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Drug Testing From the Arbitrator's Perspective

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Abstract

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KEYWORDS: testing, workplace, drug

Drug Testing From the Arbitrator's Perspective

Tia Schneider Denenberg* and Richard V. Denenberg**

I. Introduction: The Role of Arbitration

Much of this nation's industrial policy on drug testing will be fashioned within workplaces which are governed by collective bargaining agreements. Even though only about one-fifth of American workers are covered by such agreements, policies and practices which are set by collective bargaining often form the model for human resources management throughout industry. These agreements typically provide for arbitration of disputes that are not settled during the grievance procedure. Given the current surge of interest by management in drug testing, grievances over such policies are likely to become a regular feature of the case-load of arbitrators. Indeed, one federal court has already ruled that drug testing disputes are the province of arbitrators. In dismissing a union challenge to an employer testing program, the United

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States District Court for Oregon said that "it is appropriate that these problems be addressed through work rules, which be evaluated by arbitrators."¹

For many arbitrators drug testing will be a relatively new subject. Although issues such as overtime pay and job classification have been an arbitral staple for decades, hardly any drug cases appeared before the 1960's — the Bureau of National Affairs (BNA) Labor Arbitration Reports printed its first cocaine case in 1961 — and only in recent years have such cases begun to proliferate. A survey of more than 3,600 American Arbitration Association (AAA) labor cases in 1985-86 found that in only seven percent was alcohol or drugs the main issue.² The specific issue of drug testing is an even more recent phenomenon. Testing is largely a product of the "war on drugs" sentiment which surfaced in force in the workplace in 1985. The first cases dealing with the complex issues raised by testing are just now beginning to appear.

How will arbitrators analyze and decide these issues? What will be the "common law of the shop,"³ in Justice Douglas's memorable phrase, as it emerges in the pages of arbitral opinions? To answer these questions, we should understand how cases come before arbitrators and what tests they normally apply to industrial relations disputes.

A drug testing program usually will be subjected to arbitral review when a disciplinary action — a discharge or suspension for a drug offense — has been challenged through the grievance procedure. The standard arbitral rule in such cases is that the employer bears the burden of proving that it had "just cause" to discipline the grievant, and the arbitrator typically scrutinizes the employer's case with a number of basic questions in mind. Among these are:

Was the employer's action arbitrary or capricious or discriminatory?;

Was the rule allegedly violated by the employee reasonable and uniformly enforced?;

Was the collective bargaining agreement violated by the employer in imposing the penalty?; and

Was the grievant accorded basic due process rights?

1. *Association of Western Pulp and Paper Workers v. Boise Cascade Corp.*, No. 86-873-PA (D. Or. Sept. 11, 1986), reported in *STUDY TIME* (AAA), no. 4, 1986.

2. Memo from Richard M. Reilly, Regional Director, AAA, Boston, Jan. 7, 1987.

3. *United Steelworkers of Am. v. Warrior & Gulf Navigations Co.*, 363 U.S. 574, 582 (1960).

When arbitrators begin asking such questions about testing programs, certain inherent defects in the technique may begin to appear. Although drug testing is now being widely implemented, because of the desire of employers to enlist in the war on drugs, the disciplinary consequences of testing may well prove difficult to enforce in arbitration if these traditional standards are applied.

II. Ignoring Alcohol and Punishing Use of Other Chemicals

The discrimination standard is likely to be applied initially in situations in which the employer has aimed a testing program at drug use but has excluded from the program the drug ethanol, or common drinking alcohol. Employer urine screening programs generally do not test for alcohol. Thus, those employees who test "positive" are merely those whose substance abuse extends only to non-alcoholic substances. A threshold question before the arbitrator, therefore, is whether it is inherently unfair or discriminatory for an employer to deal more harshly with an employee involved with non-alcoholic drugs than one involved with ethanol.

Despite the current enthusiasm in Washington and elsewhere for rooting out the abuse of cocaine and marijuana, the research data indicate that alcohol is by far the most abused drug in modern industrial societies. The Royal College of Psychiatrists in Britain issued a study in 1986 on the deleterious effects of drinking upon that country's populace; it was entitled, "Alcohol, Our Favorite Drug."

This characterization is also borne out for the American population by a recent insurance industry study of drinking patterns:

Alcohol remains the most widely used and abused drug in the United States, despite the recent publicity surrounding the increasing prevalence of cocaine and other illegal drugs. . . . Clearly, alcohol abuse and dependence are problems of major health import that deserve as much, if not more media, medical and social attention as is currently given to the use of illicit drugs.⁴

A television news poll discovered that 66 percent of the nation's population used alcohol while only four percent used drugs.⁵ A survey of households by the National Institute on Drug Abuse found that in

4. *Alcohol Use in the United States*, STATISTICAL BULLETIN, Metropolitan Life Ins. Co., Jan.-Mar., 1987, at 20-25.

5. *ABC World News Tonight*, Sept. 19, 1986.

1985 about 10 percent of the U.S. population (12 years or older) were current users of marijuana. Cocaine users amounted to three percent; no other drug had users amounting to more than one percent. In contrast, 59 percent of the population were alcohol users.⁶

Doctors Page Hudson and Arthur McBay, two respected forensic scientists with the Chief Medical Examiners' Office in North Carolina, have concluded that alcohol abuse is the primary cause of lost productivity in the workplace. They question the reluctance of employers to concentrate on this menace, even though testing for alcohol abuse is relatively simple:

If health, safety, productivity, performance and cost-effectiveness are criteria, testing for marijuana should have very low priority. Alcohol has a greater adverse effect. . . than all of the other drugs. . . .⁷

The Chief Medical Examiner's office produced a study of 600 road accident fatalities. The study concluded that alcohol could have been responsible for about two-thirds of the accident fatalities, while traces of drugs unaccompanied by alcohol were present in only about two percent of the victims.⁸ Those with experience in employee treatment programs usually accord alcohol the number one rank on the list of addictive threats. The validity of their belief is borne out by one much-studied group: airline pilots. Dr. Richard Masters, the aeromedical advisor to the Air Line Pilots Association has estimated that of the 800 cases of pilot substance abuse he has treated since 1974, "less than five involved pure drug abuse;" the vast majority involved alcohol, although some of those were dual abusers.⁹

The Federal Aviation Administration (FAA) has reported that of a total of 3,996 general aviation pilots who died in accidents between 1976 and 1985, only twenty-two were found with traces of "illegal

6. *Highlights of the 1985 National Household Survey on Drug Abuse*, NIDA Capsules, Washington, D.C., Rockville, Md.: National Institute on Drug Abuse, Nov. 1986.

7. McBay & Hudson, *Cost Effective Drug Testing* 8 (Oct. 1986) (unpublished manuscript). See also McBay, *Efficient Drug Testing: Addressing the Basic Issues*, 11 NOVA L. REV. 647 (1987).

8. Mason & McBay, *Ethanol, Marijuana and Other Drugs in 600 Drivers Killed in Single-Vehicle Crashes in North Carolina, 1978-81*, 29 J. FORENSIC SCIENCES 987 (1984).

9. *U.S. Weighing Wider Drug Tests for Airlines' Operational Workers*, N.Y. Times, Sept. 28, 1986.

drugs of abuse" while another fourteen were found with traces of "legal drugs of abuse." In contrast, out of 5,853 pilots who died in general aviation accidents, from 1968 to 1985, 441 were found to have a blood alcohol concentration above 0.04 — a significant impairment level.¹⁰

Drinking by members of this occupational group, even while off duty, has been shown to be a much more serious threat to safety than previously recognized. In 1984, a report by the National Transportation Safety Board called attention to evidence which suggested that the "hangover effect" impeded pilots' responses to critical cockpit situations long after alcohol ceased to be detectable in the bloodstream.¹¹ More recently, a Stanford University study found that pilot performance — such as the ability to keep on course — was significantly affected as much as fourteen hours after heavy drinking. At the moment, the FAA requires only eight hours to elapse between drinking and flying—the so-called "bottle to throttle" period.¹²

Thus, if promoting industrial safety and productivity were the goal, employers of pilots should be giving due emphasis to eradicating alcohol abuse, including post-metabolism performance effects. Effort spent on testing for drug abuse might be better spent on measures to reduce the influence of alcohol in the workplace. One simple approach would be to carefully examine the qualifications of the 16,000 licensed pilots (including up to 2,000 passenger plane pilots) who have drunken-driving convictions.¹³ Also, more attention might be paid to erratic scheduling of duty periods. Such scheduling has been implicated in loss of attentiveness by pilots.¹⁴ Although there are studies which suggest that marijuana can affect pilot performance for a considerable time, given the pervasiveness of alcohol and other non-drug factors which can impair performance, it may be difficult to justify drug abuse as the top priority threat to air safety.¹⁵

10. Federal Aviation Administration, *Control of Drug and Alcohol Use for Personnel Engaged in Commercial and General Aviation Activities: Advance Notice of Proposed Rulemaking*, 51 Fed. Reg. 44,433 (1986).

11. *Safety Study: Statistical Review of Alcohol-Involved Aviation Accidents*, Nat'l Transp. Safety Bd., Washington, D.C., 1984.

12. *Alcohol Found to Impair Pilots Hours Later*, N.Y. Times, Dec. 7, 1986, at 39, col. 1.

13. *Federal Study Finds 16,000 Pilots With Records of Drunken Driving*, N.Y. Times, Nov. 5, 1986.

14. *Researcher Says Some Pilots Nap in Cockpit*, N.Y. Times, Dec. 26, 1986.

