

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS

The meeting was called to order by Representative Robert H. Miller at
Chairperson

12:00 noon a.m./p.m. on April 4, 1988 in room 526S of the Capitol.

All members were present except:

Representatives Long & Roper
Representative Sifers - E

Committee staff present:

Mary Torrence, Revisor's Office
Mary Galligan, Research Department
Lynda Hutfles, Secretary

Conferees appearing before the committee:

Galen Davis, Governor's Office
Dave Johnson, KBI
Dr. Gordon Risk, American Civil Liberties Union
Angella Rinacdo, Department of Corrections
Don Lind, Community Corrections Association

The meeting was called to order by Chairman Miller.

Representative Barr made a motion, seconded by Representative Rolfs, to approve the minutes of the March 23 meeting. The motion carried.

The Chairman reminded the committee of the changing agenda and asked them to add SB678 to Wednesday's agenda.

SB643 - Drug Screening

Galen Davis, Governor's Office, gave testimony in support of the bill dealing with drug screening of applicants for and current employees in safety sensitive positions in state government. Safety sensitive positions means state law enforcement officers who are authorized to carry firearms and state correctional officers. Screening of current safety sensitive employees would be based upon reasonable suspicion of illegal drug use. Mr. Davis also suggested that an amendment be offered authorizing that the Governor and Lt. Governor, heads of state agencies who are appointed by the Governor and employees on the Governor's staff also would be tested to establish the executive branch of state government as an example of a drug-free work force. See attachment A.

There was discussion on the consequences of refusal to take a drug test and how the rules and regs would be fashioned. There was concern that employees would be terminated on the first offense.

The Kansas State Troopers Association, represented by Pete McGill & Associates, distributed a statement in support of SB643. See attachment B.

Dave Johnson, Kansas Bureau of Investigation, expressed support of the bill as it left the House. He also added that the Attorney General wished to be included in the list of persons to be screened under the bill.

Dr. Gordon Risk, American Civil Liberties Union, expressed concern for SB643. There need to be safeguards build into this bill so that employees are not fired. Drug testing of job applicants for safety sensitive positions with the state would violate these constitutionally guaranteed rights. See attachment C.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS

room 526S, Statehouse, at 12 noon a.m./p.m. on April 4, 19

There was discussion as to why the Senate amended the bill and the chairman said he felt it was done to politically embarrass the Governor.

Representative Rolfs made a motion, seconded by Representative Walker, to reinstate stricken language and to include the Attorney General. The motion carried.

Representative Bryant made a motion, seconded by Representative Eckert, to report SB643 favorably as amended. The motion carried.

Representative Sebelius expressed her feeling that mandatory drug screening was not something she wants to support.

Representative Hensley opposed the bill because he has a problem with leaving it open ended. There need to be safeguards written into the statute to prevent employees from being fired or applicants from being discriminated against. He reserved the right to include these concerns on the floor when debated.

SB457 - Community Corrections

Angella Rinaldo, Department of Corrections, explained that the bill as amended would make several changes to the Community Corrections Act. The bill would eliminate the "charge back" system and would establish the FY1988 entitlement amounts for the Community Corrections programs as the minimum that a program would receive in the future. The bill also authorizes the Secretary of Corrections to transfer unbudgeted or unused funds from one Community Corrections program to another, to contract with Community Corrections programs for provision of services to inmates classified as less than minimum security; and authorizes counties to enter into contracts for the provision of community correction services in other counties. These monies should be based on annual needs and the programs should not be given excess funds. Programs should be funded for their true need. The programs need more monitoring by the state. Programs should be justifying their expenses. Ms. Rinaldo was asked to get a summary of what they feel the closest fiscal impact would be if this bill is passed compared to the present formula system.

Don Lind, President of Community Corrections Programs, expressed support of the bill. The formula provides a dollar figure and results in an amount of money that addresses local correctional needs. He said they are open to changes that will provide for the best services for the best dollar. They like the formula approach. This lets counties know how much money they have to spend.

Mr. Lind said he was willing to work with the Department of Corrections to get figures together.

