documented cases of cross-reactivity involving urinalysis tests include the over-the-counter medications Advil, Nuprin, Contac and Sudafed, commercially-available diet pills, certain herbal teas, poppy seeds found on Burger King hamburger buns and other very common substances.⁵⁹ The manufacturer of the EMIT test has issued warnings concerning several of these substances advising the test operators to obtain a list of potential cross-reactive agents that the test subject may have ingested recently before conducting the test.⁶⁰ The cross-reactivity problem is not limited to the EMIT test by any means; all of the other tests suffer from the same problems to a lesser or greater degree.

Evidence was presented indicating that GC/MS is particularly noted as having a greater ability to distinguish between chemically similar substances; i.e. its "specificity" rate is very high. However, this ability has been questioned by some, and in any event, it, like all other testing methods, remains subject to potential operator error or equipment failure.⁶¹ One witness testified that the tests which are operated on premises worry him more in this respect since the operator is generally not as highly trained as testing lab personnel.⁶² Although an in-house test operator may be perfectly capable of performing the test satisfactorily, he may be unable to recognize problems or errors when they occur.

Other evidence presented to the Commission dealt with the differences in test results due to the different substances of abuse. Because the chemical composition of various substances of abuse differs, and because the body's metabolism of these substances is different for each substance, the results of a urinalysis test indicate different things depending upon the substance identified.

First, alcohol is very difficult to test for with urinalysis testing methods.⁶³ It is excreted by the body very rapidly, usually within 12 hours of ingestion, so the test must be conducted very soon after the ingestion in order to obtain a positive test result. Further, an individual's body may produce alcohol in the urine through various natural processes, such as bacterial or yeast infections. Such a physical condition could cause a person to test positive for alcohol even though they have not ingested the substance.

The use of marijuana also involves certain characteristic factors in urine testing. The "high" from marijuana ingestion is generally accepted to last for less than 2 hours after ingestion, with minor residual effects lingering for slightly longer.⁶⁴ One study did find some degree of motor impairment in airline pilots 24 hours after ingestion of marijuana,⁶⁵ but the validity of that single study as proof of extended impairment due to marijuana ingestion has been questioned.⁶⁶ In particular, the methodology of that study has been criticized as lacking a control group. Further, the Commission was presented with no other study or information indicating that the effects of marijuana ingestion last longer than the generally accepted standard of approximately 2 - 4 hours. However, the Commission did review a different study of the effects of marijuana on pilots which indicated that flight performance of most of the test subjects returned to normal within 4 hours after ingestion of the drug, and all of the test subjects had returned to normal performance within 6 hours.⁶⁷

The length of marijuana impairment, as it relates to urine testing, is important because the use of marijuana can be detected through urine tests for an extended period of time after ingestion. This occurs because marijuana is a very fat-soluble substance. The body will store the drug metabolites in fatty tissues and slowly release it back into the bloodstream where it will be removed by the kidneys and concentrated in the urine. Approximately 1/3 of the drug is excreted in urine; the remainder is excreted by the body in feces. A person with poor kidney function will obviously excrete the drug more slowly, resulting in the possibility of a positive test for a longer period of time than an individual with more efficiently functioning kidneys. Similarly, a heavier person with more fatty tissue will store more of the drug metabolites and test positive for a longer period of time than a thin person.

As mentioned, the primary feature of marijuana detection through urine testing is the greater length of time for which it can be identified, even in perfectly healthy individuals. A single, isolated acute dose of marijuana may be identified in a urine test for as long as 3 to 4 days after ingestion.⁶⁸ Chronic use of marijuana, as in a regular user, may be detectable for as long as 30 days after the last ingestion; some claim for even longer.⁶⁹ The method of ingestion may also cause variation in detection periods. A person who ate the drug in "pot brownies" will test positive for a longer period of time than a person who smoked an equal amount of the drug.⁷⁰

Marijuana also poses the peculiar problem of "passive inhalation." This may occur where an individual inhales secondary marijuana smoke, whether at a rock concert, party or while riding with co-workers in his car pool, without actually intentionally ingesting any of the drug. It has been shown that such "passive inhalation" can be detected by urinalysis at levels just slightly over 20 nanograms per milliliter.⁷¹ Some of the commercial testing kits and some labs use the 20 nanogram level as their cut-off point for positive results; i.e. any result over that level will be deemed a positive test. It is possible that a person could test positive in such a situation without ever intentionally using the drug. Some employers, such as the United States Navy, have deliberately set their cut-off level for marijuana at a higher level, such as 100 nanograms per milliliter, to avoid the passive inhalation problem.⁷² However, this procedure has the drawback of eliminating several possible "true positives" in the 20 - 100 nanogram range.

Other drugs generally have much shorter detection periods than marijuana. Cocaine, for example, is detectable in urine for up to 2 to 3 days after ingestion.⁷³ Drugs of the opiate family are detectable for up to 3 days, and amphetamines may be detected as long as 2 days after use.⁷⁴

Other evidence presented to the Commission dealt with testing problems associated with possible causes of variations in urinalysis test results. There are many factors which can influence an individual's test result. The first of these involves individual physical variations. As mentioned previously, the rate at which a substance is excreted from the body will vary from person to person, depending upon many factors, such as kidney efficiency, body weight, excretory patterns, diet and others. This could result in different test results for 2 individuals, both of whom ingested the same amount of the same substance at the same time; one may test positive and the other test negative.

A second possible factor that may influence test results is the possibility of adulteration of the sample. This can be achieved in many ways. Most obvious, a sample could be deliberately "spiked" with a substance of abuse to produce a positive result. It is similarly possible to avoid positive results through various ploys. The addition of certain substances, such as vinegar, lemon juice, bleach or salt, can fool some screening tests into giving a negative test result when a substance of abuse is actually present.⁷⁵ Dilution of the sample with plain water can also reduce the concentration of the substance enough to avoid a positive result.⁷⁶

For this reason it has been strongly suggested by testing authorities that it is necessary to have an observer present to view the actual passage of urine by the test subject.⁷⁷ One spokesman went so far as to declare that it is absolutely essential to an effective drug-testing program to require observers.⁷⁸ An observer can also detect the substitution of drug-free samples for a genuine sample. There have already been instances of persons who will sell clean urine samples to potential test subjects to be substituted for their own urine.⁷⁹ Even an observer would have been unable to catch one particularly resourceful test subject who reportedly inserted drug-free urine into her bladder with a catheter.⁸⁰ Although such instances are undoubtedly rare, they do show the extent to which individuals may go to avoid positive test results.

The Commission also received evidence and testimony related to potential sources of error in the tests due to operator or laboratory error in performing the test. Examples cited earlier in this report dealt with the military's problems in coordinating their drug testing programs, particularly in the handling of samples. Evidence was presented that tends to indicate that the private sector may suffer from similar or even worse deficiencies. A widely-quoted study conducted by the respected Centers for Disease Control focused on the ability of private testing laboratories to ensure quality results.⁸¹ Selected laboratories were sent "blind" samples and asked to identify the presence or absence of various substances of abuse. All of the labs participating in the study were professional testing laboratories used by methadone treatment centers for drug testing. Error rates for false positive results ranged from 0% to as high as 66%, indicating that at least one lab reported the presence of a drug for 2/3 of the drug-free samples submitted to it. Error rates for false negatives ranged from a low of 0% to a high of 100%, indicating that at least one lab failed to identify any of the drug-spiked samples as containing drugs. Other studies support the finding that many testing laboratories are not doing quality work.⁸² As one chemist who works for a major drug testing laboratory was quoted as saying, in reference to his fears of test errors due to human mistakes, "My company makes millions of dollars doing drug testing, but I wouldn't want somebody taking my urine."⁸³

Further testimony indicated that this problem may increase as more drug testing laboratories are established to meet the growing demand created by workplace drug testing. One present laboratory operator expressed fears that these new operations may include many "fly-by-night" operators who would not take the steps necessary to ensure accurate quality control.⁸⁴ This fear is echoed by the National Institute on Drug Abuse which warned against growing numbers of incompetent testing labs. A NIDA spokesman said that many labs, recently established as a result of the growth in demand for testing

created by business and industry, are presently "turning out inadequate results."⁸⁵ Another witness stated that he knew of one instance in which lab results were distorted because laboratory technicians were using testing equipment to heat up tacos!⁸⁶ The primary apprehension expressed by the witnesses was that shoddy testing operations would be set up to cash in on the increased demand for drug testing, operations which would be run by poorly-trained technicians without adequate quality controls. The problem is aggravated by the difficulty employers face in choosing a testing laboratory. There is no easy way to ensure that the laboratory chosen by an employer will produce quality results, particularly when the lower-quality labs may offer more attractive price structures.⁸⁷

Another issue brought to the attention of the Commission involved not the tests themselves, but their effect upon the employees and employers in the workplace. Several labor spokesmen testified that the creation of substance abuse testing programs in the workplace adversely affects management-labor relations. The mere fact that an employer feels that he has to test an employee to determine if he is using drugs or not connotes a lack of trust in his employees. It further creates an immediate adversarial situation in which the tested employee is set against his employer.

Management representatives testified that this adverse effect need not occur, and that testing can actually improve relations in some respects. They pointed to the fact that substance abusers suffer from a "disease of denial;" they may deny that they actually have a problem and require some impetus to force them to seek rehabilitation. Testimony was presented indicating that in one workplace, some tested employees were grateful for their employer's test program because it forced the employee to come to grips with his or her substance abuse problem.⁸⁸ However, other tested employees remained indignant at what they perceived to be an invasion of their personal privacy. Additionally, testimony was presented to indicate that the presence of a substance abuser in the workplace can have a detrimental effect upon the morale of co-workers. Removal and rehabilitation of the substance abuser can actually improve worker morale. Employers tended to see testing not so much as a method of persecuting drug-using employees, but as a method of helping that employee regain his status as a healthy, productive worker.

Several worker representatives and rehabilitation counselors testified that they felt that voluntary employee assistance programs, discussed later in this report, were a more effective vehicle for employers in this area. This viewpoint was also supported by at least one out-of-state employer whose views were made available to the Commission in written form. (See Appendix E.) His company rejected substance abuse testing in part because of the signal it sends

to his employees that they cannot be trusted. He further related his support of a good, active employee assistance program as the most efficient method of ridding the workplace of substance abuse problems.

Concerns were also expressed about potential misuse of substance abuse tests by employers to achieve, as phrased by one labor representative, "better discipline through chemistry."⁸⁹ The concern is that employers will not use tests merely to assist in the identification of workers who may exhibit signs of a substance abuse problem, but will employ the tests to discover grounds to discipline or terminate certain "undesirable" employees, or merely to harass selected employees. At least one labor representative testified that a disproportionate number of substance abuse tests at his workplace involved persons on light-duty work because of workers' compensation injuries, the implication being that the employer was using the drug test to rid himself of a costly burden.⁹⁰ Another instance was cited in which an employer announced a drug testing policy of general application in the workplace immediately after resolution of a strike by its employees. However, upon return to work, only those employees who were members of the striking union local were subjected to testing, presumably as "punishment" for the earlier strike.⁹¹ It must be pointed out that these instances appear to be the exception rather than the rule; no evidence of widespread employer misuse of substance abuse tests was presented to the Commission. On the other hand, very few Maine companies with testing programs actually test their current employees; most currently restrict their testing activities to pre-employment drug screening of job applicants. However, the evidence indicates that it is likely that testing of employees will increase in the future. (See the Majority Findings in Section 1, Part B of this report.)

Another problem related to workplace substance abuse testing concerns the pre-employment screening of job applicants. Most companies that presently do substance abuse testing use it to screen out prospective employees who test positive in a pre-employment test.⁹² Evidence was presented showing that many employers do not notify these persons that they were rejected because of a positive test result for drugs; they simply remove them from consideration for hiring.⁹³ This poses a problem in that the rejected applicants never have an opportunity to contest the accuracy of the test results. This problem is aggravated by the fact that many employers do not confirm positive screening tests on applicants because of the expense and because there is generally a ready number of other applicants who do not test positive under the screening test. Given the documented error rates of unconfirmed screening tests, this practice effectively disenfranchises an alarmingly large number of potential workers unjustly. The effects of a false positive test result in a pre-employment

screen can carry far beyond the loss of that single job opportunity. It may prevent future employment by other employers who request information from companies that an applicant has previously applied to.

The primary problem with workplace drug testing raised in testimony before the Commission revolved around the privacy rights of employees. Of course, for most employees in the State, these privacy "rights" are not actually legally protected rights at all, but more of a moral issue. Both the United States Constitution and the Maine Constitution extend certain limited protections to individuals against wholesale violation of their personal privacy through guarantees such as the prohibition against unreasonable searches and seizures. However, legal research presented to the Commission indicated that these protections do not extend to the private employment sector, but only limit governmental intervention into private affairs.⁹⁴ Although present case law regarding substance abuse testing of government employees is somewhat conflicting, the trend appears to be to require that the governmental employer have some degree of "reasonable suspicion" that an employee is impaired from the use of a substance of abuse while on the job before the employer may require a test.⁹⁵ This standard varies somewhat according to the type of work involved in the individual case; random testing of horse racing jockeys has been upheld due to the historical role government has played in the industry in maintaining the integrity of the races.⁹⁶ Similarly, the military testing program is not limited to "reasonable suspicion" testing.