15. See generally Yesavage, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 AM. J. OF PSYCHIATRY 11

The arbitrator may not find medical or therapeutic justification for an employer policy that distinguishes between abuse of ethanol and other drugs. From a scientific standpoint, abuse of alcohol and abuse of other substances have much in common. One medical authority on drug abuse has stated that Valium is essentially whiskey in a pill. Moreover, the American Psychiatric Association has created an omnibus diagnostic category, entitled "Substance Use Disorders," which makes no distinction between alcohol and other addictive substances. The disorders are defined as behavioral changes caused by either alcohol, barbiturates and similar sedatives, hypnotics, opiates, amphetamines or cannabis (marijuana). The disorders each have the following common symptoms: "[I]mpairment in social or occupational functioning . . . , inability to control use of or to stop taking the substance, and the development of serious withdrawal symptoms after cessation of or reduction in substance use."¹⁶

There is support in the case literature for the proposition that drug abusers and alcohol abusers must be treated substantially on equal terms, even when the employer would like to distinguish between the two types of offenses. One arbitrator has remarked that "I . . . cannot conclude that the use of alcohol on company property is less dangerous than the use of marijuana, or that referral to a drug abuse program is less effective than the referral to an alcohol abuse program."¹⁷ Another arbitrator has stated that the "use of [alcohol and drugs] has a similar debilitating effect on people" and that for the company to punish the drug abuser more heavily would mean that the company "has been inconsistent in the assessment of the hazards involved, and in turn the penalties applied."¹⁸

If drug use is singled out for special attention by a testing program, despite the evidence that it is not the primary threat, the only explanation is that it is a law enforcement policy, rather than a safety or productivity policy. In taking on such law enforcement responsibilities, it will be argued, employers are acting inconsistently, since they otherwise usually eschew such responsibilities whenever possible. For

(Nov. 1985). However, the methodology of this study has been questioned by some medical experts: personal communication from R. Masters, M.D., Aeromedical Advisor, Airline Pilots Association, May 19, 1986.

16. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, AM. PSYCHIATRIC ASSOC. (3d ed. 1980).

17. Hooker Chem. Co., 74 Lab. Arb. (BNA) 1032, 1034 (1980) (Grant, Arb.).

18. Ethyl Corp., 74 Lab. Arb. (BNA) 953, 957 (1980) (Hart, Arb.).

example, management generally objected to being held responsible for ensuring that their employees are not illegal aliens—a requirement imposed on reluctant employers by federal legislation in 1986—and they have not volunteered to enforce employee compliance with other legal obligations, such as payment of court-ordered child support or registration for the draft. Such idiosyncratic attempts at law enforcement may be considered arbitrary and unrelated to the employer's demonstrable interests in an employee's behavior.

III. Licit vs. Illicit Drugs as Objects of Testing

The workplace should, of course, be free of criminal activities such as the distribution of illegal drugs on an employer's premises. Furthermore, in some fields of employment, such as law enforcement, an employee's involvement with an illegal drug may be antithetical to the very mission of the enterprise. In such cases, arbitrators have been quick to recognize that the illegality of the substance was the germ of the offense.¹⁹ Similarly, a state university employee's sale of amphetamines was held to justify discharge, because it jeopardized the university's relations with students and their parents.²⁰

The primary concern for most employers, however, is safety and productivity. If these are menaced more by legal than illegal substances, then employment rules which deal much more harshly with abusers of illegal drugs than with abusers of legal drugs may invite a re-examination by arbitrators to see whether such an approach meets the test of reasonableness.

Treatment specialists generally agree that, in practice, most non-alcoholic impairment of employees is caused by licit rather than illicit substances. As Dr. Richard Hawks, the chief of research technology for the National Institute of Drug Abuse, has pointed out:

[T]ranquilizers, barbiturates, sleeping pills and antidepressants are even more prevalent in the workplace than illicit drugs and are potentially just as likely to impair job performance or to create health problems if used in excess of prescribed amounts or without adequate medical supervision.²¹

19. See *City of Taylor*, 65 Lab. Arb. (BNA) 147 (1975) (Keefe, Arb.).

20. See *State University of New York*, 74 Lab. Arb. (BNA) 299 (1980) (Babiskin, Arb.).

21. NIDA Research Monograph 73, 1986, at 2.

No issue of criminality is posed when an employee abuses a drug, such as Valium or Seconal, which is obtained with a doctor's prescription. Of course, even prescription medication is frequently misused. It may be taken in too large or too frequent doses or be combined with alcohol. Naturally, such abuse can be of concern to employers for safety reasons. Drug testing, however, cannot distinguish between the person who uses his prescription drugs properly and one who does not. Nor can it distinguish between employees who are using medicine validly obtained by prescription and those who buy their Valium on the street.

A prescription drug which poses unique questions is the class of drugs known as performance enhancers. These are potent substances which the employee uses in order to improve physical and mental endurance, but which may have long-term ill consequences. A common example is the use of anabolic steroids by athletes to increase their body strength.

There is a curious public tolerance of these chemicals. Although it had tested for other drugs long before, professional football did not begin screening players for steroids until 1987.²² When amateur athletic bodies banned some athletes from football games in late 1986 because of evidence of steroid use, a common reaction was that it was unfair because the drug was not illegal. One athlete commented rather disingenuously that the doctor had prescribed the steroids so that he could "stay healthy" during the season, and his coach indicated that the offense was relatively minor because steroids were legal. Yet there is abundant medical evidence to show that the steroid user may suffer long-term adverse consequences, such as liver tumors, as the price for making short term performance gains. The outcry against the banning of steroid users demonstrates how over-emphasis on legal status, as opposed to practical effect, can become a tacit endorsement of some types of drug abuse.

Prescription abuse is partly a result of lax medical practices, and the only practicable solution may be beyond the workplace, in tighter regulation by government. New York State, for example, recently took steps to reduce prescription drug abuse by requiring doctors to report each prescription for sedatives, including Valium.²³ Some employers have required employees to notify supervisors when they have been prescribed any potentially impairing substance. Employer drug testing

22. *NFL Planning Tests for Steroids*, N.Y. Times, Nov. 22, 1986.

23. *State to Stiffen Sedative Rules*, N.Y. Times, Oct. 1986.

programs are not likely to be justified, however, as rational responses to licit drug abuse, given the enormous range of drugs at issue and the ambivalent public attitudes toward their use.

Even tightening prescription controls would not be a total solution, however, since many of the most troublesome drugs are over-the-counter preparations whose use is aggressively promoted. High dosage — “a thousand milligrams strong” — is advertised as a competitive virtue. Indeed, an official of a cocaine-exporting country has argued that American industry fosters the market for his nation's product by “encouraging the use of artificial substances that make you feel better. . . . As long as [illicit drug dealers] are kept prosperous by the numerous industries that make drug use appear not only fashionable but indispensable in the United States, they have good reason to celebrate.”²⁴

According to some medical researchers, much of the population comes to work each morning suffering the lingering effects of sleeping pills and cold remedies. One treatment expert has remarked that the only employees in her experience who died of an overdose were “Ny Quil addicts.”²⁵ Moreover, many abused substances are not even classified as “drugs” in the ordinary sense of the word: they are common industrial chemicals such as toluene, gasoline, aerosol products, or inhalants.

Given this veritable drug delicatessen frequented by the chemical gourmet, who often combines licit drugs with alcohol, a testing program which focuses on a few illegal substances may appear to arbitrators as unrelated to the true hazards to be found in the workplace.

IV. Arbitrary Selection of Drugs to be Detected

It is often assumed that a drug “screen” casts a net likely to catch most drugs of abuse. However, the number and variety of abused drugs is so large that in practice employment testing programs generally are designed to detect only a small sample of the wide spectrum of substances that are available. Under a typical arrangement between an employer and a testing laboratory, the lab will test for a finite number

24. Letter from Ambassador Carlos Alban-Holguin, Permanent Representative of Colombia to the United Nations, *N.Y. Times*, Sept. 19, 1986.

25. Dale Masi, Ph. D., Remarks to Conference on Interdisciplinary Approaches to the Problem of Drug Abuse in the Workplace, Mar. 1986, Washington, D.C., sponsored by the National Institute on Drug Abuse.

of drugs. One "basic" screen for employees schedules the following substances:

<u>DRUG CLASS</u>	<u>GENERIC NAME</u>	<u>BRAND NAME</u>
Antidepressants:	Amitriptyline	Elavil
	Imipramine	Tofranil
Antihistamines:	Diphenhydramine	Benadryl
	Hydroxyzine	Atarax
	Promethazine	Phenergan
Sedative-Hypnotics:	Amobarbital	Amytal
	Butobarbital	Butisol
	Pentobarbital	Nembutal
	Phenobarbital	Luminal
	Secobarbital	Seconal
	Aprobarbital	Alurate
Opium Alkaloids:	Morphine (Heroin)	*
	Codeine	*
Synthetic Narcotics:	Pentazocine	Talwin
	Hydromorphone	Dilaudid
	Propoxyphene	Darvon
	Methadone	Dolophine
	Meperidine	Demerol
	Levo-Alpha-Acetylmethadol	LAAM
Stimulants:	Cocaine	*
	Amphetamine	Benzedrine
	Methamphetamine	Desoxyn
	Phentermine	Ionamin
	Phenmetrazine	Preludin
Major Tranquilizers: (Phenothiazines)	Chlorpromazine	Thorazine
	Thioridazine	Mellaril
	Trifluoperazine	Stelazine
	Promethazine	Phenergan
	Perphenazine	Trilafon
Adulterants:	Quinine	*

*sold under generic name

While the schedule embraces the many well publicized drugs, such as opiates and cocaine, it is limited to a mere two dozen of the scores of commonly abused drugs. More than 80 are included in an authoritative catalog of abused substances prepared by a leading medical organization.^{25.1} The National Collegiate Athletic Association has about 300 substances on its prohibited list.²⁶ Indeed, the basic screen omitted some of the most common dependency-producing substances — the benzodiazepines, encompassing Valium and Librium. Testing for these drugs is an option for which employers must pay extra. Such charges deter employers from commissioning very elaborate screens.

Cost is, in fact, a significant factor in the design of screens. Mass screening became feasible only with the advent of a relatively low-cost technology based on immunoassay in which specially targeted antigens indicate the presence of a substance in urine by forming a chemical bond with it. This down-market technology (such as that sold under the brand name EMIT) is used for detecting a single substance in a population — for example, screening the entire workforce at a plant for marijuana. Because of the inherent limitations of the immunoassay — antigens sometimes bind with the wrong substance, giving a “false positive” — laboratories may report cautiously that a sample is “presumptively positive.” Forensic scientists recommend that the result be confirmed by a different and usually more costly chemical process.

One such procedure is thin-layer chromatography (TLC). In the TLC procedure colored spots appear on a sensitized plate; the position and tint of the spots identify the constituents of the urine. Another frequently used confirmatory procedure is gas chromatography/mass spectrometry. (GC/MS). Often dubbed the gold standard of testing, GC/MS searches for the molecular fingerprint of a specific drug, producing a readout which resembles a seismographic chart.