The meeting was adjourned.

STATE OF KANSAS



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Mike Hayden Governor

Testimony Concerning SB 643
Presented To
The House Federal and State Affairs Committee
April 4, 1988
By
Galen E. Davis
Governor's Special Assistant on Drug Abuse

Mr. Chairman, members of the committee, I appreciate the opportunity to appear before you today to speak in favor of Senate Bill 643, concerning drug screening of applicants for and current employees in safety sensitive positions in state government. As is noted in this bill, safety sensitive positions means state law enforcement officers who are authorized to carry firearms and state correctional officers. Screening of current safety sensitive employees would be based upon reasonable suspicion of illegal drug use.

Additionally, we would request an amendment authorizing that the Governor and Lieutenant Governor, heads of state agencies who are appointed by the Governor and employees on the Governor's staff also would be tested to establish the executive branch of state government as an example of a drug-free work force.

I. Introduction

Although America leads the world in many positive ways it is also unfortunately true that America is the leader in the use of illicit drugs. It is estimated that Americans now consume 60 percent of the worlds production of illicit drugs. Sadly, there are many statistics that reinforce this fact. It is estimated that:

Attach A

- * 23 million Americans use marijuana regularly
- * 20 million have tried cocaine and 5 million use it regularly
- * 2/3's of the people entering the workforce have used illegal drugs and 44 percent have used them in the past year
- * 10 to 23 percent of American employees use illicit drugs
- * The U.S. Chamber of Commerce estimates that, "Today in the U.S., 5,000 Americans will try cocaine for the first time; nearly 2,000 Americans will be arrested for drug related crimes and more than 2,700 boats and planes will smuggle illegal drugs into the country."
- * \$100 billion is spent annually on illicit drugs and another \$100 billion is lost to our economy due to drug related accidents, lowered productivity, police, court and hospital costs.

In a response to our societies drug abuse dilemma, Governor Mike Hayden outlined his approach to this problem in the March 26, 1987 Special Message to the Legislature entitled, Toward a Drug-Free Kansas. In this message and in the Governor's Legislative Message Presented To The 1988 Legislature, Governor Hayden requested your assistance and support for a variety of programs. This comprehensive set of programs includes drug legislation, education, prevention, intervention, treatment, law enforcement and state employee drug screening. All are necessary elements to prevent and reduce illicit drug use in our state.

II. Purpose and General Guidelines

No employer can consider themselves immune to the overwhelming evidence of illicit drug use in this society. Public employers as well as their counterparts in business and industry are learning that they have a significant role to play in addressing this nations drug problem.

Illicit drug use can have serious adverse effects on users, their productivity, their dependents and co-workers. Additionally, drug abusing employees in certain positions can also affect the safety of the general public. As the states largest employer, state government can and must address this problem.

For these reasons Governor Hayden has called for:

- * State employee education about drug abuse
- * Supervisor training to identify characteristics of a drug abusing employee and methods of referral for assessment and treatment when necessary
- * An enhanced employee assistance program for state employees and
- * Legislation authorizing drug screening of certain state employees

Today, we are requesting your approval for this legislation authorizing drug screening for specified state employees. The Governor's Special Assistant and Coordinator of Drug Abuse Programs, Chief Counsel, Department of Administration Attorneys, and the Director of the Division of Personnel Services have coordinated with members of the Attorney General's staff to design a constitutional drug screening program for certain state employees. A safer Kansas, safer working conditions, early intervention and rehabilitation, if necessary, are goals of the Governor's drug screening proposal.

Drug screening is an accepted method of ascertaining and intervening in illicit drug use in the work place. In 1983, only 3 percent of the Fortune 500 companies had a drug screening program. By 1986, that number had increased to 30 percent with an estimate of 50 percent by the end of 1988. Private industries that utilize drug screening include Kodak, Du Pont, General Motors, General Electric, The New York Times, and United Airlines. In the public sector federal, state and local units of government have established drug screening programs.

The legislation before you today is the product of a great deal of research. Each element in this bill has been carefully selected based on research, court decisions, and the experience of other public employers.

