

1993

# Study of why Montana State government has not implemented a drug testing statute

Kevin Forder Phillips  
*The University of Montana*

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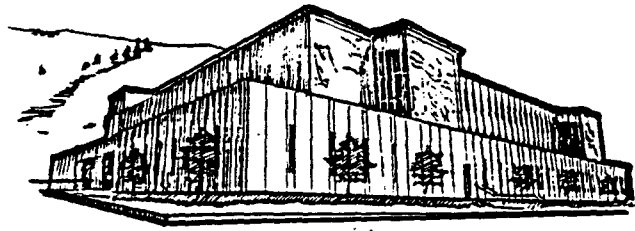
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University of  
**Montana**



A STUDY OF WHY MONTANA STATE GOVERNMENT HAS NOT  
IMPLEMENTED A DRUG TESTING STATUTE

By

Kevin Forder Phillips

B.A., University of Montana, 1988

Presented in partial fulfillment of the requirements

for the degree of

Master of Public Administration

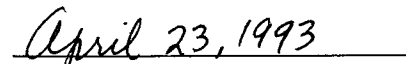
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1993

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5-21-98

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## CHAPTER I

### PROBLEM STATEMENT

In 1987, the Montana legislature enacted a statute enabling both the private and public sector to conduct limited drug testing in the Treasure state. Many of Montana's corporations swiftly implemented drug testing under this state statute. But no state agency, even with public sector drug testing in the Montana code books, has elected to test employees for drugs under this statute. No testing has occurred because personnel officers have not developed a state personnel policy from the statute. Without such a policy, drug testing will not be implemented in the various state agencies. It is relevant to explore the reasons why a policy has not been formalized and executed for such a controversial area as drug testing.

Montana state agencies have not implemented drug testing for a variety of reasons. Agency personnel officers stated that in their opinion illegal drugs were not a major problem. They also stated that the Department of Administration (DOA) had not yet developed

drug testing guidelines for the personnel officers to follow. The personnel officers were also concerned that drug testing might conflict with a worker's rights; workers who abuse drugs and alcohol are considered handicapped and are afforded certain rights.

However, the Governor should act to implement drug testing for safety reasons. State workers who are impaired on the job pose a threat to themselves and others. The Governor should order the DOA to make an agency by agency study of drug and alcohol problems. The DOA should then develop a personnel policy on drug testing. The Governor should then give each department director the power to decide whether that particular agency needs to drug test its employees.

The national and various state governments<sup>1</sup> will briefly be examined for their responses to drug testing. Around 40% of state legislatures have passed drug testing statutes,<sup>2</sup> but the states have

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<sup>1</sup>The states include Rhode Island, Utah, California, Maine, Vermont, Connecticut, Minnesota, and Montana.

<sup>2</sup>See, for example, "State Legislation," Monthly Labor Review (Jan. 1990): 37; "State Legislation," Monthly Labor Review (Jan. 1991): 42; Michael Verespej, "Why, Who, and How to Drug Test," Industry Week (May 1, 1989): 73; and Wisconsin Legislative Bureau, Drugs in the Work-place: A Discussion of Issues (May 1988): 15.



been slow in implementing the law into regulations.<sup>3</sup> Then a Montana drug testing statute will be examined. The original bill and the subsequent amendments will be examined. Lastly, legislators have introduced bills to expand drug testing in Montana since 1987. These bills' contents and fates will be reviewed.

The general policy of drug testing and the related issues were explored through the use of a personal interview survey of employees who worked with personnel issues in the state agencies. These employees develop and implement personnel policies, such as drug testing. The personnel officers surveyed answered questions about drug abuse in their workplace and the department's drug testing policies. Lastly, they made general comments about chemical abuse in the state government.

### Methodology

The national and various states' drug policies, the actions of the Montana legislature, and the interviews with the personnel officers, will be used to develop recommendations concerning the implementation of drug testing. In May of 1992, a series of personal interview surveys were conducted of state employees using open-

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<sup>3</sup>"Dealing with Drug Abuse," State Policy Reports 7, no. 17 (Sept. 1989): 18-22.

ended questions. The surveys averaged about 45 minutes. Personnel officers from the following departments were interviewed: Administration; Agriculture; Family Services; Fish, Wildlife, and Parks; Health and Environmental Services; Corrections and Human Services; Justice; Labor and Industry; State Lands; Livestock; Military Affairs; Natural Resources and Conservation; Public Service Regulation; Revenue; Social and Rehabilitation Services; and Transportation. The personnel officers with the Auditor's Office, Governor's Office, Montana Historical Society, Montana State Library and the Montana University System were also interviewed, as well as representative agencies in the judicial and legislative branches.<sup>4</sup>

The interview survey had a completion rate of 96%. A personal interview survey ought to achieve a completion rate of 80 to 85%, so this survey was above the acceptable completion rate margin.<sup>5</sup> The survey designer conducted the interviews, so there was no problem with the familiarity of survey wording.<sup>6</sup> Because

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<sup>4</sup>The State Board of Education was dropped from the interview list because there were only four people in the department. The Department of Commerce personnel officer demanded to see the survey questions in advance. She went over the questions with the department legal counsel and declined through a letter to be interviewed. Barb Charlton, Dept. of Commerce, Helena, MT., to author, TLS, May 11, 1992.

<sup>5</sup>Earl Babbie, The Practice of Social Research, Fifth Edition (Belmont, CA.: Wadsworth Publishing Co, 1989): 244.

<sup>6</sup>Ibid, 247.

interviews were face to face, the interviewer could probe for responses if the person answered in insufficient depth.<sup>7</sup> The probes were intended to be neutral, and non-directive.<sup>8</sup> The survey questions were open ended so that the interviewees could explain in detail the drug testing policies of their agency.<sup>9</sup>

After the interviews were conducted, the information was compiled to find trends. How employees from the different agencies responded could then be compared and contrasted. This information is analyzed and presented in Chapter Four along with recommendations and conclusions.

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<sup>7</sup>Ibid, 248.

<sup>8</sup>Ibid, 250.

<sup>9</sup>Ibid, 140.