As previously stated, these Constitutional protections do not extend to employees of private individuals. But many commentators and authors, as well as witnesses before the Commission, argue that the privacy issue, as a moral element, remains a valid objection to workplace substance abuse testing. The primary objections raised to the tests on this issue involve 3 separate areas. First, the actual test process is very intrusive upon many individuals' sense of personal privacy. The privacy generally extended by society regarding bodily functions is obvious and requires no comment. Many persons are offended by simply being required to deliver a sample of their urine for testing. This problem is exacerbated if an observer must be present to observe the actual passage of the urine to prevent adulteration or dilution. As one labor spokesman put it, "I don't know about you, but I don't want someone following me into the bathroom."⁹⁷

The second objection to substance abuse testing based on privacy grounds involves potential confidentiality problems. While it may be possible for a worker to seek help for a substance abuse problem from an employee assistance program with relative anonymity, it is much more difficult to conceal the identity of a worker who is subjected to a substance abuse test while on the job. First, the test subject's co-workers

immediately know something is happening when the test subject is pulled off his job to undergo the test. If he does not return, or is absent from the job for a few days, it is obvious to everyone that at least his screening test came up positive. This has the effect of branding the worker as a drug user, whether true or false. The ability of workplace grapevines to spread this information throughout the workforce needs no elaboration. One labor representative testified that anything that happens at one of his employer's facilities, which are located miles apart, is known within hours at the other work locations.⁹⁸

The third objection to testing based on privacy grounds involves the larger question of the employment relationship. As stated earlier, urinalysis tests cannot determine present impairment but can only indicate that an individual has, at some unknown time in the past, ingested an unknown amount of a certain substance. This means that a positive test result does not show current impairment on the job when the employee is tested, but merely shows that he has ingested the substance at some earlier time, perhaps on the job or perhaps off the job. Many witnesses before the Commission suggested that an employer has no legitimate interest in attempting to control an employee's behavior when he is away from his job. They questioned whether an employer should be able to take disciplinary action based on a positive test result which is due to a worker's having smoked a "joint" of marijuana on Friday night when all the evidence indicates that the worker will no longer be impaired by the drug when he reports for work on Monday.

Employer representatives stated that the employer does have a legitimate interest in an employee's life away from his job. They pointed out that employers often pay for health insurance and provide other benefits which can be markedly affected by an employee's home life. Particularly in the area of substance abuse, employers feel that they can play an important role in reducing its pervasive presence in society. By identifying substance abusers through workplace testing, and by forcing their employees to face their substance abuse problems, employers believe that they can increase the overall "wellness" of their workforce and improve not only their productivity but the employees' lives as well.

Witnesses pointed out an anomaly in this justification of substance abuse testing in that there are many other possible causes of workplace impairment which a test will not reveal. Cigarette smoking is widely recognized as a major cause of employee health problems and decreased workplace productivity, but no one has yet suggested testing workers for traces of nicotine. Similarly, an employee may show up for work with a "hangover" from excessive drinking the night before which can have a profound effect on his or her work performance, but no traces of alcohol will be found even if the employee is tested

since alcohol is passed out of the body so quickly. There are a multitude of other potential causes of decreased work performance, such as marital or economic tensions and mental stress which can be caused by a myriad of factors. All of these factors tend to decrease a worker's performance but none will show up on any substance abuse test. Employee representatives questioned why only an employee's off-duty use of illegal drugs was being singled out by employers as needing the employer's "assistance." If the employers actually have the employees' best interests at heart, why do they limit their "assistance" to identifying only employee substance abuse problems?

The general issue, as presented by the witnesses before the Commission and as related in the written material reviewed by the Commission, basically revolves around the extent of the employer's legitimate interest. Everyone apparently agrees that testing intrudes upon an individual's sense of privacy (although not everyone agrees on the extent of that intrusion), but whether that intrusion is justified or not is disputed.

The Commission also investigated potential costs and liabilities to employers who implement a substance abuse testing program. As discussed earlier, the low-cost screening tests run from \$10 - \$30 per test, the lower prices being available for volume testing. Gas chromatography/mass spectrometry costs approximately \$50 per test. Since GC/MS is recommended as a confirmatory test for all screening test positive results, a positive test result could involve a total cost of around \$60 - \$80. This cost may vary according to the type of screening test used as well. For example, an EMIT test must be repeated for each substance of abuse screened. If an employer wanted to test for marijuana, barbiturates, cocaine and opiates, the test would have to be repeated four times. These costs will also vary according to the employer, the testing facility used and the type of test performed. One laboratory offers testing services at a flat rate of \$29 per sample, which includes GC/MS confirmation for all positive screening test results.⁹⁹ The EMIT test equipment is also available for a price of approximately \$3500 and can then be operated by an employer's own personnel at a potential cost savings over laboratory testing.¹⁰⁰

An employer is exposed to potential liability whether he chooses to perform substance abuse tests or not. If he does not, he faces potential liability from impaired workers involved in accidents both on and off the job. Recent court cases have held that an individual can file suit against an employer when an employee is sent home for being intoxicated and is involved in an accident on his way home.¹⁰¹ Potential liability under a testing program is not yet well-defined. A recent legal periodical identified 3 major areas of potential legal action, with a fourth -- constitutional violations -- applicable to only public employers.¹⁰²

The first area of potential liability under a testing program involves common law rights of action available to an employee. These include possible tort actions for defamation, invasion of privacy, intentional infliction of mental distress and wrongful discharge. All of these actions could be involved in a case where an employee is wrongfully disciplined or discharged based on an incorrect positive test result. The second major area of potential liability involves actions under either the Federal Rehabilitation Act or the State Human Rights Act. These statutes prohibit job discrimination against handicapped individuals, including severe drug abusers and alcoholics. These statutes could expose an employer to liability if he were to take action on a positive test result without considering the limitations placed on him by those statutes. The third and final area of potential legal action involves unionized employees. These employees may have a right to bargain over any substance abuse testing program and may have specific contractual provisions governing discipline and discharge.

2. Employee Assistance Programs and Rehabilitation

The Commission heard testimony that Employee Assistance Programs (EAPs) can be a viable alternative to substance abuse testing, and are sometimes used in conjunction with a testing program. Although there is no rigid pattern for an EAP, most EAPs offer help for more problems than simply substance abuse. Any person suffering a behavioral or medical disorder which affects work performance, such as stress, financial, marital, family, or emotional problems, can seek help through the company EAP. EAP counselors help determine the problem, then usually refer the employee to an appropriate treatment provider if treatment or rehabilitation is necessary.

There are several ways an employee may enter the EAP. There is self-referral, where the worker recognizes that he has a problem and voluntarily, without being required to, seeks help at the EAP. Peer-referral, where a co-worker senses a problem and suggests consultation with an EAP provider, is closely related, as is union-referral, where the union representative contacts the worker on behalf of the labor organization. Medical referrals are usually made by the company medical personnel, while referrals by management may range from mere suggestions to requirements for continued employment.

Companies that have instituted employee assistance programs have seen large benefits. The Commission heard testimony concerning General Motor's substance abuse program in particular.¹⁰³ Of the employees who entered and participated in the program, GM experienced:

- 40% reduction in absenteeism;
- 50% reduction in sickness/accidents;
- 50% reduction in disciplinary actions.

General Motors estimated that for every \$1 the company spent on the program, it saved \$2. Conrail's estimates are \$3 saved for every \$1 spent; Pizza Hut claims a savings of \$17 for every \$1 it has spent on its employee assistance program.¹⁰⁴

A good employee assistance program has the added benefits of:

- encouraging labor and management to work together;
- enhancing supervisory and management communication skills;
- increasing accountability and responsibility;
- retaining management's responsibility to enforce discipline.

The costs for instituting an employee assistance program vary with the number of employees who participate in it. One witness gave figures from two different sources as national averages. According to the EAP specialist, the Wall Street Journal reported a range of \$10 - \$60 per person, while the Journal of New England Business found costs fall within \$20 - \$50 per person. Economy of scale diminishes, of course, for smaller businesses with fewer employees.¹⁰⁵

EAP specialists testified that a well designed, well-implemented EAP can serve as a successful alternative to a substance abuse testing program. As part of an EAP, supervisors are trained to recognize signs of deteriorating or unacceptable job performance. Any performance problems, including tardiness and absenteeism, are noted on the employee's record. At the point where the supervisor determines that the employee's record indicates an underlying problem rather than isolated mistakes, the supervisor must confront the employee with the fact that there is a job performance problem. The supervisor may encourage the employee to visit the EAP for help with whatever is the problem. The supervisor focuses solely on job performance, however, not the type of problem the employee is suffering. The criterion for continued employment should be improved job performance. If the employee does not bring his or her performance up to an acceptable level, whether or not he or she is seeking treatment, the supervisor always retains the right to terminate employment. EAP specialists agreed that the supervisor should fire the employee if satisfactory job performance is not reached and maintained after giving the employee an opportunity to improve the situation. Job performance is, ultimately, the employee's responsibility.

An essential element of any employee assistance program is confidentiality. The evidence shows that a large proportion of EAP participants are self-referrals, so the success of the program depends on the confidence the employees have that their participation will not be revealed to management. The Commission heard a substantial amount of evidence that the success or failure of an employee assistance program depends upon confidentiality. If the EAP counselors are located in the Personnel Department, employees may be wary of the close connection with management. In addition, if the counselors are physically located in a place which does not guarantee confidentiality of use, the EAP will not be fully utilized.

EAPs usually do not perform the treatment or rehabilitation aspects, but they do offer referral services. The EAP then serves as an entry into the provider community.

The Commission was concerned about who, if anybody, oversees EAP providers. The EAP specialists explained that the Association of Labor-Management Administrators and Consultants on Alcoholism (ALMACA) has established a code of ethics that its members follow. ALMACA is currently developing certification standards for EAP providers. Certification procedures will be in place within the next year.¹⁰⁶ The proposal is to base certification on an examination consisting of proficiency and exhibited skill in:

- 10% -- work organization
- 10% -- human resources management
- 30% -- EAP policy and administration
- 30% -- EAP direct services
- 10% -- the treatment of chemical dependencies and addictions
- 10% -- the treatment of personal and psychological problems

If a provider can prove that he or she has been in the EAP business for 9 years, and can document that experience, that provider will be exempt from taking the examination. Another problem mentioned by EAP specialists is that there are many persons licensed to provide various services which are often part of an EAP. That does not mean these people are good at providing and administering an entire employee assistance program. In addition, the certification process will be voluntary. As "experts" in the field, one specialist testified, they hope that all providers operate under the same set of standards and the same code of ethics.

The success rates for employee assistance programs and rehabilitation programs are just beginning to be calculated. When asked whether he would feel confident to depend solely on education and rehabilitation to eradicate a substance abuse problem, one witness pointed to the positive data collected from treatment and rehabilitation programs using the best available methodology. Researchers at Tulane University have completed one-year follow-ups on a selected sample of clients of such programs. The study showed that over 66% of the clients returned to work and showed improved performance; 13% returned to work with marginal improvement. Eight percent, however, were fired, and 5% "voluntarily" left their employment. Of the persons referred to the EAPs for non-addictive alcohol and/or drug abuse, 80% returned to their positions with improved job performance.¹⁰⁷

B. FINDINGS

Based on the evidence and testimony received by the Commission, the Majority of the Commission makes the following findings.

1. Privacy rights and the accuracy and efficacy of substance abuse tests. Current substance abuse tests unjustifiably intrude upon a worker's privacy and suffer from several drawbacks that limit their effectiveness in the employment area.

a. Substance abuse tests are inaccurate. The Majority finds that the most popular substance abuse tests suffer from a variety of problems that can affect the accuracy of test results. The tests themselves are subject to certain inaccuracies. The evidence indicates that cross-reactivity is a substantial problem with several of the popular urinalysis testing methods. This is a particularly dangerous problem because it can label a non-user as a substance abuser and cost that person his or her job. The Majority further finds that even if all positive screening test results were confirmed by GC/MS, generally accepted as the most accurate test available, substantial problems still remain. First, several employers do not use GC/MS confirmation because of the cost. Where it is used, it may reduce the number of testing errors, but it can never totally eliminate them.

To illustrate the accuracy problems of current substance abuse tests, consider an example using the most sophisticated and accurate test, gas chromatography/mass spectrometry. Assume that the GC/MS test is 99% accurate, as claimed, and further assume 100% accuracy is achieved in all other phases of the test, such as collection and labeling of the sample, transportation of the sample, performance of the laboratory technician, and communication of the results to the employer. If 100,000 Maine workers were tested, 1,000 of them would receive false test results. And even if one assumes that a majority, or even 90% of these results are false negatives, that still leaves 100 innocent Maine workers who may have lost their jobs due to an incorrect test result.