Courts have generally found that the drug screening of applicants for safety sensitive positions is constitutional. Further, courts have found constitutional the drug screening of current employees in safety sensitive positions when there is reasonable suspicion that the employee is using an illicit substance.

The Governor is specifically defining safety sensitive positions as state law enforcement officers who are authorized to carry firearms and state correctional officers.

Although this bill authorizes the director of the division of personnel services to establish and implement the drug screening program we are prepared to discuss guidelines that we would include to assure the drug screening integrity, accuracy, and fairness.

III. Specific Minimal Guidelines

The specific minimal guidelines for the state employee drug screening program includes:

1. A formal written state employee policy statement on illicit drug use and drug screening, which includes:
 - a)The states commitment to a drug-free work place
 - b)Consequences of violation of the substance abuse policy
 - c)Circumstances of conducting drug screening
 - d)Consequences of refusal to participate in drug screening
 - e) statement that safety and rehabilitation if necessary, not punishment, are the goals of the drug screening program.
2. Prior notice of applicants relative to the required pre-employment drug screen
3. Positions of current state employees subject to drug screening will be specifically defined and communicated prior to implementation of the screening program
4. Current employee screening only for reasonable suspicion of illicit drug use
5. Providing an employee assistance program for employees with problems
6. Providing the use of accumulated leave for rehabilitation if necessary
7. Define marijuana and cocaine as the minimum illicit drugs to be screened for in this program. Optional illicit drugs that can be added to the screen will be listed.

8. Screening procedures will be established to ensure:

- a) Confidentiality of results
- b) A questionnaire to rule out possible positive readings for over the counter and prescription medications
- c) Accurate, unobserved collection of a urine sample which minimizes the invasion of the employees privacy
- d) Proper chain of custody
- e) Primary screen with positive screens verified through gas chromatography / mass spectrometry (GC/MS)
- f) Retention of positive specimens
- g) Rechecking of screening procedures prior to reporting of a positive result
- h) Employees right to explain why they have tested positive for drugs which includes medical review of statements
- i) Employees right to rehabilitation for first positive screen results

9. The selection of drug screening laboratories that meet scientific and technical guidelines for drug testing programs as prescribed by the U.S. Department of Health and Human Services.

IV. Other State and Local Drug Screening Criteria

California - (San Francisco) reasonable grounds

Connecticut - Applicants; reasonable suspicion; random with safety sensitive

Iowa - Pre-employment for peace officers and correctional officers

Maryland - Public safety employees under reasonable suspicion

Minnesota - Reasonable suspicion

North Carolina - (Raleigh) applicants for public safety positions

Rhode Island - Reasonable grounds

Utah - Fair and equitable testing

Vermont - Applicants as a part of pre-employment physical; probable cause for current employees

Virginia - Reasonable suspicion

V. Synopses of Leading Court Cases on Drug Screening

While the courts have remained divided on the issue of drug screening, those courts with negative rulings have been with programs that conducted random drug screening and those that commenced screening without prior notice to employees about the screening program. Neither of these elements would apply to the screening program that we are proposing in this bill.

The Fourth Amendment to the Constitution provides for the right of people to be secure against unreasonable searches. In deciding whether a drug screening program violates the Fourth Amendment, courts attempt to establish if the search was reasonable.

Generally:

1) Courts attempt to balance the interest of the individual subject to the test with the right of the employer to have a drug-free work place, and to provide for the safety of co-workers and the public

2) Courts generally have not required probable cause or a search warrant for administering a drug screen.

3) Courts have upheld programs based on individualized suspicion of drug use and programs based on the nature of the jobs being performed.

4) Courts have reviewed the procedures to ensure accuracy of the drug screen. We are proposing that:

a) all federal guidelines on drug screening laboratory procedures follows

b) retest of all initial positive results utilizing a methodology as accurate as the GC/MS

Enclosed in addendum 1 are court cases on drug screening. I believe you will see that our proposed program is reflected in the cases that have been upheld and that our proposed program does not contain the elements of those cases that were not upheld.