GC/MS would be prohibitively expensive were the net cast widely to screen an entire employee population. But if the issue is whether the employer has met his burden of proof for discharge, the arbitrator presumably would demand the best available proof, that is, a test confirmed by the most probative analytical method, regardless of the cost. An arbitrator is unlikely to be impressed by the case of an employer

25.1 STATE OF NEW YORK DIVISION OF SUBSTANCE ABUSE SERVICES AND NEW YORK STATE MEDICAL SOCIETY, DESK REFERENCE ON DRUG MISUSE AND ABUSE (1981).

26. *National Report on Substance Abuse*, BUREAU NAT'L AFFAIRS, Jan. 7, 1987, at 2.

who was willing to spend, for example, \$20 to discharge an employee but not \$100.

Even if they were willing to bear higher costs in order to make the screen more comprehensive, employers would face the difficulty that standard tests are readily available only for chemicals with standard formulas, those that appear in the pharmaceutical manuals. Beyond the reach of the commercial technology is that vast body of substances that have been termed "designer drugs." The National Institute on Drug Abuse defines a designer drug as a "substance that appears in the illicit drug market that is a chemical analogue or variation of another psychoactive drug." Such drugs have been likened to the "bathtub gin" of the Prohibition Era. Produced by underground chemists — frequently with degrees from the better universities — they mimic the effects of standard controlled substances but have novel molecular structures. For that reason, and because the designer variant may be so potent that it can be taken in smaller doses, the home-made chemical often cannot be detected by a routine test. The most widely-used designer drug has been MDMA, also known as "Ecstasy," a drug with hallucinogenic and amphetamine-like properties.²⁷

Because their chemical composition did not match the standard formulas, designer drugs were not listed on the schedules of the Controlled Substances Act and thus were technically legal until passage of the Omnibus Drug Enforcement and Control Act in 1986, which prohibited their manufacture. But the formulas change rapidly, and it is questionable whether testing procedures could keep pace with these pharmaceutical phantoms. A similar problem exists in keeping pace with the large numbers of exotic natural drugs that are expected to make their way into this country from the Third World over the next several years. One such drug is ibogaine, an extract of an African shrub. It is used indigenously as an aide to game stalking, and it has stimulant and possibly hallucinatory effects. The commercial screening programs are bound to fall behind the new line of imports and product developments on the street.

Because of cost or the inherent limits of the technology, most screens can, at best, detect only a relatively short list of chemicals. Ar-

27. *MDMA: The Most Popular 'Designer Drug'*, BUREAU OF NAT'L AFFAIRS, Jan. 21, 1987, at 3. Other common designer drugs are variants of the narcotics fentanyl and meperidine. One fentanyl analogue sold on the streets is 3000 times as potent as morphine and remains undetected by conventional screens. See Baum, *New Variety of Street Drugs Poses Growing Problem*, CHEM. & ENG'G NEWS, Sept. 9, 1985, at 7.

bitrators may question the rationale for a screening process which is so truncated that it ignores scores of commonly abused drugs. An employer would have difficulty demonstrating that he was ridding the workforce of impairing chemicals by testing employees for only a fraction of the possibly impairing substances. A program which requires employees to submit to mass screening but which is not comprehensive enough to promise a substantial increase in safety may not meet the test of reasonableness in that the means are too meager to achieve the stated ends.

Arbitrators also will be compelled to examine the rationale for disciplining an employee who refuses to submit to such a screen. A drug test requires an employee to sacrifice a significant degree of privacy and personal dignity. As one federal court has recently stated in an employee drug testing case, "[E]xcreting body fluids and body wastes is one of the most personal and private human functions."²⁸ The duty to excrete upon demand is a novel feature of the employment relationship. Employers will face the task of convincing arbitrators that exacting this sacrifice from the employee is warranted by proving that it adds measurably to workplace safety. The task may become difficult if the employer cannot demonstrate that the screen will uncover more than an arbitrarily chosen fraction of the substances that threaten the workplace.

V. Surveillance as a Management Technique

Another factor to be considered in assessing the reasonableness of testing programs is the overall context. If there were an "Intrusiveness Index" for the workplace, it would have been rising rapidly in recent years. Drug testing is not the only form of intrusive scrutiny to which the average worker may be subjected. Some employees are already required to submit to AIDS screens, polygraph examination and psychological tests ("personality profiles"). Screening for genetic susceptibility to industrial hazards is on the horizon. An Illinois employer announced recently that it would put employees through periodic pulmonary function tests to deter violations of a company rule against smoking — either on-duty or off-duty.²⁹

28. *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380, 387 (E.D. La. 1986).

29. *Smoking is Grounds for Being Dismissed by Illinois Company*, N.Y. Times, Jan. 21, 1987. Cf. M. ROTHSTEIN, *MEDICAL SCREENING OF WORKERS* (1983).

Adding random urine screening may contribute to surveillance overload. The typical employee could, as a sportswriter recently remarked of professional athletes, "come to live in fear of a flying visit from the vial squad." One worry may be that employees would discover undisclosed conditions such as epilepsy—by detecting therapeutic drugs—or pregnancy.

To be realistic, arbitrators will have to decide the reasonableness of drug tests in light of the totality of invasive testing that the employee may be required to undergo — now or in the future. They will have to evaluate whether it is a rational management strategy — inherent in the concept of management rights — to try to direct the workforce by a steady flow of monitoring reports from laboratories, undercover agents and psychological analysts. Such a strategy has been criticized as a quasi-Darwinian program of "employment of the fittest."

Approval of drug testing programs could encourage other types of screening, sending the Intrusiveness Index ever higher. Many of these tests are of even more disputed scientific validity than drug screening. One commonly used test judges an employee's honesty by asking him to draw a pencil line through a maze; cutting across the lines is interpreted to mean that he is dishonest — i.e., likely to cut corners in his work. Moreover, arbitral approval of surveillance as a management strategy would encourage adoption of suggestions that surveillance be extended beyond the workplace. Attorney General Meese, for example, has suggested that employers stake out taverns and other places where employees congregate while off duty. This is a proposal put forward earlier by Peter Bensinger, a former head of the Federal Drug Enforcement Administration.³⁰

An additional consideration is the effect of testing and other forms of surveillance on programs which attempt to deal with drug abuse through non-punitive methods: education and treatment. An authority on occupational health policy has pointed out that "drug screening should be only one part, and indeed should be the least important part, of a comprehensive drug abuse program. The other two components of the program should be drug awareness and employee assistance."³¹

These components emphasize drug abuse prevention, early intervention, treatment and "peer counselling" (in which employees take the

30. *Meese Tells Employers to Look Out for Drugs*, N.Y. Times, Nov. 1, 1986; *Bensinger, Drugs in the Workplace*, HARV. BUS. REV., Nov.-Dec., 1982, at 48.

31. Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 EMPL. REL. L. J. 432, 434 (1986).

initiative in assisting chemically dependant co-workers without waiting for supervisors to act). Many of these programs are sponsored or co-sponsored by unions, especially in occupations such as nursing and railroading. The Operation Red Block program of the Brotherhood of Locomotive Engineers is a model effort of this type: it encourages members to identify co-workers whom they consider to be impaired and unsafe for duty on trains.

Such obviously worthwhile programs depend upon trust, confidentiality and protection of the referred worker against reprisal by the employer. Emphasizing surveillance measures, such as random urinalysis, could destroy confidence in the benevolent aims of these non-punitive approaches, resulting in what has been termed the "recriminalization" of addictive disorders. A recent report on the status of Employee Assistance Programs found:

The major concern about drug testing voiced by a number of EAP practitioners. . . is that damage will result to the relationship between employees and the EAP, and that the EAP will be viewed suspiciously as a tool of management and a means to conduct a "witch hunt" of employees.³²

The practitioners who endorsed screening presumed it would be used for therapeutic—not punitive—purposes. In determining the validity of testing programs, arbitrators may take into account the possible deleterious effects of heightened surveillance on these other constructive efforts to deal with workplace drug abuse.

Nor will arbitrators easily avoid the argument that chemical and undercover surveillance could be replaced by a more balanced policy, based on close performance evaluation, coupled with an offer of referral to an EAP. As a federal court commented in reviewing one testing program: "If indeed the use of drugs is causing deficient performance. . . this should be detectable to a considerable extent by properly designed personnel procedures. . . ."³³

Managers are themselves aware of the benefits that better personnel supervision might bring. The American Management Association concluded, on the basis of an extensive survey of corporate executives from Fortune 500 companies, that drug testing was receiving too much

32. *Drug Testing and EAPs*, Employee Assistance Programs: Benefits, Problems, and Prospects (BNA Special Reports) Washington, D.C., 1987.

33. *Lowman v. City of Chattanooga*, 647 F. Supp. 875, 883 (E.D. Tenn. 1986).

emphasis, at the expense of other approaches. The AMA suggested that training supervisors to recognize symptoms of drug abuse and to confront employees about it may be more productive.³⁴

The capabilities of well-trained observers were demonstrated by the Los Angeles Police Department. The department discovered in an experiment that officers could be taught to "detect the patterns of behavioral and physiological symptoms associated with major drug categories" with astonishing accuracy, thereby reducing the need for testing.³⁵ Obviously workplace managers would not be as elaborately trained as police officers on the alert for drugged drivers, but the experiment does illustrate the theoretical potential of the powers of observation.

Some employers have already formulated policies which rely on supervisory observation and referral to the EAP, rather than drug testing. Here is an example of a written company policy based on this principle:

It is the responsibility of the supervisor to evaluate a staff member's performance.

a. When a staff member's performance slips to an unsatisfactory level and normal supervisory action does not improve performance, it is the responsibility of the supervisor to determine if the staff member should be referred to the Assistance Program. In such cases, the supervisor is to discuss the matter with the Employee Assistance Coordinator. The supervisor *does not diagnose* the problem, rather the supervisor is concerned with job performance and attendance.

Prior to referring a staff member, the following steps must be taken.

- (1) Document examples of deteriorating job performance, (i.e., excessive absences, decreased productivity, poor judgement).
- (2) Inform the staff member of the inadequate work record. Give the staff member an adequate period of time to improve.
- (3) If job performance does not improve, refer the staff member who desires help to the Assistance Program for evaluation and assistance. Advise the staff member that the decision to seek assistance is confidential and is *not* included in the personnel file.