## CHAPTER II

### NATIONAL AND STATE DRUG TESTING

Policy development on drugs and testing essentially began at the national level. This issue has gradually worked its way down to the states and local government. In 1982, Ronald Reagan, as President, noted the severity of the drug problem in the United States.<sup>1</sup> He stated that the United States must “do what is necessary to end the drug menace.”<sup>2</sup> Subsequent policies developed by the Reagan administration attempted to stop drug abuse by focusing on cutting the supply and educating the public. In 1986, President Reagan observed a serious demand for drugs in the United States. On July 30, 1986, he commented, “The time has come to give notice that individual drug use is threatening the health and safety

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<sup>1</sup>He was not the first president to focus on the problem of drug abuse. Nixon in the early 1970's first spot-lighted the problem. See Stephen E. Ambrose, Nixon: The Triumph of a Politician 1962 - 1972 (New York: Simon and Schuster, 1989): 418. Nor was Reagan the last to highlight drug use. President Bush has carried on the tradition. See Lewis H. Lapham, “A Political Opiate,” Harpers, December 1989, 43.

<sup>2</sup>Steven Witsotsky, “Crackdown: The Emerging ‘Drug Exception’ to the Bill of Rights,” Hastings Law Journal 38 (1987): 890, quoting President’s Message Announcing Federal Drug Trafficking and Organized Crime, Weekly Compilation of the President’s Documents 18 (October 4, 1982): 1313-14.

of all our citizens.”<sup>3</sup> President Reagan realized that policies aimed at stopping the supply of drugs and educating the public were not working.

Thus on September 15, 1986, he signed Executive Order 12564.<sup>4</sup> The executive order specifically addressed drug testing. The drug testing policy was intended to create a drugfree workplace in the federal government. The order forbade federal employees from using illegal drugs if they wanted continued employment.<sup>5</sup> It mandated random and reasonable suspicion drug testing. Supervisors were to be trained in how to run random drug testing and how to spot employees using drugs, so that employees could be subjected to reasonable suspicion drug testing. This policy went one step beyond drug education by requiring drug testing. Policy makers wanted to cut federal employee drug use. The drug policy specifically stated

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<sup>3</sup>Brian Duffy, “Drugs: Now Prime Time,” U.S. News and World Report, August 11, 1986, 16.

<sup>4</sup>Mark J. Barnes, Carol H. Kinsey, and Ellice A. Halpern, “A Question of America’s Future: Drug-Free or Not?” University of Kansas Law Review 36 (Summer 1988): 707.

<sup>5</sup>Executive Order No. 12556, 3 C.F.R. 226 (1987), reprinted in 5 U.S.C. §7301 (Supp. V 1987).

non-drug use as a term of employment and was not just a philosophical statement of preference by the employer.<sup>6</sup>

The executive order did not apply to state government but federal officials stated their hope that state legislatures would follow suit and adopt tough anti-drug programs.<sup>7</sup> The hope was that states should also set an example for American businesses.<sup>8</sup> If state governments and businesses established testing requirements, drug policy makers believed a reduction in drug use nation wide would result. Twenty-one states followed the federal lead and enacted drug testing statutes.<sup>9</sup>

The nature of these laws takes various forms ranging from very strict enforcement to more conditional statements of state philosophical positions. In some cases, the laws were designed to protect workers from management drug testing abuses. Rhode Island, for example, protects state workers by barring all drug

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<sup>6</sup>Lawrence Linn, Joel Yager and Barbara Leake, "Professional vs. Personal Factors Related to Physicians' Attitudes Toward Drug Testing," Journal of Drug Education (Spring 1990): 95.

<sup>7</sup>Office of National Drug Control, State Drug Control Status Reports (Washington, D.C.: GPO, Nov. 1990): 1-3.

<sup>8</sup>*ibid.*, 18.

<sup>9</sup>Monthly Labor Review (Jan. 1990): 37; Monthly Labor Review (Jan. 1991): 42; Verespej: 73; and Wisconsin Legislative Bureau: 15.

testing except in cases involving probable cause.<sup>10</sup> The conservative state of Utah, on the other hand, essentially endorsed random drug testing. The legislature set the reasonable suspicion threshold at a low level. This low threshold level coupled with the requirement that a test be administered to maintain “productivity, quality of products or services, and security,” means an employer chooses whom and when to test for drugs.<sup>11</sup>

There are a variety of approaches between these extremes. For example, California tests all of its state employees as a result of gubernatorial executive order.<sup>12</sup> However, California public executives find it tough to enforce this executive order because of the California constitutional right of privacy.<sup>13</sup> Judges in cases such as Long Beach City Empire v. City of Long Beach<sup>14</sup> held that the state’s court system will uphold public employees’ privacy rights. The Court extended this principle into the drug testing arena in Luck

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<sup>10</sup>Monthly Labor Review (Jan. 1990): 37.

<sup>11</sup>Mark Wright, “State Drug Testing Statutes: Legislative Attempts to Balance Privacy and Productivity,” The Journal of Corporation Law (Spring 1989): 749.

<sup>12</sup>Wisconsin Legislative Bureau: 15.

<sup>13</sup>Cal. Const. art. 1. §1 “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and *privacy*” (emphasis added).

<sup>14</sup>719 P.2d 660 (Cal. 1986).

v. Southern Pacific Transportation Co.<sup>15</sup> The court awarded a pregnant railroad worker \$485,000 in damages from Southern Pacific after the railroad fired her for refusing to take a drug test.<sup>16</sup> Thus, the California courts have tended to favor rights of privacy over the need to protect public safety.

A California local government has legislated even further in favor of the workers' right to privacy. In 1985, the San Francisco Board of Supervisors enacted an ordinance to protect a worker's privacy in the work place, public or private.<sup>17</sup> The legislation, entitled the Workers Privacy Ordinance was the first enacted to provide privacy in the work place.<sup>18</sup> One of San Francisco's Board of Supervisors, Bill Maher, commented, "What we want to say is that businesses which operate in San Francisco should treat their employees as adults, who are free to conduct their personal lives without interference from the company so long as it does not interfere with productivity."<sup>19</sup>

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<sup>15</sup>218 Cal. App. 3d 1, 267 Cal. Rptr. 618 (Ct. App. 1990).

<sup>16</sup>ibid.

<sup>17</sup>Cliff Palefsky, "Corporate Vice Precedents: The California Constitution and San Francisco's Worker Privacy Ordinance," Nova Law Review 11 (1987): 674.

<sup>18</sup>ibid.

<sup>19</sup>ibid.