Conclusion

Governor Hayden has said that Kansas state employees "are the state's most valuable asset." The Governor recognizes the many positive professional and personal contributions that state employees make to the state of Kansas. It is further understood that the health of the employee is paramount to the carrying out of their responsibilities.

In the March, 1988 Kansagram the Governor announced Healthcheck '88 a free health risk appraisal program designed exclusively for state employees. This confidential individualized appraisal is designed to help state employees identify potential threats to their health before they become serious illnesses. Additionally, the Governor's staff is working to design an expanded employee assistance program for state employees.

In addition to his concern for the health of state employees the Governor values and seeks to protect the rights of state employees. The Governor has consistently stated that he and his staff will work with the Attorney General to ensure that the drug screening program will be constitutional. The Attorney General in responding to measures in the bill before you stated, "This proposal, in my opinion, falls within the constitutional guidelines for drug testing established in numerous court decisions. In addition, it complies with the drug testing guidelines set forth in Attorney General Opinion No. 87-49."

Public policy requires that government be responsive to societal concerns and responsible for the actions of its employees. Drug screening where legal and appropriate is a useful tool in combatting the adverse consequences of illicit drug use by employees and potential employees. Drug screening of applicants will help to ensure that the state is hiring drug-free safety sensitive employees. Drug screening of current safety sensitive employees when there is reasonable suspicion of drug use is a scientifically reliable method of substantiating concerns that the employee is using drugs. Drug screening further ensures the safety of the public, the safety of co-workers, and rehabilitation for drug abusing employees.

We encourage your positive support for adding responsible drug screening to this state's comprehensive approach to prevent and reduce illicit drug use.

Thank you Mr. Chairman and members of the Committee for considering our comments on this bill.

ADDENDUM I

National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir., 1987) - The Fifth Circuit upheld the drug testing program of the United States Customs Service which tests applicants and current employees seeking positions involving the interception of drugs. The courts believed that the government had a strong interest in ensuring that individuals working in drug enforcement not be drug users.

McDonnell v. Hunter, 809 F.2d 1302 (8th Cir., 1987)- The Eighth Circuit ruled that random testing of corrections department employees who have regular contact with prisoners in medium or maximum security prisons was reasonable.

Testing of other employees must be based on individualized suspicion.

Jones v. McKenzie, 1 IER Cases 1076 (DC Cir. 1987)- The District of Columbia Circuit decided that drug testing was reasonable as part of a routine medical examination where the duties of employees involved direct contact with school children and the employer had a legitimate safety concern. The school system had a compelling governmental interest in ensuring the safety of handicapped children and could require drug testing for Transportation Branch employees as a part of routine employment-related medical examinations. The court believed that the EMIT test was not sufficiently reliable to serve as the sole basis for adverse action against an employee who tested positive.

Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District, 510 NE2d 325 (NYctApp. 1987) - The Court of Appeals of the State of New York has ruled that drug testing of probationary teachers could only be required where there was reasonable suspicion to believe that the individuals were drug users. In balancing the government's concerns that its teachers not be drug users with the privacy rights of teachers, the court concluded that reasonable suspicion was the appropriate standard.

Capua v. City of Plainfield, 643 F. Supp. 1507 (D.C. NJ, 1986) - The United States District Court for the District of New Jersey has declared the surprise drug testing of firefighters an unconstitutional violation of the Fourth Amendment's protection against unreasonable searches and seizures. The Court criticized the city for failing to develop procedural guidelines and to take precautions to ensure the confidentiality of the test results. The court believed, that to be constitutional, drug tests must be based on reasonable suspicion.

Feliciano v. City of Cleveland, 661 F. Supp. 578 (D.C. N. Ohio, 1987) - The United States District Court for the Northern District of Ohio has ruled that the surprise drug testing of police cadets violated the Fourth Amendment since there was no reasonable, individualized suspicion of drug use. The court believed that such a standard would protect the Fourth Amendment rights of cadets without impairing the ability of the city to remove drug users.