Staff members who do not desire assistance will be expected to

34. *National Report on Substance Abuse*, supra note 26, at 5.

35. Richard P. Compton, *Field Evaluation of the Los Angeles Police Department Drug Detection Procedure*, Research Notes, National Highway Traffic Safety Administration, Washington, D.C., Aug. 1986 (MS.).

- improve performance. If performance is not improved, the supervisor must take the appropriate disciplinary action.
- b. Once the staff member is referred to the program, the supervisor is to follow through with the required job performance evaluations.

Given that Employee Assistance Programs result in fewer accidents, absenteeism and medical costs, employers may be asked to demonstrate that chemical surveillance, coupled with punishment, was an appropriate management response to the threat of drug abuse. Management may need to show that it had first exhausted the possibilities of more traditional supervisory methods, linked to employee assistance options.

VI. Validity of Administering a Test

A primary issue in arbitration is likely to be: was it proper to administer a test to the grievant in the first place? This question entails an examination of the principle of selection that governs the testing program. Most are based either on the principle of randomness or what is variously referred to as "probable cause" or "reasonable cause" (sometimes also described as an "incident-driven policy").

A series of judicial decisions in late 1986 held unconstitutional a variety of random testing programs in the public sector.³⁶ In a strict sense, these decisions, stemming from the fourth amendment jurisprudence, restrict only public employers because constitutional limits apply to governmental action. But as examples of procedural equity these decisions could also influence arbitrators, who deal with both public and private employers. For example, U.S. District Court Judge H. Lee Sarokin noted,

The invidious effect of such mass round-up urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest. The . . . [employer] essentially presumed the guilt of each person tested. The burden was shifted onto each . . . [employee] to submit to a highly intrusive urine test in order to vindicate his or her innocence. Such an unfounded presumption of guilt is contrary to the protections against arbitrary and intrusive government interference set forth in the Constitution. Although . . . [an employee's] privacy and liberty interests may be

36. *Drug Tests Losing Most Cases in Court*, N.Y. Times, Dec. 11, 1986.

charged if they refused a management order to submit to a drug test. The arbitrator ruled the program violated the contractual requirement that discipline "shall be based upon just and sufficient cause." The program improperly transferred the burden of proof from the employer to the employee. Although the program called for tests only where there was reason to suspect impairment, the arbitrator held that the employer must prove impairment by:

observing overt behavior or conduct of the employee relative to his job that establishes probable cause that the employee is under the influence of alcohol or drugs.

To unilaterally require the employee to take a test. . . or be suspended or discharged is requiring the employee to prove his innocence before the employer decided to assess a penalty. . . It is the employer who seeks to discipline the employee. . . .

. . . .
The [testing] plan is in violation of the "just cause" provision of the collective bargaining agreement. It is, therefore, not a reasonable plan.³⁹

Arbitrators may also be urged to find that the decision to test a given employee was improper, either because it was arbitrary, discriminatory or retaliatory. Such an issue is most likely to emerge where drug testing programs confer upon supervisors broad discretion to decide whom to test.

The federal government offers a useful illustration of such a program. Although it may be modified after judicial review, the Presidential Executive Order⁴⁰ (issued on September 15, 1986) authorized testing of federal workers in "sensitive positions." Under the proposed guidelines for implementing the plan, devised by the Office of Personnel Management, "the definition of a sensitive position is so broad that more than half of government workers are covered. . . . Agency heads have complete latitude in deciding whom to test."⁴¹ Anticipating a pos-

39. Association of Western Pulp and Paper Workers, Local 180 and Boise Cascade Corp. (Kagel, Arb.) (Jan. 8, 1987) (unpublished opinion). Another arbitrator held that testing violated the collective bargaining agreement by unilaterally imposing a new term or condition of employment. See *Wappingers* (New York) Central School Dist. and New York State Teachers Union, (Schwartz, Arb.) (Dec. 16, 1986) (unpublished opinion).

40. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986).

41. *Who Said Federal Workers Couldn't Be Fired for Using Drugs*, Washington Post, Weekly Edition, Dec. 15, 1986. See also *National Report on Substance Abuse*,

sible misuse of managerial discretion, the guidelines state: "Agencies are absolutely prohibited from selecting positions for drug testing on the basis of a desire to test particular individual employees."⁴² In other words, the guidelines take refuge in the principle of randomness as a way of avoiding the accusation that a particular employee has been singled out for retribution.

Arbitrators may be asked to scrutinize the selection procedure for suspect motives. The grievant may allege that he had become a target of retaliation or intimidation. The catalog of improper motives would no doubt also include race or gender discrimination, anti-union animus, and the desire to rid the workforce of "whistleblowers." Some employees have contended that they were designated for testing because they exposed safety problems at sensitive facilities, such as nuclear plants.⁴³

Allegations of testing for retributive reasons may arise even where the collective bargaining permits only testing for reasonable cause. The Executive Director of the National Football League Players Association has declared that, under the league's contractual "reasonable cause" standard, players have been unfairly tested because they fell asleep at a meeting, were injured in a game, laughed in a elevator, or failed to drink beer with teammates.⁴⁴ In some instances, it will be argued, the mere act of ordering an employee to be tested represents punishment through stigmatization, even if the results are negative.

VII. The Definition of "Reasonable Cause" for a Test

What would constitute reasonable cause to test an employee: An anonymous tip would not qualify, if employers were judged by criteria analogous to constitutional standards. But the courts in public sector cases have not set a uniform high standard. Reasonable cause has sometimes been defined much more loosely as "some quantum of individualized suspicion. . . some articulable basis. . . usually framed as a 'reasonable suspicion'" of drug use.⁴⁵ An employer policy based on reasonable suspicion emphasizes the role of supervisors as careful observers. A typical policy provides that reasonable suspicion "shall include,

BUREAU NAT'L AFFAIRS, Mar. 4, 1987, at 2-3.

42. *Reagan Aides Split on Drug Tests*, N.Y. Times, Nov. 25, 1986.

43. *Alcohol & Drugs in the Workplace: Costs, Controls, and Controversies*, BNA SPECIAL REPORT 108 (1986) [hereinafter *Alcohol & Drugs*]; see also *The Nuclear Dilemma: Safety and the Drug Issue*, Washington Post, May 5, 1986.

44. 123 Lab. Rel. Rep. (BNA) 185, 187 (Nov. 10, 1986).

45. *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 877 (E.D. Tenn. 1986).

but not be limited to, management's personal observation of an employee's appearance, behavior, or speech."⁴⁶ This is a formula which implies that testing primarily would be used to confirm visible impairment rather than seek out drug users among those who appear to be doing their jobs normally.

Purely statistical indicia, such as excessive absenteeism or tardiness, may not qualify as reasonable suspicion. A California state court temporarily restrained a public bus service from selecting employees for testing on that basis. Although the plan ostensibly treated employees individually, the employer in fact resorted to batch processing: it sought to begin the program by testing 125 mechanics.⁴⁷

A charge of insubordination for refusal to take a drug test cannot be sustained, an arbitrator has held, where the employer failed to show either that drugs menaced the plant or that the individual displayed any signs of drug use. The arbitrator declared that the employer's order to take the test was not reasonable. The employer had unilaterally added the drug screen to a negotiated medical examination whose overall purpose was to ensure that workers were not harmed by toxic industrial chemicals. The arbitrator noted that there had been no testimony with "regard to any significant problem in the plant suspected to be related to drugs"⁴⁸ nor any testimony that the grievant's "behavior had been unusual, unsafe, uncoordinated, or in any way arousing suspicion that he was unable to handle his job."⁴⁹ She concluded:

Lacking such probable cause to suspect a particular individual, forcing them to take such a test is an invasion of privacy and unwarranted requirement to furnish confidential medical information. In essence, it is requiring the employee to incriminate himself without probable cause. It is also requiring the test as a condition of continued employment when no reason exists in the performance of the individual to place such a condition upon him.

. . . .

. . . I find that the refusal to take the drug screen was a reasonable protest against the invasion of privacy, and that the discharge was not warranted.⁵⁰

46. *National Report on Substance Abuse*, *supra* note 26, at 5.

47. *Id.* at 4.

48. *Gem City Chem., Inc. and IBT, Local 957*, 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.).

49. *Id.*

50. *Id.*

In both the public and private sectors, there are examples of a probable cause standard being adopted through the unilateral action of an employer or through collective bargaining. The Maryland Attorney General has determined that testing of state employees is permissible "only if based on particularized probable cause" — the traditional prerequisite to a search or seizure.⁵¹ Under a private-sector testing agreement, between players and owners in the National Basketball Association, an official who formerly served as an Assistant U.S. Attorney and a Deputy Police Commissioner of New York City has been retained to decide whether sufficient evidence exists to order a drug test.⁵² The parties to the basketball agreement selected someone who was qualified, by virtue of his background, to exercise quasi-prosecutorial discretion. Employers lacking such in-house "special prosecutors" are probably ill-equipped to adhere to so scrupulous a standard.

To maximize the chances of surviving arbitral review, the practical option for most employers may be to test as few employees as possible and to be prepared to produce concrete evidence in support of the decision to test in each instance. Such evidence would include documented reports of job-related impairment or performance deficits so serious that substance abuse was a plausible explanation.

Of course, where such evidence is present, the test results presumably would not be essential. Keen observation by supervisors of an employee's behavior and job performance is often enough to convince an arbitrator that an employee is impaired. In cases involving the nation's primary drug, alcohol — which has a much longer history in arbitration — a medical test (breathalyzer or blood alcohol concentration) has by no means been necessary to prove impairment. The "unsteady gait" and other well-known symptoms, as reported by lay witnesses, are routinely accepted in arbitration and are highly desirable as corroboration, even when a blood test is in evidence.⁵³

VIII. Evaluation of Analytical Methods and "Decision Levels"

Arbitrators are likely to be called upon to evaluate the specific

51. 123 Lab. Rel. Rep. (BNA) 185 (Nov. 10, 1986).

52. *Lloyd and Wiggins of Rockets Banned for Drug Use*, N.Y. Times, Jan. 14, 1987.