Another factor to be considered in the previous example concerns the 900 false negative test results. In that example, there would be 900 people who tested negative when in fact they actually had substance concentration levels above the test's cut-off point. There may be another 900 individuals with these same substance concentration levels who actually did test positive; these individuals will be undergoing discipline or losing their jobs for the exact same conduct engaged in by the 900 who received false negatives, and who are quietly back on the job. An

essential element of simple justice demands that persons similarly situated should be treated similarly; where is the justice in this example? Two individuals may engage in the exact same conduct, be subjected to the exact same test procedure, but one may lose his job for his actions while the other goes unpunished, all due to some quirk of fate in the conduct of the test.

The previous examples indicate the problems inherent in urinalysis testing, but the extent of those problems becomes clear when one considers that the previous examples are based on "ideal" test conditions and actually represent the effects of tests conducted at the highest level of accuracy currently possible. The examples do not even consider the effects of the greatest source of potential error; that is laboratory or human error. The evidence presented to the Commission showed that a large number of slipshod testing operations currently exist and more are likely to begin operation in the near future. Even the apparently reputable testing labs involved in the Centers for Disease Control blind study exhibited error rates as high as 66% for false positives, and an incredible 100% for false negatives. The Majority believes that such inaccurate testing operations will continue to offer their services to unknowing employers in increasing numbers.

The Majority also finds that the breathalyzer testing mechanism appears to avoid most of the accuracy problems related above. The fact that its results are sufficient proof in even criminal proceedings indicates its reliability as a test method.

b. Most substance abuse tests cannot measure impairment.
The Majority finds that current urinalysis testing methods do not determine impairment at the time of testing, but provide only information on an individual's past use of a substance. Evidence on this subject was nearly unanimous, with the only exceptions coming from certain individuals who had close ties to the testing industry. Others in the industry freely admitted that urinalysis cannot determine impairment; their opinions were shared by experts from the medical field. Since urinalysis tests can detect the presence of drug metabolites several days -- even weeks in the case of marijuana -- after ingestion, a positive test result does not indicate current impairment. The Majority rejects the single study offered to show that marijuana impairment can extend beyond the generally accepted standard of approximately 2 - 4 hours as being against the great weight of evidence and testimony presented to the Commission. The evidence indicates that all that a positive urinalysis test reveals is that an individual has, at some unknown time in the past, ingested a certain substance in some unknown dosage, assuming that the test result is accurate. Once again, the breathalyzer machine is an exception; it is effective to determine current impairment due to alcohol.

c. The results of substance abuse tests vary according to many different factors. The Majority finds that the results of substance abuse tests can vary according to variations in a multitude of factors. These variations may be due to the type of substance ingested, personal metabolic differences, excretory patterns and further factors, all of which create further difficulties in interpreting the validity of a substance abuse test result. In addition, the use of workplace testing may encourage users of marijuana to switch to cocaine or other "hard" drugs, which are more difficult to detect. While the Majority certainly does not encourage the use of marijuana, or any substance of abuse, it agrees with the rehabilitation counselors who testified that marijuana usage is not as dangerous as other drug abuse. To paraphrase an analogy used by one rehabilitation expert, "If it came down to a choice between syphilis and AIDS, and I had to choose one, I would prefer syphilis. That doesn't mean that I want syphilis, just that it is preferable to the worse disease."¹⁰⁸ Similarly, while not encouraging the use of any substance of abuse, the Majority does not want to encourage a shift to harder drugs among current marijuana users.

d. The use of workplace substance abuse testing tends to increase management/labor friction. The Majority finds that the adoption of a substance abuse testing plan in the workplace hinders good relations between management and labor. The great deal of emotional testimony presented to the Commission by both management and labor is proof enough that substance abuse testing is a divisive issue in the workplace.

e. Workplace substance abuse tests are subject to abuse. The Majority finds that substance abuse tests may be misused in the workplace and in fact have already been used to harass Maine employees. The Majority would like to stress that these abuses appear to be the rare exception so far; additionally, the Majority feels very strongly that the overwhelming majority of Maine employers are conscientious and careful and not likely to abuse substance abuse tests. We still believe, however, that certain employers can and will do so unless some restraint is placed upon them.

f. Substance abuse tests will result in substantial costs to Maine employers and create a two-tier workforce in Maine. The Majority finds that the creation of workplace testing programs will be prohibitively expensive for some employers in Maine. While the tests themselves are relatively inexpensive, the entire process in which they must be used will entail considerable expense. All of the evidence indicates that a testing program alone, without an

associated rehabilitation and support program, would do more harm than good for an employer. Many smaller and even medium-size Maine employers will be unable to afford such programs, creating a dichotomy in the Maine workplace; large employers who can afford to use substance abuse testing, and smaller employers who cannot.

g. Substance abuse tests intrude on a worker's privacy.

The evidence presented to the Commission shows that the wholesale use of substance abuse tests in a workplace will unjustifiably intrude upon a worker's privacy in three major areas.

(1) In the first instance, the use of urinalysis tests requires each test subject to submit to an experience which many in our society find to be embarrassing at best, and degrading at worst. This is particularly true where someone is present to observe the actual passage of urine by the test subject. Since the testimony was unanimous before the Commission that adulteration or dilution of urine samples can affect the test results, the Majority finds it very likely that observers will be required by most workplace test programs. To do otherwise could result in an employer receiving more false positive results than true positives since the guilty test subjects would have an incentive and the ability to alter their test results.

Similarly, the 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. At least one court case is currently pending which involves a woman who lost her job after refusing to submit to a urine test for fear that it would reveal to her employers that she was pregnant.¹⁰⁹ In fact, it is possible that employees will be forced to reveal such information to their employers as a precaution against cross-reactivity problems; as mentioned earlier, many testing programs require a test subject to reveal any medications which he or she is taking before the test is administered.¹¹⁰

Finally, the use of pre-employment screening intrudes into the privacy of job applicants. As well as being subject to the general problems of substance abuse testing discussed earlier, the use of substance abuse tests to screen out job applicants who test positive carries with it certain peculiar risks, including damage to the future employability of the applicant. The Majority further finds that employers can protect their rightful interests by simply following good hiring practices, such as checking with an applicant's previous employers or schools to see if a substance abuse problem has manifested itself in any objective signs in the past. The efficacy of this approach is supported by at least one out-of-state employer. See Appendix E.

(2) Second, the Majority finds that workplace substance abuse testing will necessarily result in widespread dissemination of the identity and test results of test subjects. It is practically impossible to test employees while on duty and to keep that action secret from the test subject's co-workers. Further, any disciplinary action taken as a result of test results will also be apparent to the employee's co-workers, and news of the test and its results will spread throughout the employer's workforce.

(3) Third, the Majority finds that workplace substance abuse testing, with the exception of breathalyzer tests for alcohol, unjustifiably intrudes upon an individual employee's reasonable expectations of privacy away from his job. This finding was not made easily nor without long, careful, deliberative thought. In fact, several members of the Majority had reached opposite conclusions before their appointment to the Commission and changed their minds only after receiving and considering the evidence reviewed by the Commission. It is clear that an employee has a justifiable expectation that his employer will not attempt to control every facet of his life away from his job. On the other hand, an employer is equally justified in, and in fact is to be commended for, taking an interest in the general well-being of his employees as it affects their work performance. Resolution of these conflicting interests as they relate to workplace substance abuse testing is not an easy task. After careful thought, the Majority has decided that the tests are an unjustified invasion of a worker's privacy for the following reasons, in addition to those previously discussed.

- (a) The tests do not measure impairment on the job, but can detect substances ingested days, or even weeks before;
- (b) The test results themselves are unreliable, often providing incorrect results;
- (c) The use of tests is subject to abuse, both in that they may be used to harass selected employees and in that they may be used to detect physical conditions unrelated to substance abuse; and
- (d) An employer has only a limited interest in an employee's activities away from his job which does not outweigh the employee's rightful expectation of privacy.

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. Many factors, unrelated to substance abuse, can contribute to decreased productivity or excessive use of employee benefits, including the use of cigarettes, marital or financial problems at home, or even 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 actual substance abuse. 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 interests. The employer is neither a marriage counselor nor a rehabilitation therapist, nor does the employee request him to be.

The Majority finds that a diligent employer should be able to protect his legitimate interests without resorting to overly intrusive testing methods by simply requiring proper work performance from his employees. The employer can determine all that he needs to know by looking at the employee's record and simply asking, "Is this employee adequately performing his job?" If the answer is yes, the employer's interest is satisfied. If the answer is no, the employer does not need to forcibly probe into an employee's private life to protect his legitimate interests. He can talk with the employee and let him know that his performance is unsatisfactory. He can refer him to an employee assistance program if the workplace offers one. Or he can simply release the employee; there is no obligation on any employer to retain an employee who is not performing his assigned tasks adequately.

The use of substance abuse testing in the workplace adds nothing to an employer's ability to recognize and address inadequate work performance, whether due to substance abuse or any other reason. Substance abuse tests will not help an employer eliminate the cause of an employee's work performance problems; rather, an active EAP is the best approach to resolving the problems of the employee, and the employer. As stated by Lewis L. Maltby, Vice President at Drexelbrook Controls, Inc., a precision instrument manufacturer located in Pennsylvania, "(an employer) can't afford to fire a productive employee on the basis of a test that isn't much better than flipping a coin." The Majority endorses the sensible, cooperative approach taken by Mr. Maltby and explained at greater length in a copy of a presentation by Mr. Maltby that was provided to the Commission. That copy is reproduced in this report as Appendix E.

In reaching its decision, the Majority carefully considered the arguments that an employee's right to privacy in this area is outweighed because it actually does affect the rights of others; these rights are not the economic interests of the employer, but the rights of other employees to a safe workplace. The Majority accepts the fact that an employee who is severely impaired on the job can pose a serious safety threat to his co-workers and at times to members of the public. In the context of workplace substance abuse tests however, this argument fails to take into account the fact that the use of substance abuse tests, with the exception of the breathalyzer, does not measurably contribute to a safer working environment. The commonly-used urinalysis tests do not measure current impairment; so the automatic

removal of all test subjects who test positive will not necessarily result in a safer workplace. It is far more productive for employers to provide a safe working environment and to maintain close, efficient supervision over their employees' actual work performance, rather than to rely upon the fallacious supposition that urine testing will ensure a safe workplace.

Test proponents further argue that the use of testing is justified as a preventive or deterrent measure against substance abuse on the job. Before the Majority can condone the wholesale invasion of Maine workers' personal privacy, we must be shown that substance abuse in the workplace poses a substantial danger to other workers or the general public. However, the information available to the Commission indicated that both labor and management perceived the Maine workplace to be relatively drug-free. The major problem by far appeared to be alcohol, for which impairment can be detected through the use of a breathalyzer. Further evidence of the relatively minor significance of safety problems due to employee substance abuse is available from the Commission on Safety in the Maine Workplace. In over 14 months of testimony in numerous hearings throughout the State, not a single management or labor representative has raised concerns over safety problems caused by substance abuse. Two health treatment providers did raise the issue, but both stressed the need for voluntary rehabilitation instead of confrontation, and both preferred the use of EAPs to testing in the workplace.¹¹¹

Arguments were raised that certain particularly sensitive positions, such as school bus drivers, still might justify the use of substance abuse tests since they carry a potential for more serious harm in the event of an accident. However, the evidence presented to the Commission indicated that out of a total of 192 school bus accidents in Maine during the 1984-85 school year, 110 of which involved driver error, not a single accident involved a substance of abuse.¹¹² Such evidence hardly justifies a large-scale intrusion into the privacy of Maine workers. The Majority finds that testing is not justified as a preventive or deterrent measure, at least as it applies to the Maine workplace. This is particularly true where the tests' value as a deterrent must be weighed against not only the privacy rights of employees, but also the risks and drawbacks inherent in substance abuse testing discussed earlier.

The Majority is far from alone in making such findings. A similar finding, based on similar reasoning, was reached by the American Medical Association (AMA) in its recommendations to the Federal Aviation Administration on medical certification for pilots. The AMA, an organization not known for adopting radical positions unsupported by competent evidence, rejected the use of substance abuse tests for pilot certification because "We're not all that convinced that all the urine tests that are going on these days are that sensitive and specific." Further, noting that there was no evidence of rampant drug use among pilots, the AMA spokesman said that the tests might result in more false positives than true positives.¹¹³

2. Employee Assistance Programs and Rehabilitation Programs. Employee assistance programs and workplace education on substance abuse are viable alternatives to workplace substance abuse testing programs.

a. Employee Assistance Programs can accomplish all the purported goals of 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. The study evidence shows that EAPs can protect employers' investment in workers by rehabilitating and returning to the workplace with increased job effectiveness an overwhelming proportion of formerly substance-abusing employees. The Majority accepts the results of studies which show that EAPs can save employers additional money for every dollar they spend on the programs, essentially making the programs more than pay for themselves. The Majority finds that the implementation of an employee assistance program, when compared to the use of a testing program, is eminently more capable of fulfilling the many needs of both employees and employers in increasing workplace safety and productivity. We point to the fact that EAPs received high marks from both testing advocates and employees; in fact, most experts testified that a testing program should not be instituted without a good EAP to provide the counseling and support services that such testing would require.