With this ordinance, the Board of Supervisors converted a vague California constitutional right of privacy into specific policy guaranteed to protect the privacy of the employee in the work place.<sup>20</sup> The policy stated that a supervisor can only test a worker for drug use if the supervisor had reason to believe that the employee is impaired and that the impairment was a clear and present danger, not only to the employee, but also to other workers and the general public. The “clear and present danger” language means the threat must be immediate.<sup>21</sup> However, the San Francisco Board of Supervisors made a policy decision that a person seeking work does not have the same rights as a person holding a job.<sup>22</sup>

Maine is another example of a state that has also decided not to test employees for drugs. A state commission on drug testing reached the conclusion that Maine should not adopt testing because it presupposes someone is guilty by requiring workers to submit to a drug test. Maine desired to keep with the American judicial and

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<sup>20</sup>Ibid, 676.

<sup>21</sup>Ibid, 677

<sup>22</sup>Ibid, 678.

constitutional tradition of presuming a person innocent until proven guilty.<sup>23</sup>

Policies and practices in other states offer a variety of other considerations as well. In the area of random drug testing, the state of Iowa allows random testing only in specifically defined categories of employment and positions covered by federal law. For example, interstate truck drivers are covered by Department of Transportation regulation since they very directly affect public safety. Vermont limits random drug testing to federally proscribed positions as well.<sup>24</sup> In some cases, states have gone further by specifying categories of employees to be tested beyond federal requirements. Employees in safety sensitive positions can be randomly tested in Connecticut and Minnesota. The two legislatures' stated justification for using random drug testing was to prevent accidents.<sup>25</sup>

When the Montana Legislature passed a drug testing statute in 1987, they desired protecting the rights of the workers over

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<sup>23</sup>Jon Felde, "Drug Testing: A Constitutional Question," State Legislatures (May/June 1990): 28.

<sup>24</sup>Wright, 749.

<sup>25</sup>Ibid.

workplace safety. Drug testing was limited to people applying to certain positions and those workers that a supervisor deemed under the influence of drugs or alcohol. All other types of drug testing were forbidden under state law.

### Implementation of Policies

Generally, the states that have passed drug testing statutes have been slow in developing and implementing those policies.<sup>26</sup> States concentrate on high visibility drug arrests rather than on detecting and rehabilitating drug users in the work place.<sup>27</sup>

The issue of testing employees for drug testing is extremely complex and invites considerable controversy. Many courts have heard cases on drug testing creating extensive precedent on the subject.<sup>28</sup> However, no periodical articles could be found detailing how those laws have been developed into policy and then activated into the state personnel policy.<sup>29</sup> The reason is that states are slow

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<sup>26</sup>"Federal Aid Changes," State Policy Reports 7, no. 10 (May 1989): 4-5.

<sup>27</sup>State Policy Reports 7, no. 17 (Sept. 1989): 18-22.

<sup>28</sup>Most of these cases involve the federal government. For a listing and brief description of public sector court cases involving drug testing, see Paul R. Joseph, "Fourth Amendment Implications of Public Sector Work Place Testing," Nova Law Review 11 (Fall/Winter 1986-87): 641-45.

<sup>29</sup>The Public Affairs Information Service, the Council of State Governments, the Advisory Commission of Intergovernmental Relations, and other services were checked. However, there are many articles about the business world and drug testing. The private sector, motivated by profit incentives, was driven to implement drug testing at a much

to implement law into policy. Montana is no exception. The Montana Legislature passed a drug testing statute, but the executive branch has not implemented the law. The reasons will be examined, but first, the development of the Montana drug testing statute in the state legislature will be examined.

### Development in Montana

The Montana statutes regarding testing for drugs involve a rather intriguing set of circumstances since they evolved more from a concern for protection of employees' rights rather than from an initial goal of reducing drug use to protect the public. Montana State Senator Paul Boylan (D) worried about drug testing. As a dairy farmer, he had a bad experience with medical tests. Milk inspectors tested his dairy herd and the cattle tested positive for a virus; but unbeknownst to Senator Boylan or the inspectors, the test result was a false positive.<sup>30</sup> The inspectors ordered his dairy herd

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quicker pace. The business scholars, especially those in human relations, have written many articles on the pros and cons of drug testing, on how to set up drug testing, and also case studies of individual companies and on the drug testing programs that they have established. For example, see Tom Post, "You Said Yes - But Santa Fe Knows How Tough It Is," Business Month, March 1990, 42.

<sup>30</sup>Senator Joe Mazurek, "The History of the Drug Testing Statute," speech presented at a drug testing seminar sponsored by the law firm of Gough, Shannahan, Johnson & Waterman and the Montana Mining Association, Helena, Montana, 9 July 1991.

destroyed. Senator Boylan had his cattle tested a second time, by an independent laboratory. The results contradicted the inspectors' finding that the cattle had a virus. However, the independent lab results were too late; the state senator's cattle herd had already been destroyed.<sup>31</sup>

Senator Boylan was enraged that the government could dictate the destruction of his cattle through tests of this nature. He could see the danger in relying on drug tests. He envisioned that the Montana government would soon follow the federal government under President Reagan's leadership and test employee's for drug usage.<sup>32</sup> So he teamed up with Steve Unger of the American Civil Liberties Union (ACLU) to draft anti-drug testing legislation.<sup>33</sup>

On February 17, 1987, Senator Boylan introduced Senate Bill 338, which was referred to the Senate Judiciary Committee.<sup>34</sup> He proposed to graft SB 338 onto Montana Code Annotated 39-2-304, a lie detector statute. SB 338 would forbid most drug testing in state government and private businesses, except for a limited form of

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<sup>31</sup>Montana, Senate, Judiciary Committee, Drug Testing (SB 338): Hearing before the Senate Judiciary Committee, Feb. 17, 1987: 1.

<sup>32</sup>Senator Mazurek, speech.

<sup>33</sup>ibid.

<sup>34</sup>Montana Senate, Montana Senate Journal (1987): 362.

reasonable belief testing. In 1987, the private and public sector used six different types of drug testing: reasonable suspicion,<sup>35</sup> post-accident or unsafe practice,<sup>36</sup> identification of troubled workers,<sup>37</sup> post drug treatment,<sup>38</sup> pre-employment and pre-appointment,<sup>39</sup> and random drug testing.<sup>40</sup>

Senator Boylan attempted to outlaw most of these types of drug testing, except for a limited form of reasonable belief called demonstrable impairment on the job. Under this modified reasonable

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<sup>35</sup>Reasonable suspicion testing occurs when a supervisor observes behavior that clearly shows an employee is under the influence of alcohol or illicit drugs. The supervisor then requires the worker to submit to a drug test. Congress, House, Committee on Energy and Commerce, Railroad Drug and Abuse Prevention Act of 1989, report prepared by Mr. Dingell, 101st Cong., 1d sess., 1989, Committee print, 9-10.