53. Cf., e.g., the discussion of the value of lay observation in T. DENENBERG & R. DENENBERG, *ALCOHOL AND DRUGS: ISSUES IN THE WORKPLACE* 68-70 (1983).

methods which were used to analyze the sample being offered in evidence against the grievant. One issue typically will be whether the initial test that registered positive was confirmed by another test based on a different chemical method. The importance of the confirmation step for the immunoassay technique used in screening was underscored by a forensic journal report which observed that

biological samples such as urine are complex chemical mixtures. As such, there is no absolute guarantee that the drug antibodies [in an immunoassay] will not bind with another similar compound; or that another substance will not trigger a false positive. Thus the results are always suspect to some degree. . . [Yet] unconfirmed immunochemical testing is being used to influence hiring, firing, and disciplinary actions.⁵⁴

A survey by CompuChem Laboratories of North Carolina found that forensic experts had strong preferences about which combinations of analytical methods — such as immunoassay, radio immunoassay, thin-layer chromatography (TLC), and gas chromatography/mass spectrometry (GC/MS) — should be used for confirming positives. Often, these preferences varied with the type of drug in question. Arbitrators who were surveyed, on the other hand, had a difficult time discerning differences in the reliability of various combinations that were rated by the forensic experts, such as immunoassay confirmed by GC/MS. The study concluded that arbitrators “have little understanding of the differences in accuracy among commonly used analytical methods.”⁵⁵ In fact, 61 percent of those who heard a case involving urinalysis could not recall which methods were used to analyze the sample.⁵⁶

Arbitrators may become more sensitive to such questions as they gain experience in urinalysis cases. But to the extent that the survey reflects the attitudes of the arbitration community, advocates may find it prudent to rely heavily on expert witnesses to educate decision-makers in the nuances of the various test methodologies. Unless the parties resolve these issues through negotiations, it is likely that basic technical

54. *Workplace Alcohol Testing: Cost-Effective*, EMPLOYEE TESTING AND THE LAW, Nov., 1986, at 8.

55. Hoyt, Finnigan, Nee, Shults, & Butler, *Drug Testing in the Workplace: Are Methods Legally Defensible, A Survey of Experts, Arbitrators, and Testing Laboratories*, CompuChem Laboratories, Research Triangle Park, NC, 1986, at 21 (unpublished manuscript) [hereinafter *Drug Testing*].

56. *Id.* at 14.

controversies will be disputed *de novo* in each disciplinary case stemming from a drug test.

One such controversy is the threshold for reporting a positive. In a disciplinary case, the assertion may be made that the employee registered "positive" on a test, but not all positives are alike. A laboratory typically will pre-determine the minimum concentration of a drug in the urine — known as the "decision level" — that will trigger a "positive" report. Concentrations below that level will be reported as negative. The decision level is designed to avoid obtaining a false positive because of "background noise" — that is, spurious chemical reactions in the urine.

The decision level may be changed dramatically in the course of a testing program. In one company the decision level was raised from 25 nanograms per milliliter [ng/ml] to 75 ng/ml at the suggestion of the laboratory, to preclude the argument that the result was due to passive inhalation of marijuana smoked by others. (A nanogram is a billionth of a gram, or one 28-billionth of an ounce.) Some testing programs have set the level as high as 200 ng/ml. Thus, a "positive" may vary substantially from one employer to another and also may change from time to time within the same testing program.

Such shifts illustrate that "positive" is not an objective scientific threshold — certainly not a threshold which correlates with impairment — but the result of an administrative decision by the laboratory and the employer. That decision may reflect such factors as convenience. Some forensic experts have cautioned that the level could be changed deliberately to achieve results that justify the program: the illusion of gains against drug abuse could be fabricated merely by raising the decision level so that fewer personnel registered positive.⁵⁷

Arbitrators may find themselves faced with having to decide whether 25 ng/ml provides just cause for discharge, even though they are aware that such a level would not even count as a positive if the grievant worked for another employer, or if the employer had contracted with a different laboratory. A major advantage of negotiated testing protocols is that they eliminate disputes in arbitration about decision levels (see section below on joint protocols).

57. Arthur McBay, Ph.D., Taped Remarks, *Testing Employees for Alcohol and Other Drugs*, delivered at the Bureau of National Affairs Conference on Alcohol and Drugs: Issues in the Workplace, Washington, D.C., 1984.

IX. Do Test Results Establish "Just Cause" for Discipline?

It is likely to be argued in arbitration that basing a discharge on a quasi-medical test such as a drug screen is invalid because it violates the canons of proof observed in medicine itself. That argument has been voiced from a variety of perspectives. A group of human resources experts meeting under the auspices of the National Institute on Drug Abuse in 1986 concluded that "a single positive test result, even if confirmed, should not form the sole basis for disciplinary action."⁵⁸ A good reason for this caution, some academic physicians maintain, is that even a test with a 95 per cent accuracy rate, which corresponds to some of the most accurate tests in general medical use, will falsely identify as a positive one of every 20 employees tested in a large-scale screen:

Prudence and fairness would suggest that tests be applied only when there is at least a 50 percent chance that the suspect is guilty. . . . But if we knew the chance of guilt was 50 percent, would we need a test like this? Or could we use more standard personnel methods?⁵⁹

In medicine, a test is used for therapeutic rather than punitive purposes. Furthermore, test results are usually supported by other clinical findings before a decision is made about the patient's treatment. In contrast, a decision about an individual's employment status may be made on the basis of a single test result. Many clinicians find this practice disturbing because they believe it wrenches a diagnostic tool out of its proper medical context. The CompuChem study, which was prepared by laboratory scientists, noted:

[I]n the case of non-probable cause samples, the persons [tested] do not have signs or symptoms of drug use. In clinical practice, physicians can request multiple tests and/or retests to arrive at a supportable diagnosis or treatment protocol. . . . [I]n drug testing in the workplace frequently one does not have that multiple information base for arriving at a decision. Companies are basing their action on one piece of information, the urine test result.⁶⁰

58. Consensus Summary, Conference on Interdisciplinary Approaches to the Problems of Drug Abuse in the Workplace, NIDA, Dept. of Health and Human Services Pub. No. (ADM) 86-1447 (1986).

59. W. Anderson, M.D., *Too Many Bugs in Screening Measures*, Wall Street J., Apr. 14, 1986.

60. *Drug Testing*, *supra* note 55, at 17.

If a positive test result is relied upon as the sole or primary piece of evidence against the grievant, the question often arises: does the positive result prove impairment, the condition which is properly subject to discipline? In a case involving the meaning of a positive, a shipyard workers' union challenged a unilateral employer testing program which provided that the employee is presumptively under the influence of marijuana if an EMIT (immunoassay) urinalysis registers 100 ng/ml, and conclusively under the influence if the result is confirmed by GC/MS. After listening to a debate among technical experts, the arbitrator concluded:

I have no quarrel with the 100 ng threshold level. My quarrel is with the company's conclusion that a level of 100 ng in the urine in the EMIT test, if confirmed by the laboratory GC/MS test, means that the employee is "under the influence."

...

The evidence in this case does not conclusively show that a recording of 100 ng in the urine, if confirmed, is synonymous with any mental or physical impairment.⁶¹

The arbitrator resolved the dilemma by allowing the employer to declare a result of 100 ng/ml in itself a violation of company rules, whether or not that level proved anything about the employee's condition: "I do not consider it unreasonable for the company to deem an EMIT test of 100 ng. . . a prohibited or an unacceptable level of the drug, and to conclude that such a level *may* cause impairment or *may* result in being under the influence."⁶²

However, the arbitrator also called for "some additional due process protection" and thus ordered that the company physician:

shall also examine the affected employee physically for the presence or lack of presence of other symptoms of drug and alcohol use. . . [including] a test of reflexes, examination of eyes, gait, general demeanor, breath and condition of speech. . . . [The results of the examination shall be] made a part of the official record of any disciplinary action imposed on and/or counseling required of the affected employee and shall be available if the matter is grieved or

61. Local 6 and Local 7, Industrial Union of Marine and Shipbuilding Workers of America, and Bath Iron Works Corporation (Schmertz, Arb.) (June 30, 1986) (unpublished opinion).

62. *Id.*

arbitrated.⁶³

The decision suggests that even where a testing program is accepted in principle, arbitrators may be left with such deep reservations about the significance of a test result that they will require additional evidence of impairment. The issue thus may be whether the totality of the evidence, not just the test result alone, justifies discipline.

The collective bargaining agreement itself could provide a reference point for deciding the significance of a single test result. Some agreements, however, suffer from lack of precision on the drug test issue, requiring interpretation by arbitrators. The discharge of a truck driver with eight years' service was upheld after he registered positive in a marijuana urinalysis. The test was ordered because he seemed "sullen and withdrawn," as well as uncoordinated, after returning from a funeral leave occasioned by the sudden death of his brother.

In the urinalysis, the decision level had been set at 100 ng/ml. The contract contained the following provision: "An employee may be discharged for. . .being under the influence of drugs. . .The employer may request an employee to take a medical test to determine whether he was under the influence of. . .drugs."⁶⁴

The union argued that the positive on the marijuana test did not demonstrate the grievant was under the influence. However, the arbitrator held that:

the contract says the test results can be used to conclude that an employee is under the influence of drugs. The union's mistake is assuming that "under the influence of drugs" has a precise scientific meaning that is incorporated in the contract. . .I cannot interpret the contract to authorize discharge only upon a type of proof that exceeds present scientific capabilities.⁶⁵

It is interesting to note that while the arbitrator in the shipyard workers' case doubted that the employer could use a 100 ng/ml decision level to establish that an employee was impaired, the arbitrator in the trucker's case deemed such a positive sufficient proof. The reasoning of the latter arbitrator seems to be this: that if the contract allows

63. *Id.*

64. Roadway Express, Inc. and IBT, Local 705, Apr. 22, 1986 (Cooper, Arb.) (unpublished award) See also AAA Summary of Labor Arbitration Awards, No. 331-1, Oct. 15, 1986.

65. *Id.*

the employer to request a medical test, then the test results must have some meaning for the disciplinary proceedings, notwithstanding the general agreement of the scientific community that they have no such meaning. In other words, within the four corners of the contract, but nowhere else, a marijuana positive proves impairment.