We reject, however, the arguments made by employers that the effectiveness of EAPs can be enhanced by the use of testing. Substance abuse testing, even when used as an adjunct to an EAP unduly intrudes upon an employee's privacy, as discussed in the previous Majority Findings. Testimony before the Commission supports this finding. 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. As one representative of a drug test manufacturer testified, "Most employers aren't concerned about why an employee is taking drugs; the employer is only concerned with getting drugs out of his workplace." Such an attitude, although certainly not shared by all Maine employers, effectively dooms any efforts at rehabilitation to failure.

b. Employee Assistance Programs provide services that substance abuse testing programs cannot. Not only are EAPs effective in achieving the purported goals of testing programs, they increase workplace safety and productivity by reaching far beyond just the problem of substance abuse. Testing, because it focuses on the use of substances and not on the employee as a person, cannot begin to help employees whose job performance has slipped because of personal problems other than substance abuse; conversely, an EAP does not detract from workplace morale and productivity by falsely accusing an employee of abusing substances. Because they are not invasive of employee privacy, well-functioning EAPs can actually improve employer-employee communication and cooperation.

The Majority recognizes the irony in the employer's argument that he has instituted testing for the overall health of his employees, when the employer focuses solely on the presence of an illegal substance in the employees' urine. An employer who is genuinely concerned about his employees' total well-being will not limit the "assistance" he offers to the detection of past use of illicit substances, but will also look at alcohol use, use of tobacco and nicotine addiction, exercise and diet, and the myriad of other physical, financial, emotional and mental problems or stresses that can leave an employee less effective. We therefore reject the rationale that workplace substance abuse testing programs are being implemented for the benefit of employees when the employer refuses to consider a more comprehensive, and therefore more effective, approach to assisting employees. We do not mean to imply that an employer is, or should be, the guardian of the health and well-being of his employees 24 hours a day; however, we remain suspicious of the motivations behind an employer's testing program when he ignores other potential sources of employee workplace problems. This is particularly true when virtually all workplace testing programs focus on identifying the use of illegal drugs, which all available evidence indicates is only a fraction of all substance abuse problems.

IV. RECOMMENDATIONS

Based on the evidence and testimony received by the Commission, and based on the findings made by the Majority, the Majority makes the following recommendations.

A. SUGGESTED LEGISLATION

The Majority recommends that the Maine Legislature pass and the Governor sign legislation prohibiting the use of workplace substance abuse testing, except for breathalyzers, in Maine. The Majority has drafted proposed legislation which is included in this report as Appendix B. Before discussing the details of the proposed legislation, we would like to explain our recommendation of a complete ban of substance abuse testing in the workplace.

The Majority is aware that its recommendation goes beyond legislation which has previously been considered in other states; previous legislation in other states generally sought to prohibit testing except when an employer had some degree of "probable cause" to suspect that an employee was under the influence of a drug while on the job. The Majority has decided to reject that compromise approach because we feel that it compromises too much without requiring a showing of proof in return.

As our findings indicate, the use of substance abuse testing in the workplace is rife with potential problems. Innocent people may be falsely accused by the tests. Impaired workers may pass the test with flying colors and immediately return to work. Two similarly situated workers may end up being treated in two totally dissimilar ways because their test results differed based on one of many potential factors known to affect the test results. Use of the tests may set management and labor at odds, particularly if unscrupulous employers, though an acknowledged minority, begin to use the tests to obtain "better discipline through chemistry." Thousands of Maine people will be subjected to the humiliating collection process. Many Maine workers may find that their employer is using the tests to determine other physical conditions beyond the presence of substances of abuse. Many present marijuana users, rather than quitting their use of substances of abuse, may switch to cocaine or other drugs because they are more difficult to detect. Maine employers may see their potential liability under the testing programs skyrocket, perhaps bringing higher insurance costs with it. All of this is to be done at a substantial cost to employers for the purpose of catching a number of Maine workers, estimated by both management and labor to be tiny, whose substance abuse problems may be affected their job performance. This emphasis upon testing programs runs the

further risk that employers will rely primarily, or even exclusively, upon test results as an indicator of substance abuse problems, in the process ignoring the inherent limitations of test capabilities and neglecting the promising and expansive possibilities offered by EAPs.

All of these potential risks, as well as the invasion of workers' privacy, are being set off against the potential gains under test programs. This requires a sensitive analysis and balancing of the costs and benefits on either side of the scale. At the outset, the Majority would like to make it clear, in no uncertain terms, that we do not condone substance abuse, but condemn it in all of its various forms -- including alcohol abuse -- in the strongest possible terms. Substance abuse exacts an exorbitant cost from the individual, his or her family and friends, and society as a whole. An employee, like any other citizen, does not have the right to abuse an illegal substance; nor does he have a right not to be discovered in his use.

However, our society has established a mechanism to enforce its lawful prohibitions; they are known as law enforcement agencies. Society has delegated and constitutionally restricted its power to enforce its laws to these enforcement agencies. The Majority cannot approve of the mass "deputization" of all employers to use their economic leverage to force compliance with laws through methods unavailable to proper law enforcement agencies under the Constitution. We do not think it is proper to allow such an "end run" around time-tested Constitutional protections. The use of substance abuse tests in the workplace essentially reverses the venerable rule of Anglo-American jurisprudence that an accused is presumed innocent until proven guilty. Testing programs require the accused employee to "prove" that he is actually innocent by passing a substance abuse test. The evidence shows that many employers have unwittingly assumed the role of "Constitutional vigilante" by rushing into the testing "fad" without stopping to consider whether it will really help them.

Testing proponents also argue that the use of substance abuse tests in the workplace to detect illicit drug use assists an employer in determining the general honesty and character of their employees, which they further assert to be a legitimate interest of the employer. The validity of this reasoning quickly fades when one considers other examples of potential methods of discovering this information. No one can seriously argue that an employer has the right to seize an employee's tax returns and financial records to determine if the employee is cheating on his taxes. Nor can anyone suggest that an employer has the right to hire a private detective to follow his employees when they leave work to see if they break the speed limit, or any other law unrelated to employment, on their way home. While the general legitimacy of an employer's interest in the character of his employees is unquestioned, it is the method employed to discover that characteristic that is offensive.

Some may argue that substance abuse testing is justified as a weapon to combat society's acknowledged drug abuse problem. This drug abuse "epidemic" is characterized as being so pervasive as to threaten the very bases of our society, thus justifying the use of any potentially helpful tool, whatever the cost. Similar "crisis" reasoning has precipitated ill-advised actions by many nations in the past, examples of which are too numerous to recite. At times, it takes great strength for a nation, just as for an individual, to resist the temptation of rushing to embrace a seductive quick fix, which is bought at the cost of hard-earned traditional values. The Majority is not inclined to surrender the very principles upon which our society has been built in order to counter some media-created "crisis" in the workplace, particularly when the evidence indicates that the suggested cure is not the panacea some claim it to be.

As stated earlier, the question of whether workplace substance abuse testing is justified must be answered by balancing the relative costs and benefits of the two competing interests, the worker's right to his or her personal privacy, and the employer's right to operate a safe and productive workplace. Although constitutional limitations do not apply to private sector employers, an analogy may properly be drawn with Federal constitutional law, where a similar balancing analysis is often employed. As interpreted by the United States Supreme Court, when the government attempts to interfere with an individual's "fundamental rights" -- rights so precious and central to our heritage that they are seen as deserving of special protection -- the Constitution requires that the state demonstrate a "compelling interest" which can overbalance the individual's rights.¹¹⁴ Additionally, this compelling interest cannot be based upon mere speculative fears; the State must show that actual harm will occur unless the fundamental right is outweighed.¹¹⁵

The right to personal privacy asserted by employees in the substance abuse testing context may not be legally protected under the Constitution, but it is inarguably a fundamental tenet of our society. The dignity and equal respect due every man and woman in our society, as an individual, lies at the bedrock of western civilization. As stated by the late Supreme Court Justice Louis Brandeis, the "right to be left alone is the most comprehensive of rights and the right most valued by civilized men."¹¹⁶ In order for an employer to morally justify the imposition of substance abuse testing in the workplace, the Majority believes that he too has the burden of demonstrating a "compelling interest," but none has been presented to the Commission.

It is too easy to say that no privacy right is implicated by workplace substance abuse testing because an employee automatically consents to the possibility of testing simply by accepting employment; if he does not want to be tested he can always leave. That argument ignores the financial realities of the employment relationship, and also ignores nearly 100 years of recent history in which the government was forced to pass laws recognizing workers' rights to a safe workplace and fair wages. The only legitimate interests advanced to justify workplace testing are the employer's right to have an efficient, productive employee; and the rights of all employees and the general public to be free from the potential safety risks associated with an impaired worker in certain jobs. The findings previously made by the Majority demonstrate that neither of these interests is productively served by the adoption of workplace substance abuse testing.

Testing proponents argue that the possible dangers of workplace substance abuse justify the intrusion into the workers' personal privacy. Just as they would reverse the usual presumption of innocence for individual workers, they would require testing opponents to prove that no harm can possibly result from workplace substance abuse. The Majority cannot agree with this analysis. An individual's fundamental right of privacy cannot be outweighed by mere speculation that other important interests might be served by the imposition of workplace substance abuse testing; we must be presented with substantial evidence demonstrating the value of testing before the Majority can approve of the wholesale invasion of workers' privacy.

The Majority believes that before it can approve of substance abuse testing in the workplace under any conditions, it must be shown a real, not speculative, compelling interest that will overbalance the heavy weight of the "fundamental" right of privacy, which is intruded upon to a great degree by urinalysis testing. The compromise position, allowing testing based upon a showing of "probable cause," somewhat limits the degree of intrusiveness of the testing procedure, but fails to advance any other significant interest. If an employer has reasonable cause to suspect that an employee is impaired, he will almost always also have enough evidence to remove that worker from his workforce, either temporarily or permanently. If this action is coupled with the use of an effective EAP, as recommended under Part C of this section of the report, the employer is gaining nothing by testing the employee, and in fact may be losing a great deal. (See the previous Majority Findings.) Even if he does test and the result is positive, the result will not tell him that the employee actually was impaired, but only that he had been exposed to the substance at some time in the past, assuming that it is not a false positive result. Conducting substance abuse testing based on a "probable cause" standard does not serve any interest of employers sufficient to establish a compelling need for its use.

For these reasons, the Majority has recommended a complete ban of substance abuse testing in the workplace. The proposed legislation is designed to accomplish that objective. It prohibits any public or private employer, defined to include employment agencies, from requiring, requesting or suggesting that any employee or job applicant submit to a substance abuse test. It further prohibits an employer from administering a test or having a test administered to any employee or applicant, and prohibits the employer's use of any such test results for hiring or employment purposes.

The legislation does not prohibit the use of a breathalyzer.. This was done intentionally because the use of a breathalyzer in the workplace raises different issues than other substance abuse tests. First, and foremost, the test can measure actual impairment of the test subject when he is tested. For this reason it demonstrates a much higher value for an employer who wishes to determine an employee's fitness for duty. Second, it detects the presence of alcohol, the substance of abuse which all of the evidence suggests is by far the greatest workplace substance abuse problem. Finally, the test procedure itself is much less intrusive upon an individual's privacy, both in that it requires a much less private "sample" and in that it does not reveal details about the employee's life away from the job. Since alcohol is excreted by the body very rapidly, the test will not reveal whether the subject had been drinking at some much earlier time. For these reasons, a "compelling interest" can be shown which justifies the rather modest imposition upon personal privacy caused by the test.

Other provisions of the proposed legislation ensure that it will protect, as much as possible, Maine citizens whose work requires them to leave the boundaries of the State. The laws of a state normally will have an effect only within the area enclosed by its boundaries. The question was posed as to what would happen to a truckdriver who works primarily in Maine but may occasionally drive out of state for a delivery or pick-up; Could he legally be tested by his employer after he had left the State? To limit this problem, a provision was added which requires every employment contract that is subject to Maine law when it is formed to automatically include the substance abuse testing prohibition as part of the employment contract and thus restricts an employer's ability to test the employee even if he leaves the State while working.

Finally, an enforcement clause was added which provides that the affected employee or the Department of Labor can prosecute any violation of the law. Damages include a civil forfeiture of \$100 to \$500, and personal damages to the injured employee. He can receive treble lost wages, reinstatement to his previous job, court costs and reasonable attorneys' fees, which will be set by the court.