National Association of Air Traffic Specialists v. Elizabeth Dole, Secretary of Transportation, Civil Action No. A-87-073, (D.C. Alaska, 1987) - The United States District Court for the District of Alaska has upheld a drug testing program for flight service specialists which was conducted as part of an annual medical examination. The court based its opinion on the national interest in air safety which justified the intrusion into the legitimate expectation of privacy by the employees.

American Federation of Government Employees v. Elizabeth Dole, Secretary of Transportation, Civil Action No. 87-1815, (D.C. DC, 1987) - The United States District Court for the District of Columbia upheld a drug testing program for employees who worked in jobs concerned with public health, safety, national security and law enforcement. The court believed that the duty to ensure the public safety justified the drug testing. The court found that the program "reflects a high degree of concern for employee privacy interests and is carefully tailored to assure a minimal amount of intrusion."

Mulholland v. Department of the Army, 660 F. Supp. 1565 (D.C. E. Va., 1987) The United States District Court for the Eastern District of Virginia concluded that the random testing of employees who worked in aviation-related jobs was reasonable due to the safety-related nature of the jobs.

Taylor v. O'Grady, Civil Action No. 86 C 7179, (D.C. N. Ill., 1987) - The United States District Court for Northern Illinois ruled that the annual drug testing of every correctional department employee violated the Fourth Amendment. The court concluded that absent individualized, reasonable suspicion of drug abuse, trained supervision was equally effective in detecting chronic abusers as well as occasional drug users who come to work impaired.

TESTIMONY
TO
HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

Senate Bill 643
April 4, 1988

The Kansas State Troopers Association supports Governor Hayden's drug screening program addressed by Senate Bill 643.

Troopers are given a very high degree of public trust and we wish to assure Kansans that we are drug free as we attempt to decrease the flow of illegal drugs into and through our state.

If a drug test is requested of the officer, we would ask that the testing be performed by the officer's personal physician. This physician would then be requested to either work with the patrol doctor to determine if additional tests are needed or provide an acceptable rehabilitation program.

In the event of a test that indicates illegal drugs we would hope that a retest be required to determine the true nature of the drug to see if it is a prescription drug or truly an illegal substance.

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Either case should be dealt with in a positive manner that is beneficial to the state and the employee.

Strict guidelines should be established either in the bill itself or through agency policy to administer the original test, the retest and the treatment procedures to eliminate the problem.

My name is Doctor Gordon Risk, and I'm the president of the American Civil Liberties Union of Kansas. I'm here today to register our comments and concerns regarding SB #643.

The Fourth Amendment to the U.S. Constitution guarantees to the people of this country the right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures by the government. The Fifth Amendment guarantees individuals equal protection of the laws. One does not lose these rights simply because one is applying for a government job. Drug testing of job applicants for safety sensitive positions with the state would violate these constitutionally guaranteed rights.

Our's is not a country in which some citizens have more constitutional rights than others. The courts regard drug testing as a search and seizure, and to require applicants for government jobs, or a certain class of applicants for government jobs, to give up their right to be free of unreasonable searches and seizures, is to deny them the equal protection of the laws. Job applicants do not have fewer constitutional rights than job holders, even though job holders certainly have job-related, non-constitutional rights and prerogatives not available to the mere applicant. Nor does one lose constitutional rights as a consequence of increasing job-related responsibilities, as would be the case with this bill. The men who wrote the Constitution would have found such reasoning quite alien.

Drug testing of job applicants should be opposed for reasons of due process. False positives are a problem with laboratory tests, which is particularly the case with drug testing, where, in addition to the usual factors predisposing to error, you have the problem of cross reactivity among drugs. One might anticipate, in fact, that most of the positives would be false positives under the circumstances contemplated. Concern for due process requires that one not be harmed or damaged on the basis of false information. This bill contains no provisions to prevent this from happening.

The legislature teaches by example. The lesson to our law enforcement and correctional officers from this legislation would be that search and seizure may take place without probable cause, that people are not equally protected by the laws, and that due process rights may be violated in certain circumstances. Is this the message you want to send to those with responsibility for upholding and administering our laws?