The arbitrator evidently relied heavily on the fact that the parties had contracted for the test. It could be argued, of course, that by contracting for a medical test, they meant a test that was scientifically capable of proving what the employer had to prove. The contract provision did not mention marijuana specifically, and the framers could have had in mind tests such as blood alcohol concentration, which are accepted evidence of impairment. In drafting their agreements, parties would be well advised to specify which tests they envision.

X. Conduct that Occurs Off-Duty

Drug testing cases are likely to fall into the class of arbitrations in which nexus to the job is a key issue. By and large, arbitrators have regarded off-duty misconduct, including many types of criminal behavior, as beyond the reach of the employer's disciplinary powers, except where the misconduct has a direct bearing on the employment relationship. A recent study summarized arbitral thinking in this way:

The employer must . . . demonstrate that there is a valid nexus between the off-duty misconduct and the status of the grievant as an employee. The decisions indicate that this may be accomplished by showing that the misconduct has damaged the employer's business or will do so if the employee is reinstated; that fellow employees would refuse to work with the offender or would be exposed to danger from the offender; and/or that the nature of the misconduct is disqualifying, in that it is incompatible with the duties of the employee's job classification.⁶⁶

Unless these conditions are present, marijuana testing cases may pose peculiar problems in arbitration, inasmuch as urinalysis reaches backward in time. It often probes into possible drug use during periods when the employee was off duty.

In a typical alcohol intoxication case, the grievant is charged with

66. Hill & Kahn, *Discipline and Discharge for Off-Duty Misconduct: What are the Arbitral Standards?*, ARBITRATION 1986: CURRENT AND EXPANDING ROLES, PROCEEDINGS NAT'L ACAD. ARB., 1986, at 152-53.

violation of employer rules against being under the influence of ethanol while on the job. A blood alcohol concentration test result may be introduced into evidence to substantiate the charge that the grievant was chemically impaired while at work. In such cases, the job nexus is clear; the impairment is temporally related to the offender's duties.

But supporting an allegation of "under the influence" with a urinalysis result raises serious nexus issues, because a positive merely substantiates that use occurred in the past, not that the grievant was impaired on the job. To that extent, marijuana analysis is quite unlike blood alcohol testing, which shows current effects; it fights the presumption that the employer is primarily concerned with on-the-job impairment.

This point is likely to be made quite forcefully by expert witnesses in arbitration. For example, Professor Ronald K. Siegel of UCLA Medical School, a forensic psychopharmacologist who has testified in many arbitrations and judicial forums, maintains: "Testing does only one thing. It detects what is being tested. It does not tell us anything about the recency of use. It does not tell us anything about how the person was exposed to the drug. It doesn't even tell us whether it affected performance."⁶⁷

Underlying this opinion is the fact that the marijuana immunoassay, the most popular form of urinalysis, is based on inference: it detects not the psychoactive substance itself but the excreted metabolites — that is the waste products into which the drug has been broken down by the body's physiological processes. Such a testing procedure is analogous to inferring — in the best Sherlock Holmesian tradition — that cigarette smoking has occurred by discovering tobacco ashes. The inference is a fair one, so far as it goes. But it begs questions crucial to grievance arbitration: How recently did the employee use marijuana? To what extent was the employee's ability to carry out his duties affected by the drug? Just as one could not tell exactly when the cigarette was smoked from the mere presence of ashes, urinalysis cannot demonstrate when an employee used marijuana or was impaired by it.

The difficulty of relating urinalysis results to impairment has been explained by the U.S. Centers for Disease Control in an "advisory" notice:

[A]ttempts to correlate urine concentration with impairment or time of dose are complicated by variations in individual metabo-

⁶⁷ *Alcohol and Drugs*, *supra* note 43, at 29.

lism, metabolite accumulation in the chronic user, and urine volume changes due to diet, exercise and age. Therefore, a positive result by the urine cannabinoid test indicates only the likelihood of prior use. Smoking a single marijuana cigarette produces THC metabolites that are detectable for several days. . . . [T]he urine cannabinoid test result alone cannot indicate performance impairment or assess the degree of risk associated with the person's continuing to perform tasks.⁶⁸

The notice adds that the cannabinoids remain detectable in urine "for up to 2 weeks in the casual user and possibly longer in the chronic user."⁶⁹

The effect of urine volume on the significance of the test result has been vividly explained by an experienced forensic witness, Harold L. Klawans, a professor of neurology and pharmacology at Rush Medical College in Chicago. Testifying about the excretion of marijuana metabolites, he gave the following illustration:

Let us say that on the day of the test, the patient, it's a hot day, he is drinking two gallons of water. Puts out four liters [4,000 ml] of urine. . . .

Let us say he is going to put out 4,000 nanograms [of the metabolites]. He puts out 4,000 nanograms in a day in 4,000 milliliters of urine, it's one nanogram per milliliter.

Let us say for whatever reason, he only drinks one quart of water. He puts out. . . one liter [1,000 ml] of urine. He still puts out the same 4,000 nanograms. It's now in one liter of urine. His test result is 4 nanograms per milliliter. Four times as high. [Yet] it's the same amount of chemical [metabolites].

Basically, all this tells you is how much is in one milliliter of urine of an inactive chemical. . . [and] you don't know when it got into the body. . . .⁷⁰

A Harvard Medical School psychiatrist, commenting on the investigation of train crewmen involved in an accident, has given the opinion that the effects of the cannabis detected would have been relatively short-acting: reaching a pharmacological peak within five minutes of

68. Centers for Disease Control, *Urine Testing for Detection of Marijuana: An Advisory*, MORBIDITY AND MORTALITY WEEKLY REP., Sept. 16, 1983.

69. *Id.*

70. Sworn testimony of Dr. Harold L. Klawans, *Deposition in the matter of testing for marijuana (cannabis) use among railroad workers*, Chicago, Ill., Aug. 9, 1986.

use and tapering off rather sharply — within 45 minutes to an hour.⁷¹ Such expert opinions would favor the conclusion that, in the absence of proof of on duty use, the positive result did not demonstrate an effect lasting long enough to be of concern to the employer.

Not knowing when a drug was used would leave a large gap in the arbitration record if the employee is not subject to discipline for his off-duty and off-premises conduct. To uphold a discharge on the basis of such a record would presumably require a finding that the employer has the right to discharge an employee for using impairing substances at any time — a premise which would be revolutionary if applied to the leading chemical threat to industrial safety: alcohol. It should also be noted that among the substances that TLC detects is nicotine; urinalysis thus could be as easily used to enforce disciplinary penalties for off-duty smoking (a possible source of medical costs to the employer) as to enforce rules against marijuana use. Prohibiting off-duty smoking has been praised as an industrial health measure.⁷²

An employer might promulgate a policy of disciplining employees for drugs which are “in their system.” This policy is equivalent to imposing discipline for the mere act of registering positive on a drug test. Such rules may be attacked as unreasonable, on the grounds that what is “in the system” is inert and has no psychoactive effect. To return to our cigarette analogies, these rules will be likened to disciplining an employee for violating a plant no-smoking rule on the ground that he had ashes in his pocket when he reported for duty.

The argument also may be advanced that punishing the mere act of registering positive ignores the element of intent. While some experts doubt that passive inhalation of marijuana smoke would appear on an employment test — because studies have not shown that such smoke produces urine levels as high as 20 ng/ml — it has been pointed out that smoke is not the only medium of unintentional contact with marijuana:

As a practical matter, passive inhalation has been an unsuccessful defense. What is technically plausible, however, is accidental or passive ingestion of marijuana from eating a brownie, a piece of cake, or some other food prepared with marijuana. Here a real question of credibility exists because a subsequent test will proba-

71. Dr. Norman Zinberg, quoted in *Drug Trace Found in 2 Rail Workers After Fatal Crash*, N.Y. Times, Jan. 15, 1987, at 1.

72. Professor M.S. Rutstein, Letter to N.Y. Times, Feb. 5, 1987.

bly register positive.⁷³

The reasoning here is that by unwittingly eating food laced with marijuana, perhaps a treat proffered by a co-worker, the grievant could have ingested a substantial dose, in comparison with the quantity that could be inhaled from ambient smoke. Unintentional ingestion of marijuana in food was the basis for reinstatement of the grievant in some cases.⁷⁴

Another issue is whether a penalty of discharge could properly be imposed on an employee for registering positive on a test — especially as part of a company physical — without examining whether the positive indicated the need for treatment of a substance abuse disorder. Discharging him without an opportunity for treatment could be considered tantamount to dismissing an employee for being ill, an action which arbitrators often are reluctant to endorse, particularly where there has been no demonstrable effect on job performance. Reasoning along similar lines, the Maryland Attorney General has opined that discharging state employees solely because they were identified as drug users by a test would violate the Federal Rehabilitation Act of 1973.⁷⁵

XI. Blood Tests for Marijuana

Urinalysis is by far the most popular method of testing employees for marijuana use, because it is considered less invasive than blood tests. But even if blood samples were analyzed and the results introduced into evidence at an arbitration, a number of questions would be raised about the significance of the results.

Blood levels of THC, the active ingredient in cannabis, are more closely linked to recent use than metabolites in urine. The THC is active when in the blood, while metabolites in urine are inert. Also, blood levels dissipate within a matter of hours rather than days or weeks, making a blood test a better indicator of proximate use than a urine test.

But could a high THC blood level prove impairment? Many reputable researchers believe that the data available so far reveals no corre-

73. *Passive Inhalation Defense Difficult to Demonstrate*, EMPLOYEE DRUG TESTING AND THE LAW, Nov. 1986, at 5.

74. *KCBS and IBEW, Local 202*, 72 Lab. Arb. (BNA) (1978) (Ward, Arb.); *Oshkosh Truck Corp.*, 75 Lab. Arb. 722 (1980) (Cox, Arb.).