The Majority recognizes that the application of such a law will be limited to some extent by present, and possibly future, federal preemption. Regulations currently exist requiring the testing of railroad employees in certain situations.¹¹⁷ Military personnel are similarly subject to substance abuse testing under federal authority.¹¹⁸ These employees will not be able to avail themselves of the protection afforded by the suggested legislation even if it is enacted into law; the Supremacy Clause of the United States Constitution requires that the federal law take precedence over Maine law.¹¹⁹ There is nothing that Maine, as a state, can do to prevent this from occurring. However, the Majority sees no reason to leave the great majority of Maine workers unprotected simply because a small number of workers will be subject to possible substance abuse testing under federal law.

B. JOINT RESOLUTION TO CONGRESS

The Majority further recommends that the Maine State Legislature enact a Joint Resolution memorializing the United States Congress to undertake an effort to reduce the possibility of substance abuse-related accidents in nuclear power plants. As discussed in the previous recommendation, the Majority believes that the fundamental human right of privacy may only be outweighed by an opposing compelling interest. Some members of the Majority believe that the potential dangers involved in an accident at the Maine Yankee nuclear plant could possibly produce a compelling interest.

The Majority recognizes that we have absolutely no reason to suspect that the workforce at the Maine Yankee nuclear plant suffers from any substance abuse problem different than the general Maine workforce. We also recognize that we have previously found that that problem has not been documented to be severe enough to justify the intrusiveness and inherent risks of workplace substance abuse testing. However, an additional factor must be considered when dealing with the analysis of the Maine Yankee situation that is not present in any other private workplace situation in Maine. That factor is the unprecedented and unequalled scope of the damage possibly resulting from a major nuclear accident.

A major accident at the Maine Yankee nuclear plant has the potential of rendering the lower one-third of the State totally uninhabitable. The exact extent of potential damage is inestimable as our nation has been fortunate enough, so far, to avoid such a major catastrophe. However, recent events at the Chernobyl nuclear site in the Soviet Union, and our own experiences at Three Mile Island in Pennsylvania show that the possibility is not to be ignored.

Despite this demonstrated potential for great destruction, the Majority is reluctant to except Maine Yankee from the general recommendation that substance abuse testing in the workplace should be banned. Primarily because we believe that present tests, other than the breathalyzer, are ineffective, the Majority cannot find that substance abuse testing at the Maine Yankee work site is justified. However, recognizing that the possibility of harm, although small, involves such a potentially massive amount of damage, the Majority finds that the situation demands some response. The State of Maine's ability to respond is limited, however, since the field of nuclear power plant safety has been preempted by the Federal Government.

Therefore, the Majority recommends that the Maine State Legislature enact a joint resolution, memorializing the United States Congress to encourage the development of workplace substance abuse tests for use in nuclear power plants. The tests should be able to measure present impairment and should intrude into the individual workers' private lives to the least extent possible, consistent with the needs for accurate testing. The Majority further recommends that the Legislature encourage Congress to continue with the development and encouragement of other tools against employee substance abuse in nuclear power plants, particularly the use of EAPs and rehabilitation programs, the value of which has been extensively documented. A draft of the proposed joint resolution is included in this report as Appendix C.

C. EMPLOYEE ASSISTANCE PROGRAMS

The Majority recommends that employers implement employee assistance programs to help address all problems which may impair an employee's performance on the job. Substance abuse is not the only factor which can render an employee ineffective or even dangerous on the job. Testing, even if at peak accuracy, is inherently limited to detecting past use of substances, while EAPs can address an entire range of employee problems, and sometimes find and resolve the underlying cause of a substance abuse problem. The Majority encourages the use of EAPs to take advantage of the beneficial services such programs can provide to both employers and employees. Indeed, an employer who is genuinely concerned about his employees' wellbeing can utilize no better vehicle for improving the workplace morale, safety and productivity than an EAP. We further recommend that the Legislature investigate ways to make EAP services more widely available to employers and employees in the State, with particular regard to the financial ability of small employers to participate in EAPs. Perhaps companies that are too small for a separate EAP to be economical should band together with similarly situated employers to, as a group, make use of EAP providers' services. The Majority is optimistic that sufficient certification procedures for EAP providers will soon be in effect to ensure that the programs are appropriate and effective.

D. SUBSTANCE ABUSE EDUCATION RESOURCES

The Majority recommends that employers and unions should take advantage of substance abuse education programs that are available from the State and private providers. Rather than reinventing the wheel, there are very good programs which already exist and can be adapted easily to any work environment.

The Majority recommends that the Legislature look at the adequacy of existing substance abuse education programs. Increased funding should be investigated to make helpful resources available to all employers and employees. In the interest of increased availability of such programs, the Majority recommends that the Legislature consider developing an employee assistance program model and facilitation project for small businesses. It is recognized that very often small businesses do not have the access to important resources that larger companies do, and the State's role in providing such access to EAPs may be pivotal.

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REPORT OF THE MINORITY OF THE
COMMISSION TO EXAMINE CHEMICAL
TESTING OF EMPLOYEES

MEMBERS

Jim McGregor
Paul Falconer
Thomas Johnston

I. PREFACE TO MINORITY REPORT

The Commission to Examine Chemical Testing of Employees grew out of an effort to prohibit or severely limit the right of private businesses to conduct tests to detect substance abusers. Specifically, this issue surfaced in the final days of the Second Regular Session of the 112th Legislature, but proposed legislation was ultimately withheld to give this Commission an opportunity to study the problem and the specific issue of workplace substance abuse testing.

Although legislative concern grew out of the start-up of testing programs in private businesses, it became obvious to the Commission that the issue is much broader, involving both the public and private sectors.

Over the course of the summer and fall, the Commission heard from scores of witnesses at data gathering sessions and during two full days of public hearings on November 19 and 20.

We, the undersigned, consider it a great privilege to have been appointed by the Maine Legislature to serve on the Commission. Service has provided us with a unique opportunity to examine one of the most serious and complex problems in modern society: Substance abuse, and particularly substance abuse in the workplace.

The following constitutes the report of the Minority of the Commission.

II. EVIDENCE AND TESTIMONY

The testimony from experts in the areas of drug awareness and rehabilitation, from the business community and from law enforcement convinced us that there is indeed a major and serious substance abuse problem in this State and nation. During the course of the Commission's deliberations, a few have attempted to downplay the extent of the problem, particularly in the workplace, or to say that data specifically relating to the Maine problem is limited. Although accurate statistics relating solely to substance abuse in the Maine workplace are lacking, nothing we heard from expert witnesses, including the United States Attorney for Maine, have given us any comfort that Maine has somehow been shielded from this epidemic that Newsweek magazine likened to "the plagues of medieval times." Also, we should anticipate that the drug problem, especially cocaine, will become worse in the State of Maine. U.S. Attorney Richard Cohen noted that since 1981 the prevalence of cocaine has increased three times in the State of Maine.¹ Significant state and federal money has already been spent in Maine for law enforcement, education and rehabilitation relating to substance abuse problems, which demonstrates the seriousness of the problem and the commitment of the people of Maine to respond to it.

Whatever position the Maine Legislature ultimately takes on the issue of workplace testing, lawmakers would commit an error of enormous, and potentially deadly, magnitude if they allowed themselves to be deluded into believing that there is no problem in the Maine workplace or that it is somehow less than in other areas of the country.

The Commission Majority states that a primary objection to workplace substance abuse testing is that current tests are unable to show impairment. Despite that finding, the Majority uses an unscientific, perception-gauging survey of the Maine Labor Group on Health to attempt to show that the national substance abuse problem has somehow spared the Maine workplace. It therefore appears to the Minority that the Majority has taken an inconsistent and contradictory position.

The Majority registers skepticism over the statistics presented by EAP, laboratory and employer witnesses as being motivated to inflate the extent of the substance abuse problem. However, the Majority seems to accept as Gospel the testimony of labor witnesses as having no motivation to under-report the problem. In fact, union representatives admitted that they hide the problem from employers and do not report suspected drug and alcohol situations. Thus, it may well be that the employers with unions are underreporting the problem of drug and alcohol abuse.

What is the extent of the problem in Maine and the nation? Testimony from Maine companies which have conducted pre-employment screening for drugs indicated confirmed positive test results ranging as high as 33 percent.

A study conducted by the Research Triangle Institute of North Carolina revealed that drug abuse alone cost an estimated \$33 billion in reduced productivity in 1983. Most experts double or triple that figure for 1986.

A survey of high school seniors by the National Institute on Drug Abuse revealed that cocaine use in 1985 was the highest ever, with more than 17 percent of high school seniors having tried it.² An estimated 5,000 people try cocaine for the first time every day of the year. A November 10, 1986, Associated Press report said 22 million Americans have at least tried cocaine, and over four million are either addicted or are on an uncertain road to addiction.

Peter Bensinger, former director of the Drug Enforcement Administration, provides similar figures evidencing the prevalence of the problem. On the national level, there are 22 million marijuana users (use at least once a month), 6 million cocaine users (use at least once a month), 6 million pill users, 10 million alcoholics and 5,000 new cocaine users per week.³ The health and safety consequences of such widespread substance abuse are staggering: Substance abusers are involved in accidents on the job 3 to 4 times more often than non-users, and accidents off the job 4 to 6 times more often. In fact, United States industry has lost over \$80 billion dollars because of substance abuse-related accidents in 1984 alone. Absenteeism is 2.5 times higher for substance abusers. Experts estimate a reduction in productivity of between 25% and 33% because of substance abuse. In addition, substance abusers file 3 times as many medical and other benefit claims, and are involved in 7 times as many wage garnishment actions.⁴

In March of 1986, the President's Commission on Organized Crime concluded that drug trafficking and abuse are the most serious organized crime problems in America today. The Commission concluded that law enforcement alone is powerless to stop the flow of illegal substances into our homes, schools and places of business.⁵ Testimony from U.S. Attorney Cohen agreed with this conclusion and there is virtually unanimous agreement that the problem must be attacked at the user level; the demand for the drugs must be curtailed.

The statistics relative to use and abuse vary to a degree depending on the expert or the source, but whether one takes the high side or the low side, the evidence is overwhelming that there is a major substance abuse problem and that Maine has not been spared.

For anyone with lingering doubts about the seriousness of the problem there are ready sources for verification: Local law enforcement officials, substance abuse professionals at local hospitals and mental health centers, and school administrators.

As previously indicated, the issue of substance abuse testing in Maine extends far beyond the private workplace. For example, the Maine Municipal Association pointed out to the Commission that a number of police departments, fire departments and municipal ambulance services are interested in instituting employee substance abuse testing programs. "We believe that the professional responsibilities of municipal firefighters, policemen and ambulance personnel demand that he or she remain free of drug dependence," the MMA said in testimony submitted to the Commission.⁶ The International Association of Chiefs of Police has developed a model drug testing policy designed to help municipal police departments identify and deal with the use of drugs by police officers. MMA said it is currently reviewing the policy to determine if its key elements would be applicable to other types of municipal emergency personnel.

The Maine Hospital Association also told the Commission that its members would be concerned if they were barred from being allowed to test for alcohol or drug use at pre-employment, or during employment, for cause.

"It is not enough to rely on supervisors to protect patients and employees through observation because some drugs do not produce clearly aberrant behavior," said the Hospital Association in its testimony. "Some drugs will affect individuals in very subtle yet dangerous ways. Hospitals and employers are especially at risk if the Commission were to recommend legislation which would create barriers for them in assuring (sic) a safe environment for the delivery of health care."⁷

While we recognize that urine testing to secure or retain a job can be offensive to some individuals, it must also be recognized that substance abuse is a tough issue and that there are no easy, totally palatable solutions to the problem. Like it or not, testing is one of the few weapons available to combat this cancer that is quickly eating away the insides of our society.

Indeed, it is difficult to understand the sudden clamor for "privacy" now that some companies have instituted substance abuse testing programs and others have indicated a desire to follow. In our modern society, we undergo scrutiny from metal detectors at airports; those stopped for suspicion of operating under the influence of alcohol are subjected to tests; and finger-printing is standard procedure in the application for

some sensitive jobs. Physical examinations have become commonplace and expected when one is seeking insurance and applying for most jobs. To argue that it is appropriate to examine individuals for diseases of the heart and eyes, for example, and neglect the equally tragic diseases of alcoholism and drug addiction is an irresponsible position for Maine to take.

There are a series of evolutionary changes occurring in the workplace which give greater recognition to the permanency of employment and the obligation of the employer to protect the continuing viability of the workers. The willingness of the courts to recognize wrongful discharge as a cause of action; the requirement that employers protect non-smokers from smokers; and honoring "workplace stress" as a compensable injury for workers' compensation are examples of these trends. In its report the Majority pretends that these trends do not exist and that the employment relationship is the same as it was twenty years ago. The fact of the matter is that even the interest groups that favor strong protection of individual rights fall short of the extreme position taken by the Majority.

The American Civil Liberties Union testified before the Commission that while it "prefers" legislation banning all testing, it has endorsed "for cause" testing in San Francisco. The Legal Action Center, a law firm in New York City specializing in drug and alcohol issues, likewise endorsed legislation which contained "for cause" testing.