<sup>36</sup>Post-accident or unsafe practice testing occurs when a worker causes an accident or blatantly violates safety procedures while on the job. The supervisor can then require the person to submit to drug testing. Terrence K. Cowan, "Drugs and the Workplace: To Drug Test or Not to Drug Test?" Public Personal Management (Winter 1987): 315.

<sup>37</sup>A troubled worker may be a sign of drug abuse. A supervisor may be trained to detect telltale signs to include arriving at work late to using excessive sick leave. The supervisor can then confront the worker to "persuade" the worker to enter a drug program. *Ibid.*

<sup>38</sup>Post-drug testing occurs after an agency rehabilitates an employee. The employee, after undergoing drug abuse therapy, will be subject to periodic testing. NASA, NASA Plan for a Drug-Free Workplace (Washington, D.C.: GPO, April 27, 1988): 1.

<sup>39</sup>Pre-employment and pre-appointment testing involves screening applicants for drug use who are applying for an initial job or a promotion. *National Treasury Union v. Von Raab*, 109 S. Ct. 1384 (1989).

<sup>40</sup>Random drug testing involves randomly selecting workers to be tested at a set interval. Supervisors have no control over who is selected to be tested. U.S. Department of Transportation, DOT's Drug Program Random Testing: How It Works (Washington D.C.: GPO, 1989).

belief standard, an employer could only test an employee if there was a clear and present danger to the employee or others.<sup>41</sup> His legislation mirrored the concerns that many Montanans have about a right to privacy. Montanans feel so strongly about privacy that it was included as a citizen's right in the 1972 Montana Constitution.<sup>42</sup> The state can only invade a citizen's privacy if there was a "compelling state interest." This balanced a citizen's right of privacy against a state interest, such as public safety.

One corporation opposed a legislative restriction on drug testing. Pegasus Mining, represented by lobbyist John Fitzpatrick, opposed the bill because of the safety in the workplace issue. Pegasus Mining contended that it needed expanded drug testing or workers' lives could be lost through drug induced mining accidents. Pegasus Mining had enough influence to obtain an important legislator's attention, State Senator Joe Mazurek. Fitzpatrick convinced Senator Mazurek to attempt a compromise.<sup>43</sup> Senator

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<sup>41</sup> Senator Mazurek, Speech.

<sup>42</sup>"The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10.

<sup>43</sup>Senator Mazurek was the chairman of the Senate Judiciary Committee where the bill was assigned.

Mazurek had Steve Unger of the ACLU and John Fitzpatrick hammer out an agreement.<sup>44</sup>

The compromise bill read in part as follows:

Montana Code Annotated 39-2-304 (1987): Lie detector tests prohibited -- regulation of blood and urine testing.

(1) No person, firm, corporation or other business entity or representative thereof shall require: . . .

(b) as a condition for employment, any person to submit to a blood or urine test except for employment in hazardous work environments or in jobs the primary responsibility of which is security, public safety, or fiduciary responsibility;

(c) as a condition for continuation of employment, any employee to submit to a blood or urine test unless the employer has reason to believe that the employee's faculties are impaired on the job as a result of alcohol consumption or illegal drug use . . . ."

Before the Senate Judiciary Committee, most organizations backed the compromise including the ACLU, the Montana AFL-CIO and other labor groups.<sup>45</sup> The Oil, Chemical and Atomic Workers International Union backed the bill with reservations because they were concerned about the wording "reason to believe" which is a lesser legal standard than "probable cause."<sup>46</sup> On February 25, 1987, the Senate voted 50 to 0 in favor of SB 338.<sup>47</sup>

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<sup>44</sup>Senator Mazurek, Speech.

<sup>45</sup>Montana, Senate, Judiciary Committee, Drug Testing (SB 338): Hearing before the Senate Judiciary Committee. 50th Leg., Regular Sess., Feb. 17, 1987: 1-3 and exhibit 3.

<sup>46</sup>Ibid., exhibit D.

<sup>47</sup>Montana Senate, Montana Senate Journal (1987): 676.



The Senate transmitted the bill to the House where it was referred to the Judiciary Committee. At this time, three organizations voiced their concern about the bill. The Montana Chamber of Commerce, Montana Hospital Association, and International Business Machines all opposed the bill because it restricted pre-employment drug testing to certain job categories.<sup>48</sup> The Montana Nurses' Association backed the bill with reservations because "urine tests as a condition of employment . . . are not an accurate measurement of an individual's ability to perform a given job if hired".<sup>49</sup>

The Judiciary Committee made some minor amendments to the bill. The House voted on the bill March 29 where it passed 92 to 8.<sup>50</sup> The representatives who voted "no" gave varied explanations for voting against the drug testing bill. Their objections offer some insights into the problems associated with such legislation. Rep. Stella Jean Hansen wrote she voted against the bill because she was worried about all the lawsuits that would be incurred against the

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<sup>48</sup>Montana, House of Representatives, Judicial Committee, Drug Testing (SB 338): Hearing before the House Judiciary Committee. 50th Leg., Regular Sess., March 18, 1987: 5-6.

<sup>49</sup>Ibid., exhibit C.

<sup>50</sup>Montana House of Representatives, Montana House Journal (Helena, MT.: State Publishing, 1987): 1665.

state.<sup>51</sup> Employees could sue their employers, including the state, over the invasion of privacy issue. Rep. Ben Cohen quoted one of his professors from Harvard, Dr. Timothy Leary who stated, “Nobody proscribes to me except me and my babe”.<sup>52</sup> He also said that a woman’s right to choose to have an abortion and the right to control one’s body are all intertwined with an individual’s right of privacy. He acknowledged that the bill was progressive in that it limited many types of drug testing, but Rep. Cohen does not like any drug testing. To him, it was a philosophical choice. “Pre-employment drug testing presupposes everyone applying for a job is guilty of drug abuse. This flies in the face of assuming that every man is innocent until proven guilty.”<sup>53</sup>

Governor Ted Schwinden signed the bill on April 15, 1987.<sup>54</sup> The bill that started out restricting most types of drug testing, finished with a strong emphasis on privacy. Only in certain job classifications could employers conduct pre-employment tests. Also, a supervisor could only drug test an employee if the supervisor

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<sup>51</sup>Rep. Stella Jean Hansen, to author, concerning SB 338, L, Jan. 19, 1992.