75. 123 Lab. Rel. Rep. 185.

lation between dosage levels and behavioral effects. This is true even when the level of THC currently in the bloodstream is known. Scientists have been unable to discern a uniform physiological response among persons administered the same measured dose. Summarizing a large body of research, Dr. Richard Hawks of the Research Technology Branch at the National Institute on Drug Abuse, a Federal agency, has commented:

[W]hat is obvious so far is that even though some consistency exists among individuals smoking a given dose of marijuana, in terms of expected blood levels, the associated performance effects of these doses do not show the same consistency. It is not yet clear whether a practical presumptive concentration of THC can be related to measurable impairment.⁷⁶

More recently, Dr. Hawks and a collaborator have noted:

Due to wide variations in the pharmacokinetics [drug concentrations over time] and pharmacodynamics [intensity of drug effects] . . . the use of plasma drug concentrations for the estimation of impairment has not been established for most drugs. As for urinalysis, drug concentrations in the urine are further complicated by other factors such as urine flow and pH [acidity].⁷⁷

This phenomenon contrasts sharply with the effects of alcohol: the blood alcohol concentration is a highly accurate measure of the level of impairment. Persons with blood alcohol concentrations of more than 0.10 are presumed to be legally intoxicated by highway codes in many states, and few doubt that drivers with such blood levels are dangerous. Many employers have incorporated the BAC in their disciplinary policies, providing for example that 0.05 will be considered a presumption of "under the influence" and 0.10 will be deemed "intoxication." Differing levels may entail different penalties. In a marijuana case, however, there might be expert witnesses giving the opinion that human physiology seems too variable to establish a firm link between dosage and effect, thus precluding conclusive proof by blood test that the employee was "under the influence."

76. Hawks, *The Analysis of Cannabinoids in Biological Fluids*, NATIONAL INSTITUTE ON DRUG ABUSE MONOGRAPH No. 42, 1982, at 4.

77. Hawks & Chiang, *Urine Testing for Drug Abuse*, NATIONAL INSTITUTE ON DRUG ABUSE RESEARCH MONOGRAPH, No. 73, 1986, at 80.

XII. Laboratory Accuracy

Since a grievant may face "industrial capital punishment" on the basis of a laboratory report, arbitrators will be forced to take note that commercial drug testing services and laboratories can vary widely in their accuracy and reliability. The diligence and qualifications of the technicians and supervisors, as well as the thoroughness of the procedures may differ.

The National Institute on Drug Abuse issued preliminary guidelines for choosing laboratories early in 1987, but cautioned that its proposed code of standards "does not guarantee absolute reliability."⁷⁸ Until there is a widely accepted accreditation system, or routine proficiency evaluation, the booming "diagnostics industry" will remain a highly competitive, unregulated business.⁷⁹ The race may be to the swiftest, not necessarily the most competent. Pressures for a share of the expected \$115 million market could compel some testing services to promise more than they can deliver.

The variability of laboratory performance was demonstrated by a study conducted by the Centers for Disease Control. Chemists at the federal facility in Atlanta mailed to 13 laboratories serving drug treatment centers a number of urine samples which either had been spiked with known chemical substances, such as cocaine and barbiturates, or were blank. The results were dramatic. The laboratory reports contained a large proportion of false negatives (substances present were not detected), and some laboratories produced false positive rates (substances purportedly detected were not present) of 66 percent.⁸⁰

Although the survey research was done some years ago, Dr. Robert Willette, the former chief of research technology for NIDA and a frequent witness in arbitration, has commented that "there are laboratories currently offering services to employers that would probably do as badly on those tests. . . . There are some good labs — there are some excellent labs — and then there are some poor labs. . . ."⁸¹

The same caution is heard from within the testing community itself. Dr. Don H. Catlin, chief of clinical pharmacology at the University of California at Los Angeles, and the scientist who supervised test-

78. *National Report on Substance Abuse*, BUREAU NAT'L AFFAIRS, Feb. 4, 1987, at 1-2.

79. *Boom in Drug Tests Expected*, N.Y. Times, Sept. 8, 1986.

80. Hansen, Caudill, & Boone, *Crisis in Drug Testing*, 253 J. A.M.A. 2382-87 (1985).

81. *Alcohol & Drugs*, *supra* note 43, at 30-31.

ing at the 1984 Olympics, has stated that testing firms "vary tremendously from laboratory to laboratory as well as within the same laboratory on a day-to-day basis because the tests require skill in interpretation and the reliability of the results depend on who does the test."⁸²

An illustration of how laboratory personnel staff can influence the result of the test is provided by a Congressional committee staff report. It notes that the marijuana immunoassay "is unusually reliant on the skill of the technician, in maintaining the appropriate environmental conditions, in mixing the proper level of reagents, and in comparing color intensity between the mixed sample and the pre-mixed sample, known as the calibrator."⁸³

Some experts, such as Dr. Willette, consider it imperative for employers to perform a "pre-contract award assessment" of the laboratory's quality control system. Similarly, the authors of the *Crisis in Drug Testing* study recommended that the performance of contract laboratories should be monitored "with quality-control samples, preferably through blind testing."⁸⁴ If a laboratory's quality control were challenged in arbitration, the measures taken by the employer to evaluate the laboratory's quality and performance presumably would be relevant. An employer's failure to apply the rigorous assessment methods recommended by responsible scientists might make more plausible an argument that the test results offered in evidence were suspect.

Arbitrators have at times required employers to make an affirmative showing that the laboratory procedure was sound. One arbitrator held:

Correct testing procedures include not only arrangements to insure the fairness and accuracy of drug testing samples obtained from employees, but also checking the testing laboratory's experience, its analytical methods and the way it protects the security and identity of each sample.

.....

82. *Drug Tests Gain Precision, But Can be Inaccurate*, N.Y. Times, Sept. 16, 1986.

83. *Drug Testing in the Federal Government*, Staff of the Subcommittee on Civil Service of the Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C., June 20, 1986, at 14 [hereinafter Staff Report]; see also Schroeder & Nelson, *Drug Testing in the Federal Government*, 11 NOVA L. REV. 685 (1987).

84. Hansen, Caudill & Boone, *supra* note 80.

[I]n order to sustain its burden of proof, an employer must show by substantial evidence, that the testing facilities and personnel were qualified. This requirement includes the obligation to make available, by testimony and written records, complete details of the testing.⁸⁵

Despite the possibility that proof of laboratory quality may be required in disciplinary cases, few employers apparently take the necessary steps. A survey conducted by a management information service revealed that only 19.8 percent of firms with testing programs had evaluated their laboratories by submitting "blind" samples.⁸⁶

XIII. Verifying the Chain of Custody

In addition to disputes about the overall accuracy record of laboratories and the specific analytical methods used, arbitrators may face disagreement about the integrity of the urine specimen at issue. Did it emanate from the grievant charged with misconduct? Furthermore, was it properly handled and secured during all stages of the test procedure?

Assuring an unbroken chain of custody begins with the taking of the sample. In the past, when testing was only sporadic, samples were often treated quite casually — left lying about in the employer's mail room unattended and similarly neglected in transit. Today many testing services are moving toward what has been called the "forensic philosophy":

The forensic philosophy is characteristic of laboratories which were originally established to perform law enforcement. . . . They take a very defensive approach to the entire analytical process, and implement strict controls to ensure that each and every activity in the laboratory can withstand legal scrutiny

. . . .
The forensic philosophy starts at the time of sample collection. Sample collection includes a witnessed urine sample, verified by the submitter, sealing of collection vial, signature of person collecting and shipping of the sample. Samples are not accepted for analysis if there are any discrepancies in the collection procedures or docu-

85. *Wappingers* (New York) Central School District and New York State United Teachers Union, (Schwartz, Arb.) (Dec. 16, 1986) (unpublished opinion).

86. *M&M Management Memo*, MERCHANTS AND MANUFACTURERS ASS'N, Jan. 1987.

mentation submitted by the employer.⁸⁷

Some laboratories supply their employer customers with kits, containing sample bottles, instructions for collecting and mailing cartons, to which have been affixed seals signed by the employee and witnesses. But difficulties still arise. Before it gets to the laboratory, the specimen must get into the bottle under verifiable circumstances. To avoid doubts, collection must be witnessed, a necessity which is repugnant to — and often resented by — both the watchers and the watched. (A new job classification of "Micturition Monitor" may become necessary). Whether witnessing was performed effectively could become an arbitration issue.

Urine advertised as clean has been offered for general sale "for experimental purposes only."⁸⁸ Street vendors of urine sometimes appear outside the plant gates to assist employees who face a drug screen. A grievant might contend that he was merely a victim of consumer fraud — that his positive came from urine which did not live up to the claims made for it by the seller.

Catheters and similar devices permit exogenous urine to be introduced into a sample. Urine may also be diluted with bathroom water. So ample are the opportunities for adulterating a specimen that even an eye-witness might not detect subterfuge. One employer, the Boston Police Department, has promised to make available a special high-security bathroom in which "the sink water has been shut off and the toilet water chemically treated to prevent unnoticed tampering."⁸⁹ Grievants may challenge in arbitration the reasonableness of testing procedures based upon less careful specimen-giving procedures — or less advanced plumbing. The argument is sometimes made that such a program is not adequately designed to accomplish its ends, since those who are involved in drug use are also those who are most likely to defeat the system by tampering with the sample.

To obviate the need for witnesses, some proposed testing programs would allow employees to sign an affidavit attesting that the urine is their own. It has been argued that if the employee's word is acceptable,

87. *Drug Testing*, *supra* note 55, at 17.

88. *Texan is Selling Drug-Free Urine to Meet "Unanticipated Demand"*, N.Y. Times, Nov. 29, 1986.

89. *Boston Waits Word on Police Drug Test Suit*, N.Y. Times, Sept. 28, 1986. The federal employee testing program also provides for checking the temperature of the sample. *National Report on Substance Abuse*, *supra* note 41.

he could be asked to sign an affidavit that he was not a drug user, thereby eliminating the need to test at all.

Large-scale testing programs often have trouble keeping track of the samples. In disciplinary proceedings in the armed forces, for example, a key defense strategy is to challenge the prosecution to prove that the test result offered in evidence came from a urine specimen of the accused; defense advocates report regular success with this approach.⁹⁰

Mixups can result from automated processing of sample bottles identified only by stick-on labels with serial numbers. An example of such a mixup occurred recently when a boxer was accused of testing positive for marijuana in connection with a heavyweight bout in late 1986. A boxing official later withdrew the charge, explaining that the wrong urine specimen had been linked to the accused because "someone in my office misread the number. . . . [I]t was clearly a clerical error."⁹¹

The quality of evidence in arbitration may also be affected by long-term custody techniques. Freezing is required to store urine samples for later verification and re-analysis. This requirement might prove impractical on a large scale, given the volume of samples and time that it takes to process a case to arbitration.⁹² The evidence may also deteriorate due to evanescence of the test materials. TLC requires subjective judgments about the colors of spots on a glass plate. Yet the colors on the TLC plate fade, making it difficult to preserve the plate as evidence. Reliable photographs of the plates are notoriously hard to secure because subtle color discrepancies could prove crucial. An arbitrator might be called upon to decide whether the loss of the original sample or test materials vitiated the reported test result.