The Minority finds it difficult to agree to the radical position of the Majority because the Majority would not consider a more moderate position balancing the interests of employers and employees.

III. FINDING

Therefore, while we do not suggest that the State of Maine mandate substance abuse testing for either the private or public sector, we believe that the Legislature would make a grave mistake if it enacted legislation to prohibit or severely restrict the right of employers to test.

We make this finding for the following basic reasons:

(1) No testimony was presented by employees or labor groups to show that substance abuse testing is being used by Maine employers for any purpose other than to promote self-help and safety. Although there was considerable concern expressed for potential misuse of testing to justify arbitrary actions against employees, to attempt to recommend legislation to remedy imagined problems would be to, in effect, attempt to fix something that isn't broken.

(2) The Commission could find no other state that had enacted legislation to prohibit workplace testing and thus the Minority questions the desirability of Maine rushing to judgment. Should Maine be the only state, or one of only a few, to enact prohibitive legislation the messages such action would send could be extremely damaging to the State. It could send an unintended message to drug pushers everywhere that the streets and parking lots in the proximity of Maine businesses are fertile fields for their deadly trade. Such legislation could also place Maine at a decided disadvantage in the area of economic development. With a large and growing number of Fortune 500 companies already conducting testing programs, it is highly unlikely that one of those companies would consider locating or expanding in a state that prohibits testing.

(3) While legal and constitutional questions have been raised in regard to testing in the public sector, the Commission heard no evidence that testing in the private workplace is illegal or constitutionally impermissible. Instead, arbitrators' rulings have generally upheld the right of private employers to test.⁸ It appears that the only way private workplace testing will become illegal is for the Maine Legislature to assume the responsibility of declaring it so.

(4) As previously mentioned in this report, testing is one of the few tools available to prompt individuals to come to grips with the problems of drug addiction and alcoholism. As a matter of fact, testing is often used in rehabilitation programs to monitor the abstinence of the clients. Some will, no doubt, argue that the problem can be dealt with through greater awareness, education and rehabilitation. Although those three elements are crucial,

we heard no evidence to convince us that they alone can make a dent in the problem. Indeed, most Maine schools have been devoting entire weeks to substance abuse awareness in recent years and it is doubtful that much more school time can be spent on a single subject and remain effective. With substance abuse threatening to bring a great nation to its knees, it would be folly to toss aside one tool without another proven one to replace it.

(5) Arguments by some that employers have no vested interest in what employees do in their time off the job have a very hollow ring considering the fact that Maine has one of the nation's most liberal workers' compensation laws and that a majority of businesses in the State pays for a portion, if not all, of the costs of group health insurance coverage, unemployment compensation, and pension and retirement benefits. In recent years, the Maine Legislature deemed that substance abuse is, in fact, a major problem in the State and required company-sponsored group health insurance policies to include substance abuse treatment. After having legislated a program that is costing Maine businesses millions of dollars annually, it is difficult to believe that a majority of Maine legislators would now want to take away the only tool businesses have to detect the diseases relating to substance abuse.

(6) Substance abuse is a social problem as well as a disease. In the more advanced stages of the disease, a person loses control to choose between abstinence and use, and is further characterized by the strong component of denial. A significant number of professionals from the rehabilitation and counseling communities testified as to the increasing problem of substance abuse and dependency in Maine. It is simply not reasonable to assume that problems of this nature and severity magically stop at the factory gate. Therefore, an effective testing program will enhance the opportunity to detect and treat the diseases, and at the same time help to create a safer working environment for all employees, including the majority who are not abusers.

(7) Use of alcohol and illegal drugs cannot always be combined for purposes of analysis. As noted by some experts, had alcohol just been discovered it would likely be declared an illegal drug and its use would be more severely restricted. The fact of the matter is that in our present society the purchase and sale of alcohol and its moderate use is not illegal. In addition, because alcohol has been a problem for many years, science has had time to develop tests to measure present impairment. It is safe to assume that future technology will provide reliable tests to determine drug impairment.

(8) While opponents of substance abuse testing argue that present tests can only determine drug use, not drug impairment, their case begs the question that, unlike alcohol, there is no right in the State of Maine for an individual to use an illegal drug, no matter what the amount or the degree. Therefore, the abuser of controlled substances does not have a right not to be discovered and does not have the right to continue his or her illegal activity. On the other hand, co-workers of abusers do have a right to a safe workplace.

(9) Opponents of workplace testing will, no doubt, question the reliability of testing methods. While experts say that the reliability of so-called "screening" methods average in the 90 to 95 percent range, they are virtually unanimous in their agreement that the confirmatory gas chromatography/mass spectrometry (GC/MS) test has an accuracy rate of approximately 99 percent if properly conducted. Confirmatory testing is one of the safeguards recommended by the Minority of the Commission. With the proper safeguards, one could easily argue that, rather than increase the chances of an employee being wrongfully accused, testing could well prevent such arbitrary action.

(10) In today's highly regulated business environment, where employees already have several legal avenues to pursue if they feel they have been wronged, employers are increasingly called upon to demonstrate objective criteria regarding employment selection and rejection. More and more, the adoption of tests to demonstrate such objectivity is needed. In the absence of substance abuse testing, one defense that will certainly be used in the appeal of cases where employees have been disciplined is that the employer has no demonstrable proof of use.

(11) It is imperative that the Maine Legislature balance the rights of the non-abuser with those of the abuser when it attempts to weigh the absolute right of privacy against the right to a safe working environment. In addition to co-workers, the public also has a right to be safe. Lawmakers should seriously consider situations involving school bus drivers, airplane pilots, train engineers, truck drivers, firefighters, police officers, heavy equipment operators and ambulance drivers when they deliberate over the question of workplace testing and make certain that passengers and bystanders are given equal consideration and treatment. This is vital since some unions testified before the Commission that they would discourage the disclosure of suspected impairment from management, even in the case of school bus drivers.

(12) While some jobs and professions obviously pose greater threats to the safety of co-workers and the public than others, the Legislature should proceed with extreme caution if it attempts to carve out exemptions to any law to prohibit or restrict testing. Such a list of exemptions could be so extensive that only the small, in-state employer would suffer from a ban on substance abuse testing. Although blanket testing of public employees may not ultimately be permitted, government regulation will probably allow and even encourage testing under federal contracts, for the nuclear power industry, railroads, airlines, trucking and other interstate businesses. With the very real possibility of preemption in those areas, and the possibility that the preemption may apply to sub-contractors, the only employers in the State that would be affected could be indigenous Maine employers.

(13) The recommendation of the Commission Majority that the Maine Legislature ask the Congress to develop a substance abuse testing program for nuclear power plants, in the opinion of the Minority, is a major flaw in its overall position against testing. The majority, in effect, states that the "fundamental human right of privacy" may only be outweighed by an opposing compelling interest and at least some members of the Majority believed that the Maine Yankee Nuclear Power Plant presents such an interest. In making that argument, the Majority ignores the fact that nuclear power has not caused a single death in Maine and that other professions and jobs in the State realistically pose a much greater threat to the safety and wellbeing of employees and the general public. The flaw in this portion of the Majority's argument quickly becomes a gaping wound. Is the Majority arguing that even though it believes tests to be unreliable and unable to test impairment that one segment of our workforce -- the nuclear power industry -- should be subjected to them? In any event, both the Majority and the Minority should be careful not to allow pro- or anti-nuclear sentiments to possibly place members of the legislature at cross-purposes as they attempt to weigh the merits of workplace substance abuse testing and the continued operation of Maine Yankee as legitimate separate issues.

(14) Finally, the Majority fails to appreciate the growing nature of the problem of substance abuse. The Majority cannot address the issue of employers sincerely wishing to curtail substance abuse. Aside from school, there is no other institution in society that has daily contact with people. Most of us spend more time working than doing anything else. It is through the workplace that substance abuse can be recognized in its early stages. In addition, there are the issues of personal judgment, honesty and values which are reflected by one's choice to violate the law and use illegal drugs. The propensity to violate the law is certainly a valid concern of a prospective employer and one which should be recognized by the Legislature.

IV. RECOMMENDATIONS

The Minority therefore makes the following recommendations.

A. Legislation concerning substance abuse testing

Until there is evidence that substance abuse testing is being used in Maine to unfairly treat employees and until such time that a more effective, reliable and more palatable tool is discovered to combat this problem, we feel the only logical areas for legislative consideration at this time are the following. (The language of the suggested legislation is included as Appendix D.)

1. Some state oversight of testing programs;
2. Required confirmatory testing in cases where results can mean job loss or denial; and
3. Certification of laboratories which perform tests.

B. Substance Abuse in the Workplace Advisory Committee

1. The appointment of an Advisory Committee to the appropriate state agency, perhaps the Office of Alcoholism and Drug Abuse Prevention within the Department of Human Services. This committee would continue to monitor the issue and problems surrounding it and collect specific statewide data that might be useful in the formulation of any future legislation. The Advisory Committee should be composed of an equal number of representatives from both labor and management.
2. This advisory committee should also work through the appropriate government and private agencies to distribute information and to encourage businesses to institute employee assistance programs, whether or not they include workplace testing.

C. Laws prohibiting sale of alcohol to minors

That the Legislature examine all state liquor laws to determine what additional steps can be taken to prevent the selling of alcoholic beverages to minors by retailers, bars or individual adults, including more severe penalties for such sales.

The Minority members respectfully submit this report to the 113th Legislature with the stipulation and understanding that we stand ready as individuals and as a group to discuss these findings with any members or committees of the 113th Maine Legislature.

V. FOOTNOTES

1 Testimony of Richard Cohen -- U.S. Attorney, District of Maine -- before the Maine Commission to Examine Chemical Testing of Employees, September 17, 1986.

2 National Institute on Drug Abuse statistics.

3 Alcohol and Drug Abuse Policy in the Workplace, Bensinger, Dupont and Associates.

4 Id.

5 President's Commission on Organized Crime, Report to the President and the Attorney General: AMERICA'S HABIT: Drug Abuse, Drug Trafficking, and Organized Crime, March, 1986.

6 Letter submitted by Kathryn J. Rand -- Director of State and Federal Relations, Maine Municipal Association -- to the Maine Commission of Chemical Testing of Employees, November 26, 1986.

7 Letter submitted by W.F. Julavits, Esq. -- Counsel, Maine Hospital Association -- to the Maine Commission to Examine Chemical Testing of Employees, November 20, 1986.

8 See, for example, In the Matter of the Arbitration between Local 6 and Local 7, IUMSWA, AFL-CIO, and Bath Iron Works Corporation, Opinion and Award, Eric J. Schmertz, Arbitrator (June 30, 1986); and In re Birmingham-Jefferson County Transit Authority and Amalgamated Transit Union, Local 725, 84 LA 1272 (May 13, 1985).

APPENDICES TO THE REPORT OF
THE COMMISSION TO EXAMINE CHEMICAL
TESTING OF EMPLOYEES

APPENDIX A. LIST OF COMMISSION MEETINGS AND WITNESSES

1. June 25, 1986
State House, Augusta, Maine
Organizational meeting
2. July 30, 1986
State House, Augusta, Maine
Background information and research by Commission staff attorneys
3. August 27, 1986
State House, Augusta, Maine
Technical Aspects of Testing
Speakers:
 - Dr. Mark L. Powell
Director, Pharmaceutical and Toxicological Testing
Roche Biomedical Laboratories
Raritan, New Jersey
 - Dr. John Benzinger
Pathologist
Mid-Maine Medical Center
Waterville, Maine
 - Robert Morgner
Chemist
State Public Health Laboratory
Augusta, Maine
 - Dr. James R. Young
Chemist
Young Laboratories
Bangor, Maine
4. September 17, 1986
State House, Augusta, Maine
The Scope of the Substance Abuse Problem
Speakers:
 - Albert Anderson
Director
Alcohol and Drug Abuse Planning Committee
Augusta, Maine
 - Richard Cohen, Esq.
United States Attorney for District of Maine
Portland, Maine

Theodore K. Rice, Jr.
Counseling and Consulting Services, Inc.
South Portland, Maine

Cathy St. Pierre
Planning and Research Specialist
Office of Alcoholism and Drug Abuse Prevention
Augusta, Maine

Dr. George K. Dreher
Medical Director
Chemical Dependency Unit
St. Mary's Hospital
Lewiston, Maine

5. October 8, 1986
State House, Augusta, Maine
Employee Assistance Programs
Speakers:

Earle R. Loomer, Jr.
Executive Director
National Council on Alcoholism in Maine, Inc.
Augusta, Maine

Dr. Polly Karris
Director
Employee Assistance Program
University of Maine
Orono, Maine

Andrew Loman
Private provider and
Chemical Dependency Program, St. Mary's Hospital
Lewiston, Maine

Kevin Michael Parker
Director
State Employee Assistance Program
Hallowell, Maine

Theodore K. Rice, Jr.
Counseling and Consulting Services, Inc.
South Portland, Maine