<sup>52</sup>Representative Ben Cohen, interview by author, 14 January 1992.

<sup>53</sup>Ibid.

<sup>54</sup>Montana Senate, Montana Senate Journal (1987): 1580.

had reason to believe a worker used drugs. These two types of drug testing are an invasion of privacy, but are allowable under the Montana constitutional right of privacy because there is a “compelling state interest.”<sup>55</sup> The state wants a limited form of testing to protect Montana citizens from state workers under the influence of drugs or alcohol. But the state’s overall emphasis is on a state worker’s privacy.

#### Bills since 1987

Senator Joe Mazurek believes that 1989 marked the shift in Montanan’s attitude concerning the rights of Montana citizens. In 1987, the citizens’ concern had been on privacy, but by 1989, he felt the concern had shifted to the right of safety in the workplace.<sup>56</sup> This shift was helped in part by the various industries who lobbied both the Montana populace and the legislators for open drug testing, citing workplace safety.

In the 1989 session, Steve Browning, a lawyer and lobbyist for IBM, drafted legislation allowing random drug testing of workers.<sup>57</sup> He convinced Senator Richard Pinsoneault of St. Ignatius to sponsor

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<sup>55</sup>Mont. Const. art. II, § 10.

<sup>56</sup>Senator Mazurek, speech.

<sup>57</sup>Ibid.

the bill, which was designated Senate Bill 373.<sup>58</sup> The unions and like minded organizations opposed the bill.<sup>59</sup> The bill died in committee after a tie vote on a DO PASS recommendation.<sup>60</sup>

Two years later, in the 1991 legislature, legislators introduced three bills. Senator Lawrence Stimatz of Butte introduced Senate Bill 138.<sup>61</sup> Steve Browning, then a lobbyist for a newly formed coalition, Montanans for a Drug-Free Society, prepared the bill for Senator Stimatz.<sup>62</sup> Mr. Browning modeled the bill after one prepared by the federal Office of National Drug Control.<sup>63</sup> This bill would abolish restrictions on all types of drug testing.<sup>64</sup> Corporations backed this bill,<sup>65</sup> while labor opposed it.<sup>66</sup> On

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<sup>58</sup>Montana, Senate, Judiciary Committee, Drug Testing (SB 373): Hearing before the Senate Judiciary Committee, Feb. 15, 1989: exhibit A-1 and exhibit 1.

<sup>59</sup>Ibid., exhibit 5 and exhibit 6.

<sup>60</sup>Ibid., 4 and Montana Senate, Montana Senate Journal (Helena, MT.: State Publishing, 1989): 463.

<sup>61</sup>Montana, Senate, Judiciary Committee, Drug Testing (SB 138): Hearing before the Senate Judiciary Committee. 50th., Regular Sess., Jan. 31, 1991: exhibit 7.

<sup>62</sup>Steve Browning, Montanans for a Drug-Free Society, Helena, Montana, to all Montana state representatives and senators, TLS, Dec. 27, 1990.

<sup>63</sup>Office of National Drug Control, Building a Drug-Free Workforce (Nov. 1990): Tab A.

<sup>64</sup>Steve Shirley, "Group Talks to Legislators about Testing Workers for Drugs," Great Falls (Mont) Tribune, May 17, 1990, 4A.

<sup>65</sup>Montana, Senate, Judiciary Committee, Drug Testing (SB 138): Hearing before the Senate Judiciary Committee. 50th., Regular Sess., Jan. 31, 1991: 2-5.

<sup>66</sup>Ibid., 5-7.

February 23, 1991, Senator Mazurek moved that SB 138 be tabled. The motion carried unanimously in the Judiciary Committee and the bill died.<sup>67</sup> The labor lobby had exerted enough influence to have the bill killed.

Senator Towe of Billings introduced Senate Bill 31, which would restrict drug testing to certified laboratories.<sup>68</sup> Labor supported this bill because it would reduce false-positives<sup>69</sup> while corporations opposed the new standards.<sup>70</sup> On February 23, 1991, an amendment was added that would allow pre-employment testing of all job applicants.<sup>71</sup> The bill passed the Senate 41-8 on February 26.<sup>72</sup>

The Senate transmitted the bill to the House, which referred it to the Labor and Employment Relations Committee.<sup>73</sup> Labor opposed

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<sup>67</sup>Montana, Senate, Judiciary Committee, Drug Testing (SB 138): Hearing before the Senate Judiciary Committee. 50th., Regular Sess., Feb. 23, 1991: 3 and Montana Senate Journal (1991): 94.

<sup>68</sup>"Towe: Mishandling of Drug Tests Likely," Great Falls (Mont) Tribune, Jan. 17, 1991, 3C.

<sup>69</sup>Montana, Senate, Drug Testing (SB 31), Jan. 16, 1991: 1-3.

<sup>70</sup>*Ibid.*, 3-4.

<sup>71</sup>Montana, Senate, Judiciary Committee, Drug Testing (SB 31): Hearing before the House Judiciary Committee. 52nd Leg., Regular Sess., Feb. 23, 1991: 2.

<sup>72</sup>Montana Senate, Montana Senate Journal (1991): 671 and 685.

<sup>73</sup>Montana House of Representatives, Montana House Journal (1991): 1151.

the amendment because the bill expanded pre-employment testing.<sup>74</sup>  
The bill was tabled and died in committee.<sup>75</sup>

Representative Bob Gilbert, a truck driver from Sidney introduced House Bill 110. The 1987 drug testing statute severely restricted drug testing in Montana. If a truck driver only drove a truck in Montana, then he could not be drug tested. However, if that same driver drove over the state line, he would need to be tested under federal regulations.<sup>76</sup> HB 110 would bring Montana law to the same standards as federal law for Montana truck drivers.<sup>77</sup> The bill only allowed pre-employment, biennial (periodic) and reason to believe drug testing of truck drivers. The bill also set strict standards for all drug testing: a firm or agency must use federally approved drug testing laboratories.<sup>78</sup> The bill faced no opposition

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<sup>74</sup>Montana, House of Representatives, Labor and Employment Relations Committee, Drug Testing (SB 31): Hearing before the Labor and Employment Relations Committee. 52nd Leg., Regular Sess., March 20, 1991: exhibit 6.