In sum, arbitrators can expect to have much argument over the very identity of the sample and its provenance. Many cases may turn upon this issue.

XIV. Compulsory Treatment of Employees Testing Positive

Arbitrators will hear cases in which the grievant has not been discharged because of a drug test but referred to treatment against his will as a condition of further employment. In the debate within the

90. See e.g. Waple, *Drug Tests: Issues Raised in the Defense of a "Positive" Result*, 11 NOVA L. REV. 751 (1987).

91. *Boxer's Drug Test Negative*, N.Y. Times, Dec. 20, 1986.

92. See generally Staff Report, *supra* note 83.

Reagan cabinet on drug testing policy for federal employees, one position was that anyone testing positive should be discharged. The ostensibly more compassionate position, which prevailed to some extent, was that an employee should be sent for treatment the first time a positive was registered. Discharge was reserved for a second offense. But compelling an employee to undergo treatment merely on the basis of a single positive drug test may also be difficult to support.

In 1986, a group of air traffic controllers in Palmdale, California, were investigated by their employer because of an off-duty party at which drugs were reportedly in use. Drug tests were part of the investigation. The upshot was that 13 of the 34 controllers were ordered to enter treatment or lose their jobs. The employer, in fact, did not offer any evidence that they were compulsive users or could be considered addicted.⁹³

Quite apart from whether the employer has a reasonable need to scrutinize an employee's off-duty behavior in that fashion — the employees, after all, had not been arrested or charged with any criminal offense — such an incident raises crucial questions about the propriety of using a drug test as an indicator of the need for treatment.

There is a school of thought which holds that no drug use should be considered "recreational." Adherents of that school believe the label "recreational" sends a permissive message, which encourages drug use. They also regard the casual drug user as someone who sets a bad example for those less capable of moderating their drug use: the "successful" casual user lures the compulsive personality into an addictive lifestyle.

While such considerations may figure in law enforcement "demand reduction strategies," they may not justify referring for treatment — involving costly use of medical or quasi-medical facilities — someone who does not truly require treatment. Treatment is not a form of punishment, it will be argued, and to regard it as such may both debase treatment and confuse the disciplinary process. An arbitrator might well conclude that forcing an employee into treatment who is not ill (in any customary sense of the word) is a cynical exercise and a waste of scarce treatment resources.

93. *FAA Reports 13 of 34 Controllors Took Drugs*, N.Y. Times, Sept. 13, 1986, at 8. In another aviation case, a federal judge suggested that off-duty drug use might constitute reasonable grounds to administer a test—but only to determine possible on-duty drug use. *National Report on Substance Abuse*, BUREAU OF NAT'L AFFAIRS, Mar. 18, 1987, at 3.

A person who has registered a positive in a drug screen is not necessarily a compulsive user. The positive result shows only an instance of drug use. There is no accepted treatment for casual, non-compulsive use of drugs, such as marijuana (or NyQuil, for that matter) other than to explain the potential health risks to the user and hope that rational persuasion prevails. No psychological "therapy" is indicated, according to Professor Siegel of the UCLA School of Medicine, who has given this description of how he deals with occasional users:

tell them everything we know about the drug. . . . [W]e feel that if they really knew everything we know about marijuana or cocaine. . . they probably will never go near it again. . . . But I find it particularly troublesome when somebody [who is not addicted] is ordered for treatment. Isn't that sort of like Russian psychiatry, where when you are deviant and you think differently from the state, you are mentally disordered until you agree to think differently?⁹⁴

XV. Legislative and Judicial Restraints on Testing

A long-standing debate in arbitration concerns the proper relationship between arbitration and external law. In the case of testing, a swirl of legislative and judicial developments now forms the external environment in which arbitrators must make their decisions.

Legislative proposals to restrict the use of drug testing as a condition of employment are under consideration at all levels of government. San Francisco has already enacted a municipal ordinance on the subject,⁹⁵ and legislation is pending in several states. The New York State Assembly and Senate Standing Committees on Labor held extensive hearings in November, 1986, at which there was substantial testimony in favor of regulating testing. Bills introduced into Congress by Rep. Charles Schumer and others proposed federal controls on testing. In its preliminary version, the Schumer bill would make it unlawful for any employer "to require or cause any employee. . . to undergo. . . any drug test: except when the employer has reasonable suspicion that a

94. Los Angeles County Bar Association, *Alcohol and Drugs and the Disciplinary Process*, 1985 SOUTHERN CAL. LABOR LAW SYMP. PROC. 153 (These remarks were made by Professor Siegal of the UCLA School of Medicine on May 23, 1985).

95. See generally Palefsky, *Corporate Vice Precedents: The California Constitution and San Francisco's Worker Privacy Ordinance*, 11 NOVA L. REV. 669 (1987).

controlled substance or designer drug had been used.”⁹⁶

In the courts, unfair dismissal suits challenge private employer testing programs. As noted above, a number of suits in public employment, some stemming from the Presidential Executive Order, have resulted in judicial decisions which, in the main, have found the programs constitutionally defective.

It may be difficult for arbitrators to ignore this body of evolving law. Influenced by the general politico/legal culture, arbitrators often derive “workplace rights” by analogy to constitutional and statutory rights. They tend to enforce such rights as part of the due process to which an employee is entitled in the system of industrial justice. Moreover, if a trend toward legislative regulation of testing develops, arbitrators could be swayed by what they perceive to be the climate of public opinion, as evidenced by the statutory enactments — just as they were influenced by marijuana decriminalization a decade ago. Thus, even in jurisdictions without laws regulating testing, arbitrators may impose closer scrutiny of testing programs.

XVI. Dealing with Substance Abuse through Joint Agreements

Given the uncertainties facing the parties to an arbitration over drug testing, there are many advantages to negotiating a joint policy on substance abuse. Such a policy might define the meaning of test results precisely. It could include a mutually agreed testing protocol, which would specify when employees may be tested, the substances to be detected, the decision levels for registering “positive,” the chain of custody, the technical procedures, and the laboratory to which the analysis will be entrusted. The policy would announce the penalties and the treatment options being offered to employees, placing testing within the context of an overall strategy for preventing chemical abuse.

There are models for such negotiated policies. In 1984, the International Brotherhood of Teamsters signed a Letter of Understanding with a committee of employers, providing for reasonable-cause testing as a part of the master Freight Agreement. Annexed to it was a five-page protocol, designating the testing laboratory and the procedures. The protocol even covered such details as the amount of urine to be taken (“25 ml. . . in a screw capped container”). For marijuana, an immunoassay confirmed by thin-layer chromatography was required. A

96. H.R. 5530, 99th Cong., 2d Sess., (introduced Sept. 16, 1986).

positive triggered analysis of an already drawn blood sample.⁹⁷

The Washington (DC) Area Metropolitan Transportation Authority and the Amalgamated Transit Union (Local 689) reached a comprehensive agreement on chemical abuse in 1984 which stipulates not only the testing procedures and the decision levels, but also the consequences of testing positive. The agreement creates a disciplinary offense: "use off-duty of any intoxicant with detectable presence in the body as indicated by a post-incident [such as accident] medical examination." However, the policy requires blood, rather than urine, tests for marijuana (as well as alcohol), to create a closer nexus to the job. Furthermore, it differentiates the penalties according to whether the results reach a "stipulated minimum level." The minimum for alcohol is 0.05 BAC and for marijuana 5 ng/ml (blood) or 10 ng/ml (blood plasma). A first offense for those with detectable but below-minimum levels is a 10-day suspension; for those at or above the minimum level, the first offense requires enrollment in the Employee Assistance Program and assignment to a job that is not safety-sensitive during the treatment period.⁹⁸

The agreement replaced a testing program under which the employer discharged scores of employees but saw many reinstated by arbitrators because of doubts about the test results. One immediate advantage of the agreement to both parties was that it virtually eliminated arbitrations, owing to the narrowing of the technical and policy issues that had pervaded grievances in the past. A number of employees returned to work after receiving treatment, saving the employer retraining costs. There was also positive spinoff for industrial relations at the Authority: the overall climate was reported to have improved significantly because of the mutually satisfactory experience of negotiating the chemical abuse policy.⁹⁹

Drug testing disputes that turn entirely on technical points might also be resolved by means of specialized arbitration forums. The arbitrator would sit with independent forensic experts as a tripartite panel. A similar panel could be used for disputes over the diagnosis of the

97. Richard D. Cohn, *Testing for Controlled Substance, Alcohol and Other Substances for Abuse Within Industry*, paper presented to BNA Conference on Alcohol and Drugs: Issues in the Workplace, Washington, D.C., Nov. 4-5, 1985.

98. BUREAU NAT'L AFFAIRS, CONFERENCE COURSEBOOK 145 (1985) (The Coursebook is from the Bureau of Nat'l Affairs Conference on Alcohol and Drugs: Issues in the Workplace, given in Washington, D.C., in 1985).

99. *Alcohol and Drugs*, *supra* note 43, at 56-57.

grievant as a substance abuser; on the panel would be independent diagnostic and treatment experts as well as a neutral chairman.

These solutions depend on the kind of cooperation now found in Labor-Management Committees. Such committees have been formed in many industries to undertake joint decision-making, replacing the usual strife. Health and safety typically are prime subjects on their agendas. Since substance abuse is among the chief threats to worker health and safety, as well as productivity, there is a mutual interest in forming Labor-Management Committees to address this issue, rather than leaving the field to unilateral assertions of management rights.

Jointly made substance abuse policy — particularly policy which provides recovery options as well as penalties — not only avoids needless arbitration but also is more likely to be effective. In consensus policy, management and labor devote their energies to making the policy work — rather than opposing each other. If management and employee representatives can fashion a joint approach to substance abuse, the achievement could well become a model for other cooperative attempts to improve the welfare and productivity of the American workforce.