Almon Young
Former Director
Employee Assistance Program
Maine Yankee Atomic Power Company
Augusta, Maine

Bo Miller
Occupational Health Program
Mid-Maine Medical Center
Waterville, Maine

6. October 27, 1986
State House, Augusta, Maine
Speakers:

Rear Admiral Paul J. Mulloy, U.S. Navy Retired
President
Quatro Associates
Annapolis, Maryland

Paul N. Samuels
Executive Vice President
Legal Action Center
New York City, New York

7. November 19, 1986
State Office Building, Augusta, Maine
Public Hearing: Management Interests
Witnesses:

Patti Aho
Maine Chamber of Commerce and Industry

Cliff Piper
Safety engineer in construction industry

Dr. Robert Ayerle
Manager of National Medical Operations
Scott Paper Company

Patricia Currier
Registered Nurse
S.D. Warren

Clifford Bolster
Vice President
Bath Iron Works Corporation

William Duddy
St. Johnsburry Trucking

Richard Jones
Maine Motor Transport Association

Brenda Fraser Castonguay
Manager, Administration
Maine Yankee Atomic Power Company

Dick Marston
Fraser Paper Limited

Sam Patterson
USG Industries

Alan Burton
Cianbro Corporation

William I. Peterson
Labor Relations
Boise Cascade

Doug Daniels
Regional Manager
Boise Cascade

8. November 20, 1986
State Office Building, Augusta, Maine
Public Hearing: Labor Interests
Witnesses:

Robert Piccone
President and Business Agent
Teamster's Union Local 340

Charles Shurburne
Maine AFSCME

George Lawson
Maintenance of Way Employees

Steve Crouse
Maine Teachers Association

Jim Mackey
Local 6
Bath Iron Works Corporation

Sam Giles
Local 6
Bath Iron Works Corporation

Paul Whitman
Professional truck driver

Peter Hellman
International Painters

John Lemieux
Maine State Employees Association

Arthur Gordon, Jr.
Chair, Maine Labor Group on Health
United Paperworkers International

Robert Aimsley
Director, Affiliated Laboratories
Eastern Maine Medical Center

Sally Sutton
Maine Civil Liberties Union

9. December 5, 1986
State House, Augusta, Maine
Commission deliberations
10. December 9, 1986
State Office Building, Augusta, Maine
Commission deliberations
11. December 29, 1986
State House, Augusta, Maine
Final deliberations; review draft report

APPENDIX B. MAJORITY SUGGESTED LEGISLATION

FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

No.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY SEVEN

AN ACT TO Prohibit Substance Abuse
Testing in the Workplace

Be it enacted by the People of the State of Maine as follows:

26 MRSA §595 is enacted to read:

§595. Substance abuse testing of employees

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings:

A. "Applicant" means any person seeking employment from an employer. The term also includes any person seeking to use an employment agency's services.

B. "Employee" means a person who is permitted, required or directed by any employer to engage in any employment in consideration of direct gain or profit.

C. "Employer" means any person, partnership, corporation, association or other legal entity, public or private, which employs one or more employees. The term also includes an employment agency.

D. "Substance abuse test" means any test procedure designed to take and analyze body fluids or materials from the body for the purpose of detecting the presence of scheduled drugs, alcohol or other drugs, or any of their metabolites. The term does not include tests designed to determine blood alcohol concentration levels from a sample of an individual's breath.

(1) "Alcohol" has the same meaning as found in Title 28, section 2, subsection 1.

(2) "Drug" has the same meaning as found in Title 32, section 2805, subsection 4.

(3) "Scheduled drug" has the same meaning as found in Title 17-A, section 1101, subsection 11.

2. Testing prohibited. No employer may, directly or indirectly:

A. Require, request or suggest that any employee or applicant submit to a substance abuse test as a condition of:

(1) Obtaining or retaining employment;

(2) Qualifying for a promotion or change in work assignment; or

(3) Receiving any employment benefit;

B. Administer or cause to be administered to any employee or applicant any substance abuse test; or

C. Use or refer to the results of a substance abuse test for hiring or employment purposes.

3. Contracts for work out of state. All employment contracts made in this State shall include an agreement that this section will apply to any employer who hires employees to work outside the State.

4. Violation and remedies. The following provisions govern the enforcement of this section.

A. Any employer who violates this section:

(1) Commits a civil violation for which a forfeiture of not less than \$100 nor more than \$500 may be adjudged; and

(2) Is liable to any employee subjected to discipline or discharge based on a violation of this section for:

(a) An amount equal to 3 times any lost wages;

(b) Reinstatement of the employee to his job with full benefits;

(c) Court costs; and

(d) Reasonable attorneys' fees, as set by the court.

B. The Department of Labor or the affected employee or employees may enforce this section. The Department of Labor may:

(1) Collect the judgment on behalf of the employee or employees;

(2) Supervise the payment of the judgment and the reinstatement of the employee or employees; and

(3) Collect fines incurred through violation of this section.

STATEMENT OF FACT

This bill is the result of recommendations made by the majority of the Commission to Examine Chemical Testing of Employees, established by Resolves 1985, chapter 86. The reasons for its introduction are set out in the Majority Report of that Commission. In short, the prohibition is necessary to avoid widespread interference with the privacy rights of Maine workers and to prevent inaccurate and unreliable test methods from being employed in the Maine workplace to the detriment of innocent Maine workers and job applicants.

The bill prohibits an employer's use of any substance abuse test, except for a breathalyzer, in the workplace. A "substance abuse test" is defined to include any test designed to use a bodily sample to determine whether a substance of abuse is present; a breathalyzer is excepted from this definition. "Substance of abuse" is defined to include scheduled drugs, alcohol, or any other drug, in its widest sense. The prohibition applies to all employers in the State, both public and private.

Its specific provisions prohibit an employer from requiring, requesting or suggesting that an employee submit to a substance abuse test as a condition of obtaining or retaining employment, qualifying for a promotion or a change in work assignment, or receiving any employment benefit. It further prohibits an employer from administering or having a test administered to any employee or job applicant, and from using or referring to the results of any substance abuse test for any hiring or employment purpose. These provisions are intended to prevent an employer from making any possible use of a substance abuse test or test result for any hiring or employment purpose.

The bill also includes a provision designed to protect employees whose work requires them to leave the State. This provision requires that every employment contract which is subject to the laws of this State when it is made, shall have the provisions of this bill automatically read into the contract. Even if an employee is required to perform work outside of the State, this provision will ensure that the substance abuse testing prohibition will continue to protect his privacy rights on a contract basis.

An enforcement section was also added to this bill to provide a means of enforcing its provisions. It allows either the Department of Labor or the injured employee to file suit if an employer violates the testing prohibition in any way. Any violation of the prohibition is made a civil violation with penalties from \$100 to \$500. The injured employee may also recover treble damages for any lost wages, reinstatement to his previous job, and court costs and attorneys' fees. The Department of Labor, besides being authorized to pursue the civil violation forfeitures, is also authorized to recover and pay over any damages due any injured employee for a violation of the prohibition.

It is recognized that this bill has already been preempted by regulations of the Federal Government in at least two areas -- the testing of military personnel and the testing of railroad employees in certain instances. Further preemption may occur, but the provisions of the bill will remain valid for all other Maine employees.

APPENDIX C. MAJORITY SUGGESTED JOINT RESOLUTION

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY SEVEN

JOINT RESOLUTION MEMORIALIZING THE CONGRESS
OF THE UNITED STATES TO SUPPORT
THE DEVELOPMENT OF MEANS TO REDUCE
THE POSSIBILITY OF A SUBSTANCE ABUSE-RELATED
ACCIDENT AT NUCLEAR POWER PLANT FACILITIES

Whereas, We, your memorialists, the Senate and the House of Representatives of the State of Maine in the 113th Legislature most respectfully present and petition the Congress of the United States, as follows:

Whereas, there is a general consensus that our nation is subject to a substance abuse problem of immense proportions; and

Whereas, there exists in our nation at the present time a controversy over the use of substance abuse tests to identify employees with a substance abuse problem in the workplace; and

Whereas, a majority of the Maine Commission to Examine Chemical Testing of Employees, after extensive study and review, has determined that present substance abuse tests are incapable of determining whether an individual is impaired at the time of testing, except for alcohol impairment; and

Whereas, extensive debate has occurred in our nation over whether current urinalysis substance abuse tests in the workplace constitute an unjustified invasion of an employee's personal privacy; and

Whereas, the effectiveness of employee assistance programs at reducing substance abuse-related problems of employees has been extensively documented; and

- Whereas, it is possible that substance abusers are carrying over their abuse of drugs and alcohol into the workplace; and

Whereas, there is reason for concern over the potential hazards caused by supervisors and employees who may be impaired by the effects of a substance of abuse while on the job; and

Whereas, the potential for disaster of immense proportions connected with the operation of nuclear power plants has been demonstrated by the unfortunate tragedy at Chernobyl in the Soviet Union, and the narrowly-averted disaster at the Three Mile Island nuclear facility in Pennsylvania; and

Whereas, because of this potential for disaster, it is essential that the possibility of an accident due to employee or supervisor substance abuse at a nuclear power-generating facility be reduced to a minimum: now, therefore be it

Resolved: that we, your memorialists, respectfully urge and request that the 100th Congress of the United States support and encourage the implementation and utilization of employee assistance programs at all nuclear power generating facilities; and be it further

Resolved, that the 100th Congress of the United States support and encourage the development of substance abuse tests that can be utilized in the nuclear power plant workplace, that are less intrusive upon the privacy rights of employees and that are capable of determining present impairment of a test subject; and be it further

Resolved, that a copy of this resolution, duly authenticated by the Secretary of the Senate to the President of the Senate and the Speaker of the House of Representatives in the Congress of the United States and to each member of the Maine Congressional Delegation.

APPENDIX D. MINORITY SUGGESTED LEGISLATION

FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

No.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY SEVEN

AN ACT to Ensure Confidential and Reliable
Substance Abuse Testing of Employees.

Be it enacted by the People of the State of Maine as follows:

26 MRSA §595 is enacted to read:

§595. Substance abuse testing of employees

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Applicant" means any person seeking employment from an employer. The term also includes any person seeking to use an employment agency's services.

B. "Employee" means a person who is permitted, required or directed by any employer to engage in any employment for consideration of direct gain or profit.

C. "Employer" means any person, partnership, corporation, association or other legal entity, public or private, which employs one or more employees. The term also includes an employment agency.

D. "Law enforcement agency" has the same meaning as found in Title 25, section 3701, subsection 1.

E. "Negative test result" means a test result which indicates that:

(1) A substance of abuse is not present in the tested sample; or

(2) A substance of abuse is present in the tested sample in a concentration below the cut-off level.

F. "Positive test result" means a test result which indicates the presence of a substance of abuse in the tested sample above the cut-off level of the test.

(1) "Confirmed positive result" means a confirmation test result which indicates the presence of a substance of abuse above the cut-off level in the tested sample.

G. "Substance abuse test" means any test procedure designed to take and analyze body fluids or materials from the body for the purpose of detecting the presence of substances of abuse. The term does not include tests designed to determine blood alcohol concentration levels from a sample of an individual's breath.

(1) "Screening test" means a substance abuse test that is reliable within known tolerances and which is used as a preliminary step in detecting the presence of substances of abuse.

(2) "Confirmation test" means a substance abuse test that uses a scientifically-recognized method capable of providing quantitative data specific to the substance of abuse detected. A confirmation test used on a sample which resulted in a positive screening test result must use a method more reliable than the screening test used to test that sample.

H. "Substance of abuse" means any scheduled drug, alcohol or other drug, or any of their metabolites.

(1) "Alcohol" has the same meaning as found in Title 28, section 2, subsection 1.

(2) "Drug" has the same meaning as found in Title 32, section 2805, subsection 4.

(3) "Scheduled drug" has the same meaning as found in Title 17-A, section 1101, subsection 11.

2. Testing procedures. No employer may require, request or suggest that any employee or applicant submit to a substance abuse test except as provided in this subsection.

A. Before establishing any substance abuse testing program, an employer must develop a written policy governing the following:

- (1) When substance abuse testing may occur;
- (2) Collection of samples;
- (3) Chain of custody of samples sufficient to protect the sample from tampering and to verify the identity of each sample and test result;
- (4) The cut-off level at which the presence of a substance of abuse in a sample is considered a positive test result;
- (5) Consequences of a confirmed positive result;
- (6) Consequences for refusal to submit to a substance abuse test; and
- (7) To what extent an employee or applicant who requests a sample to be tested on his own must share the results of the test with the employer.

B. The employer shall provide each employee and applicant with a copy of the written policy under paragraph A.

C. The employer shall obtain and handle samples according to the written policy under paragraph A.

D. At the request of the employee or applicant at the time the test sample is taken, the employer shall make available to the employee or applicant tested a portion or portions of the sample for that person's own testing. The employee or applicant shall pay the costs of such additional tests..