<sup>75</sup>Idem, April 4, 1991: exhibit 5.

<sup>76</sup>Montana, House of Representatives, Labor and Employment Relations Committee, Drug Testing (HB 110): Hearing before the House Labor and Employment Relations Committee. 52nd Leg., Regular Sess., February 12, 1991: exhibit 3.

<sup>77</sup>Ibid.

<sup>78</sup>Montana, Senate, Judiciary Committee, Drug Testing (HB 110): Testimony before the Senate Judiciary Committee. 52nd Leg., Regular Sess., March 21, 1991: exhibit 9.

from legislators in either house and Governor Stephens signed the bill into law on April 20, 1991.<sup>79</sup>

The business community realized after the 1987 legislative session that they had given up the right to random drug test. The private sector in Montana prefers random drug testing and has lobbied the legislature for the right. However, corporations have been thwarted so far because of the unions' successful defense of a worker's privacy. Union lobbyists have convinced the legislature that the privacy of the individual is more important than the right of a business to random drug test because of safety in the workplace issues.

So the business community has had to use selected pre-employment drug testing and "reason to believe" testing. However, the state government conducts very little testing, all of which is required by federal regulation. The reason no state agency has drug tested under the auspices of the state statute is because no drug testing policy has been implemented. The Department of Administration writes state policy, but has not written any drug testing policy. The reasons will be explored in the next chapter.

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<sup>79</sup>Montana House Journal (1991): 2857. See Mont. Code Ann. § 39-2-304 (1991) for amended statute.

CHAPTER III  
STATE PERSONNEL OFFICER INTERVIEWS

In May of 1992, a series of personal interview surveys averaging about 45 minutes apiece were conducted with state agency personnel officers.<sup>1</sup> The survey had a completion rate of 96%. Such surveys should have a completion rate of 80 to 85%, so this survey was above the acceptable completion rate margin.<sup>2</sup> The survey used open ended questions which allowed the interviewees to explain in detail the drug testing policies of their agency.<sup>3</sup> Because personal interviews were used, the interviewer could probe for responses if the person answered inappropriately, or answered in insufficient depth.<sup>4</sup> The probes were intended to be neutral, non-directive questions.<sup>5</sup>

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<sup>1</sup>Other state employees were interviewed by phone.

<sup>2</sup>Babbie, 244.

<sup>3</sup>Ibid, 140.

<sup>4</sup>Ibid, 248.

<sup>5</sup>Ibid, 250.



The personnel officers were asked questions concerning drug testing policies. The survey questions dealt with statistical data and anecdotal stories about drug abuse in their workplace and the department's drug testing policies. Lastly, the personnel officers made general comments about chemical abuse in Montana state government.

#### Drug Testing Policy

The first question asked was whether the agency had implemented a drug testing policy. Only the Department of Military Affairs had implemented a drug testing program. The Department of Military Affairs does not follow the state statute, but instead follows federal guidelines set down in U.S. Army and Air Force regulations.

Although the vast majority of agencies do not test for drugs, they do follow the Drugfree Workplace Act.<sup>6</sup> Through this act, Congress mandated that any entity receiving federal funds must certify that the recipient of the funds is running a drugfree work environment. The agency is also required to notify the federal government of any violation of this federal regulation. This

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<sup>6</sup>Public Law 100-690, Title V, sub-title D.

certification merely consists of the department director writing to the federal government each year certifying that the work-place is drugfree. No drug testing is conducted under this federal regulation. Thus the federally mandated Drugfree Workplace Act is a relatively toothless act in that the agency merely must certify that the particular department is drugfree.

Since the majority of agencies have not implemented a drug testing policy, the next area to explore is if there are major chemical abuse problems in state government. Montana citizens have access to alcohol and illicit drugs.<sup>7</sup> However, if there is no appreciable problem of drug and alcohol abuse by state employees, then there is no pressing reason to examine why the government has not implemented the drug testing policy. Why implement a policy to prevent a nonexistent problem?

#### Statistics and Anecdotal Stories on Chemical Abuse

To ascertain chemical abuse problems, personnel officers were asked if there were any drug or alcohol statistics for state government or for their particular agency. They responded that the state does not keep statistics on legal or illegal drug use problems

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<sup>7</sup>Ken Pekoc, "Drugs: Helena Isn't Immune," Helena (Mont) Independent Record, April 7, 1992, 6A.

of state government employees.<sup>8</sup> Also, very few state agencies keep department level statistics. The Department of Military Affairs is one of the few that does keep statistics. It tests around 900 soldiers and airmen each year. Generally 25 to 45 service members test positive (3-5% a year). This is a low average and matches the statistics for the surrounding states of North Dakota, South Dakota, Wyoming, and Idaho, according to Col. Hindoien, Department of Military Affairs.<sup>9</sup> In contrast, Col. Hindoien disclosed that other military personnel officers describe drug usage rates five times higher in the eastern and western coastal states.

Barbara Martin, Department of Transportation, stated that nationwide 20 to 25% of employees use an Employment Assistance Program (EAP) a year. EAPs' deal with many types of problems, but many employees use the program for chemical dependency.

Confidentiality was granted regarding the percentage of workers who use the Department of Transportation EAP. However, compared to the national average, the percentage was quite small. An even smaller number of personnel used the EAP for chemical dependency.

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<sup>8</sup>Karen Goans, Alcohol and Drug Division, Department of Corrections and Human Services confirmed this by phone interview on May 19, 1992.

<sup>9</sup>Unless otherwise stated, the various state workers cited are personnel officers for their respective agencies.

The Department of Labor and Industry also has an EAP and less than 1% of the workers used the program for chemical dependency.

Generally speaking, for the agencies which keep statistics on chemical abuse, the percentage of worker chemical abuse is low. However, the use of EAP statistics may be misleading. Most substance abusers only turn to an EAP when the addiction becomes serious. Not included are the individuals whose addiction has not yet taken them to that stark realization. Also, it is hard to take statistics from one agency, such as Military Affairs or Transportation, and then reasonably infer that those statistics represent the chemical abuse problems of all state agencies.