E. The employer shall promptly provide a legible copy of the laboratory report to the employee or applicant tested. The laboratory report shall, at a minimum, state:

- (1) The name of the laboratory which conducted the test or tests;
- (2) The type or types of test conducted, both for screening and for confirmation;
- (3) The results of each test;

(4) The sensitivity or cut-off level of the confirmation test; and

(5) Any available information concerning the margin of accuracy and precision of the quantitative data reported for the confirmation test.

In the case of a negative test result, the report shall specify only that the test was negative for the particular substance.

F. The employer shall pay the costs of all substance abuse tests to which he requires, requests or suggests an employee or applicant submit. The employee or applicant shall pay the costs of any additional substance abuse tests.

3. Use of test results. An employer's use of substance abuse test results is limited as provided in this subsection.

A. Only a confirmed positive result may be used by an employer who desires to use the results of a substance abuse test as a factor in any of the following decisions:

(1) Refusal to hire an applicant for employment;

(2) Discharge of a current employee;

(3) Discipline of a current employee;

(4) Determination of qualification for a promotion or change in work assignment; or

(5) Determination of qualification to receive any employment benefit.

B. An employer may not convey the results of any substance abuse test to any law enforcement agency.

4. Home rule authority preempted. No municipality may enact any ordinance concerning an employer's use of substance abuse tests.

5 Violation; penalty. Any employer who violates this section commits a civil violation for which a forfeiture of not less than \$100 nor more than \$500 may be adjudged.

STATEMENT OF FACT

This bill is the legislation suggested by the Minority of the Maine Commission to Examine Chemical Testing of Employees, created by Resolves 1985, Chapter 86. The reasons for the introduction of this bill, as well as the text of the entire Minority Report, are found in the Report of the Maine Commission to Examine Chemical Testing of Employees.

The bill permits employers to use substance abuse testing provided they follow certain safeguards that guarantee, to the greatest extent possible, accuracy and confidentiality.

"Substance of abuse" is defined as including alcohol, scheduled drugs and other drugs, as well as their metabolites.

The bill defines "substance abuse test" as a procedure that analyzes fluids or other materials from the body to determine if substances of abuse are present in the body of the person tested, indicating that the person used that substance sometime in the past. The term does not include, however, breathalyzers or other tests used to determine blood alcohol concentration levels from a sample of an individual's breath. This is because such breath tests are universally recognized as accurate and non-invasive means of testing present alcohol impairment. The bill recognizes two levels of substance abuse tests: "Screening tests" and "confirmation tests." A screening test must be accurate within a known margin of error. It is usually used as a preliminary step in testing for substances. An employer may not use the result of a screening test as a factor in certain employment decisions. A confirmation test is usually performed on the sample after the screening test has indicated a positive result. A confirmation test must use a scientifically-recognized method capable of providing quantitative data about the specific substance tested for. That is, the confirmatory test must be of higher accuracy than the screening test, and must be able to indicate specific levels of the substance of abuse in the sample.

In order to clarify when a substance abuse test result may be used for an employment decision, the bill clearly defines both "positive test result" and "negative test result." A negative test result occurs when the test shows that the sample contains none of the substance tested for, or an amount of that substance below the cut-off level set by the employer or testing laboratory. A positive test result indicates that the substance is present in the sample above the cut-off level. A "confirmed positive result" means that the sample was subjected to a confirmatory test, which also produced a positive result.

The bill allows the use of substance abuse tests if the employer develops a written policy concerning specific aspects of testing. The required aspects of the policy are intended to enhance the accuracy and fairness of a workplace testing program. The policy must specify when testing may occur, such as "for cause," at random, periodically, workforce-wide, pre-employment, etc. The policy must describe how samples will be collected, including when an observer will be required to eliminate the possibility of tampering or diluting samples. The policy must indicate how the employer, and any laboratory used by the employer, protects each sample from tampering and ensures the identity of each sample. The employer must state in the policy at what level the cut-off point is set to determine when a sample is positive. If a laboratory is used, the laboratory may set the cut-off level, but the employer must provide that information in the policy. Too high a cut-off level will allow true positive results to be treated as negative results, while a cut-off level that is too low will include some true negatives to be considered as positive results.

The employer's policy must explain what may or will happen when an employee or applicant tests positive in a confirmation test. If discretion will be used in each case, the policy must state that fact. The policy must also indicate the consequences that an employee or applicant faces when he or she refuses to submit to a substance abuse test.

The employer's policy must also describe the extent to which an employee or applicant must share the results of a test he or she has commissioned with the portion of the sample provided by the employer. The policy may require documentation and chain of custody as required when the employer is responsible for the testing.

The employer must provide a copy of the written policy to every applicant and employee.

If the employee or applicant requests, at the time the sample is to be taken, the employer shall make available to the employee one or more portions of the sample to be tested so that the employee can have his or her own tests made. Any tests run on a sample provided to the employee shall be paid for by the employee. The employer shall bear the costs of all tests to which he or she requires, requests or suggests an employee submit as a condition considered in certain employment decisions. The bill requires that the employer promptly provide a detailed copy of the test results to the employee or applicant tested so that the employee or applicant will know all the substance abuse test evidence on which the employer may base an employment decision.

An employer may use the results of substance abuse tests as factors in employment decisions. However, the test result used must be a confirmed positive result when the employment decision made by the employer is:

- 1) Refusal to hire an applicant;
- 2) Discharge of a current employee;
- 3) Discipline of a current employee;
- 4) Determination of qualification for a promotion or change in work assignment; or
- 5) Determination of qualification to receive any employment benefit.

Because the decisions are so important, the accuracy of the test result must be as high as possible; requiring that, if a test result is used, it must have been confirmed satisfies that need.

Because confidentiality is very important in substance abuse programs, the bill prohibits employers from conveying substance abuse test results to any law enforcement agency. This will ensure that the employer does not operate in the sphere of law enforcement.

The bill provides that a municipality does not have the power to adopt an ordinance governing substance abuse testing, whether it be stricter or more lax than this law.

An employer who violates this section is civilly liable, and the forfeiture may range from \$100 to \$500.

APPENDIX E. TRANSCRIPT OF A PRESENTATION BY LEWIS L. MALTBY,
Vice-president of Drexelbrook Controls, Inc.

THE DRUG TESTING DEBATE: REMEDY OR REACTION?

AN EMPLOYER'S PERSPECTIVE

Presented by:
LEWIS L. MALTBY
Vice President
Drexelbrook Controls, Inc.
Horsham, Pennsylvania

My company makes precision instruments that control hazardous materials in chemical plants and refineries. If our equipment doesn't work right - people die. The recent tragedy in Bhopal, India is an example of what can happen when our type of equipment malfunctions. We can't tolerate workplace drug abuse - and we don't.

But we don't do drug testing and we're not going to do drug testing.

Our reasons for deciding against drug testing have little to do with civil liberties. We're not a philanthropic organization. But when our top management considered the idea of drug testing, we concluded that it would actually hurt our performance and our profits. My purpose is to share our reasoning with you in the hope that it will be useful to you should you have to negotiate with your management on this issue.

One reason we don't do drug testing is that the testing isn't accurate. The combination of cross-reactivity inherent in immunoassay technology and the lack of careful skilled handling of test samples, caused by the economic pressure to minimize testing costs, has produced staggering error rates. (Thirty percent false positives is typical, and the Center for Disease Control found up to seventy percent false positives at some labs.)

These kinds of error rates make drug testing useless to me as an employer. It costs a lot of time and money to recruit and train good employees. It takes us, on the average, between two and three months to find and hire a new employee, six more months to train them, and another two years before they become fully effective. We have to spend time and money on interviews, reference checks, and training. And we have to pay the new employees while they are learning their jobs. It costs us over \$10,000 to hire and train even an entry level employee. For the average employee this cost exceeds \$25,000. Every time we terminate an employee for drug abuse I need to be confident that he or she really is a drug abuser. I can't afford to fire a productive employee on the basis of a test that isn't much better than flipping a coin.

Even more important, even if the tests were accurate, it wouldn't tell me what I really need to know. As an employer, I need to know an employee's condition when he or she shows up for work. And that's exactly what drug testing does not tell me. Traces of drugs remain in the urine from three days to several weeks, depending on the drug. So, a positive drug test result doesn't tell me anything about an employee's condition at the time of the test. For all I know, that employee who just tested positive for marijuana might be sober as a judge. And I can't afford to fire good employees because of something they do on their own time that doesn't affect their job performance.

Our industry is very competitive. We have at least six major domestic competitors trying to take business away from us. We're now starting to face competition from foreign manufacturers as well. In order to succeed in this kind of environment our company's performance and the performance of each individual in it has to be as good as it can possibly be. But, if I select people based on factors other than performance, I won't get the strongest possible team. In a competitive world I have to select my people based on performance and performance alone.

Finally, and most important, we don't do drug testing because of the damage it would do to the attitude of our entire workforce. We want every employee to give us 100% effort every day. And we want them to make every decision with the best interests of the company at heart. And, by and large, we get that. But that kind of commitment doesn't come easily. You have to earn it. One way we earn it is by treating our employees like adults. We trust them to do their jobs right and don't subject them to a lot of unnecessary rules. For example, we don't have a dress code and we don't have fixed work hours. We trust our employees to know what working hours and style of dress are required for them to get their jobs done. Another thing we do to earn that commitment is to respect their rights. For example, we scrupulously avoid prying into our employee's private lives. Their private lives are their own and we don't interfere.

But drug testing flies in the face of all of this. 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.

At this point, many employers would respond, "I didn't realize there were all these problems with drug testing - but we have to do something." That's right - they do have to do something. Our company doesn't tolerate drug abuse and I'm certainly not advocating that others tolerate it either. So let me tell you about our program to combat workplace drug abuse.

Our program to stop drug abuse is something we should all do anyway - we practice good management of people.

We business people always say that people are our most important asset. And it's true. What we do at Drexelbrook is try to put that idea into practice.

For example, when we hire a new employee, we conduct several in-depth interviews - with different interviewers. And we check references - thoroughly. Not with the personnel department - all they ever give us is name, rank, and serial number - but with their previous supervisors. And we screen out the drug abusers. Not because anyone tells us directly, of course, but by learning about which applicants had chronic absenteeism, inconsistent quality, and bad work habits at their former jobs. And we find out with much better accuracy than with a hit or miss drug test.

Once we've hired someone, we take the trouble to get to know that person - as a person. And when employees have problems outside the workplace, we try to help. Sometimes we help by having our financial people help arrange a personal loan at our bank. Sometimes we help by having our legal department straighten out a problem with an employee's landlord. Mostly, we help just by listening and caring.

Finally, we tell our employees what performance we expect from them - and then pay attention to their results. If an employee's performance consistently falls short of our expectations, their supervisor sits down with them and discusses the problem. Usually they tell us what it is. And when the problem is drugs or alcohol, we get them into a treatment program.

That's our program - and it works. By doing good interviewing and reference checking, we almost never hire an employee with a drug or alcohol problem. We have had employees who developed such problems after we hired them. But our supervisors noticed their declining job performance quickly, confronted them, and got them into treatment. Almost all those individuals are still with us - as productive employees.

Let me tell you about one of our employees who developed a problem. This employee, I'll call him Joe, was a lathe operator in our machining shop. For the first five years Joe was with us he was a very good employee, but then he started to slip. His sick days started to pile up, he was frequently late for work, and the quality of his work started to decline. His supervisor noted the pattern and sat down with him to discuss the problem. Joe acknowledged that his performance had slipped, denied having any problems, and promised to do better. Unfortunately, his performance only got worse. So, we confronted him again. The time he reluctantly confessed that he had an abuse problem, but said he would stop on his own. As

you can imagine, he failed. Finally, the Production Manager explained to him that his performance had declined to a point where it was no longer acceptable and, since he had failed to handle it himself, he had no alternative but to accept professional help, unless he wanted to lose his job. When he agreed to this, he was immediately escorted to the drug and alcohol unit of the local hospital, which had a place waiting.

Joe was in treatment for just over a year. He completed treatment two years ago. Since then, his work had improved so much that when an opening occurred for a first level supervisor, we gave Joe a shot at it. He did so well that we sent him to our management training program. Joe now runs our entire machine shop.

I've spoken to other companies with employee assistance programs and they report similar success.

So there's the choice that industry faces. We can attack workplace drug abuse with drug testing. It's quick, it's easy, and it's cheap. It just doesn't work. It gives us inaccurate and irrelevant information and undermines the trust of the good employees who resent being ordered to pee in a bottle when they've done nothing wrong. Or, we can take the time to learn about our employees, watch their job performance, and help them when it starts to slip. It's time-consuming, difficult, and expensive. But it works. Not just in preventing workplace drug abuse, but in creating a committed and productive workplace.

Workplace drug abuse is a serious problem. Everyone agrees that employers must take steps to deal with it. Some people think the answer is drug testing. But there is another way to deal with the problem. And it's a better way for management as well as labor.