Since the majority of agencies do not have any statistics on drug abuse, the personnel officers were asked to state an opinion if Montana state workers' drug abuse statistics would be about the same as the national averages. As a whole, they agreed that Montana state employees' use of licit and illicit drugs would be around the national average. However, when asked about the use of alcohol, many of the personnel officers thought that the state workers would have a higher abuse rate. Ellen Engstedt, Environmental Quality Council, pointed out that upon examining statistics for the general

population, Montana has a higher consumption of alcohol than the national average.

However, Louise Ross, Secretary of State's Office, made the counterpoint that there could be a problem in separating state employees as a subset from the general Montana populace. She noted that the state has many Native American reservations. Also, she claimed to have seen statistics that Montana has one the highest percentages of people on welfare.<sup>10</sup> Evidence suggests that these groups tend to have a higher abuse rate. Therefore, including those groups into Montana's average, which has a low population to begin with, could lead to skewed statistics, especially for alcohol. State employees as a subset of the state population likely do not drink more alcohol than the national average.

On the issue of illicit drugs in state government, the general consensus was that drugs are less of a problem than the national average. Brian Cockhill, Montana Historical Society, felt Montana state government employee drug abuse would be lower because Montana is a conservative state, although he admitted that there

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<sup>10</sup>However, her claim does not appear to be true. The percentage of Montanans on public assistance is low compare to the rest of nation. See U. S. Department of Commerce, "Statistical Abstract of the United States 1991: The National Data Book 111th Edition (Washington, D.C.: GPO, 1991): 372.

will be pockets of use in the state, such as the city of Missoula.

Rex Renk, the Deputy Clerk of the Supreme Court, said illicit drugs were less of a problem because of availability. Just like corporations which will not locate to Montana because of accessibility problems, the quality and varied types of drugs will not enter Montana that L.A. drug users would have access to use.

The majority of personnel officers felt that the number of drug users in state government would be a minor percentage. Rod Sunstad, Montana University System, supported that statement by saying that when he worked for the Department of Administration, the percentage of illicit drug users was small, but that there was a substantial percentage of alcohol abusers. Gail Kuglin, Department of Administration, supported the notion of high alcohol abuse rate by estimating that 90% of the work related problems are caused by alcohol. It would seem that alcohol, not drugs, cause the majority of chemical abuse problems. But Pat Lopach with the Department of Justice noted that maybe illicit drugs are seen as less of a problem, because people are more open about their alcohol use than they are about their drug use.

The answers given by the personnel officers show inconclusive information as to whether a drug problem truly exists. However, their statements on alcohol show that alcohol abuse by workers is a problem for state government. Because there are no available statistics on drug abuse in Montana state government and the personnel officers' guesses as to percentage of abusers is at best, marginal, they were asked for anecdotal stories about chemical abuse in their agency. While the personnel officers may not have statistics on chemical abuse about their agency, they have developed opinions from their work experience as to whether a problem exists.

Again the personnel officers stated that they felt that there were minor problems with illegal drug abuse. Legal drug abuse, such as alcoholism, was not a major problem in their particular agencies. The stories they told were isolated instances of abuse concerning mostly alcohol, but also included illicit drugs such as cocaine or marijuana. Brian Cockhill of the Montana Historical Society stated that he was sure employees used drugs recreationally, but not at work. He recounted only one incident of drug use at work, from the early 1970s, and that was an intern smoking marijuana.

However, Tom Gooch with Department of Corrections and Human Services was one of the few personnel officers who admitted there are problems due to drugs. He said workers have been absent from work due to alcohol, brought drugs and alcohol into state buildings, and used alcohol while off-grounds when patients are under their charge. Employees have been caught during work hours driving while consuming alcohol and one worker was killed while driving under the influence of alcohol. Lastly, workers have been charged with distributing drugs off the work grounds.

The personnel officers gave a mixed answer concerning chemical abuse. It appears that there are few problems with illicit drugs in state government. However, the abuse of alcohol may be a problem. Alcohol is covered under the Montana drug testing statute. For the reason that alcohol may be a problem, the examination will continue as to why the drug testing policy has not been implemented.

#### Why Testing has not been Implemented

The personnel officers were asked why they had not implemented the drug testing statute. Their answers were two pronged. One prong was procedural in that agencies could not implement drug testing because the Department of Administration



(DOA) had not developed any policy on how to test. Because the DOA did not develop policy on how to test, the agency could not implement testing. But there is a deeper reason, a second prong, as to why there was no policy implementation. The majority of personnel officers have stated that they do not want to implement drug testing at this time.

First the procedural reason will be examined. Drug testing has not been implemented because the Department of Administration has not developed policy guidelines. Personnel officers stated that in order for the agencies to implement drug testing, the Department of Administration needs to draft policy guidelines. The DOA has not done so at this time. According to Dal Smilie, Chief Legal Counsel for the DOA, the statute is permissive in that it reads that drug testing “may” be implemented, not “shall” be implemented.<sup>11</sup> The state legislature, then, is not mandating a duty upon the state agencies to impose drug testing. If an agency wanted to start drug testing, they would request that the DOA develop a policy so that testing could occur. No agency has requested that the DOA develop a policy.

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<sup>11</sup>Dal Smilie was interviewed by phone on May 1, 1992.

Mr. Smilie also stated that the legislature must authorize the DOA, as per the Montana Administrative Procedure Act (MAPA), to make an Administrative Rule of Montana (ARM).<sup>12</sup> Only then can the DOA draft it. The legislature made no such provision for adapting the drug testing legislation into an ARM.<sup>13</sup> Thus Mr. Smilie's position is that the DOA could not develop an ARM because the legislature did not authorize it. Also, the state agencies have not requested the DOA to develop policy, and may never make that request because the legislature has not mandated the agencies to implement the law.

However, Ron Sunstad, of the Montana University System, pointed out that even though the DOA does not have the authority to make a drug testing policy in the ARM, it can make personnel policy. The Montana Code Annotated reads: "The department (DOA) shall develop and issue personnel policies for the state."<sup>14</sup> Under the authority of this code, the DOA could adopt a drug testing policy.

So while the DOA cannot make an ARM, they can develop a personnel policy. Procedurally, an agency at this point in time could

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<sup>12</sup>Mont Code Ann. §2-4-301 (1991).

<sup>13</sup>1987 Mont. Laws 482.

<sup>14</sup>Mont. Code Ann. §2-18-102(3) (1991).

not implement a drug testing policy because there is no ARM or personnel policy. But even if there were policy developed, the majority of personnel officers do not think it is needed at this time. Many of the personnel officers stated that they would not actively support implementing the drug testing policy.

The personnel officers were asked if they had any concerns about implementing drug testing. Many of the personnel officers did have concerns. Brian Cockhill, Montana Historical Society, was not sure that it was the state's business to know if a person was using drugs away from work. The Montana Historical Society is not an organization that has the agency director and personnel officer implement policy from the top and then force it down on the employees. He would rather try to achieve a solution through relations with the employee.

Wayne Phillips, Governor's Office, had a similar problem with "reason to believe" testing. If a worker is performing to work standard, she should not be tested. If the worker has job performance difficulties documented, and the supervisor has worked with the employee on the problem, only then in Mr. Phillips' opinion, is testing permissible. If the work is not impaired, then by testing,

the employer becomes involved in a person's life. Supervisors have no right to control a worker's life. If the supervisor does intervene, then he becomes an "Orwellian Big Brother."

Pat Lopach, Department of Justice, was concerned about using the "reason to believe" standard. People are individuals; a person who always has blood shot eyes as a personal characteristic could be mistaken for using drugs. Supervisors could harass that employee while zealously looking for drug users. Along the same lines, Barbara Martin, Department of Transportation, was uncomfortable with using "reason to believe" testing because it is a judgment call. Supervisors could use it or be accused of using it as a harassment tool.

Dal Smilie, Chief Legal Counsel for DOA, was concerned about intervening into a person's life. He stated that a supervisor cannot intervene unless a worker's performance is affected. Under the Montana Human Rights Act, a department cannot discriminate against alcoholics unless work is affected.<sup>15</sup> He further added that the state does not want to be intervening into a person's private life or such practices may get out of hand. Supervisors would then be

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<sup>15</sup>Mont. Code Ann. §49-2-308 (1991).

intervening when a person had a marriage problem or a death in the family. The supervisor does not want to get involved in, nor has the time for, these personal matters.

Ken Toole, with the Office of Public Instruction, also stated that drug abuse is a protected class under the Montana Human Rights Act. The Montana Human Rights Commission holds that if a supervisor discriminates against a person because of an addiction, that act is illegal. If a supervisor treats a person differently because of a handicap, such as addiction, then the department is on “thin legal ice.” He further stated that if no performance problems exist and a department personnel officer tells a supervisor to use the “reason to believe” standard to detect drug abuse, a supervisor could misidentify an employee as a drug user. The department would then take action against the person based on the erroneous information and the employee ultimately could sue the department.

Drug counselors have called the Office of Public Instruction and asked supervisors to intervene as an employer. The Office of Public Instruction has refused this request because intervention would be coercive as an employer. Ken Toole stated that the Office

of Public Instruction cannot get overly aggressive on drug and alcohol issues in the workplace.

Pat Lopach, Department of Justice, noted that under the Americans with Disabilities Act, if a supervisor has knowledge that a worker has a drug abuse problem, the supervisor could be accused of discriminating against that person. Alcoholics and drug abusers are considered to be handicapped. The legal system could view any action taken by a supervisor against an employee whom the supervisor knows abuses a substance, as discrimination against the employee.

A few of the personnel officers had no problems with implementing drug testing. Captain Berry, Montana Highway Patrol, is the most eager of all the personnel officers to implement testing. His problem as personnel officer is that the state has no policy so that the Montana Highway Patrol can implement drug testing. He wants to know where the Governor is on the issue, because in his words, the drug problem will not go away. He said someone in the governor's office has to push for a state policy that is developed, funded, and backed with personnel who have expertise in the area of drug testing.

He agreed that drug testing is not a big issue right now. But he said that the Montana Highway Patrol must take care of the problem before something drastic happens. He gave a hypothetical example of a highway patrolman, under the influence, who becomes involved in a high speed chase and hits an oncoming car. Another scenario he outlined could involve a snowplow driver ramming into a loaded school bus. Policy development at that point is too late. He feels that Montanans will not be upset if the drug testing plan is reasonable.

Rod Sunstad, Montana University System, felt that the law tried to balance employees's rights with public safety. The legislators had a difficult time balancing these two issues, but enacted a statute that should satisfy proponents of both sides. Because it was a compromise that erred on the side of the employee, he would feel comfortable implementing the policy.

While there were a few personnel officers who did not have a problem implementing drug testing, many did have concerns. The personnel officers were worried about privacy issues, only looking at job performance not drug use, and harassment of employees. So the majority, because of these concerns, stated: Do not drug test.

### General Comments on Chemical Abuse and the State Statute

Lastly, the personnel officers were asked to comment on any aspect of drug abuse that may have been left out of the survey. Most people commented that drug abuse was not a major problem they encountered as personnel officers. They pointed out that there are more pressing concerns facing the state today.

Pam Wintrode, Department of Labor and Industry, stated that she realizes illegal drugs are in Helena, but she has never run across abuse problems in state government. She has worked with alcohol problems, but she would be perfectly happy if the state government left drug testing alone. Brian Cockhill, Montana Historical Society, stated that drug arrests in Montana show that there is drug traffic, so existence of the problem is obvious, but he questioned wasting resources on a small problem. Since Montana gets good service from its employees, there is no need to test. An agency should concentrate on its mission, and only if drugs interfere with the agency mission should the state start a drug testing program.

Melva Miller, Department of Health and Environmental Sciences, said there are bigger problems than drugs that should be dealt with. Morale is low because of the new pay system mandated



by the state legislature. Linda Dixon, Social and Rehabilitative Services, added to that opinion by agreeing on morale problems. State workers are worried because the economy is bad and their livelihoods depend on the strong economy to provide revenues for their salaries. They are also demoralized by the perceived lack of support from politicians who constantly try to cut the number of state positions, and the state communities who see state workers as “lazy.” She stated that the state government continues to downsize, while the federal government mandates more requirements. Increased workloads leads to a worker’s attitude of just getting the work done, because she does not have the time or energy to nurture herself or mentor other workers. Work overload leads to high job dissatisfaction and people quitting their jobs. Employees quitting leads to a higher workload on the remaining workers.

Pat Lopach, Department of Justice, stated that a personnel officer puts energy where a crisis develops. The workload is heavy enough that it is management by crisis. Drug abuse by employees has created no urgency for supervisors to focus on the problem.

Until the spotlight is turned on drug abuse problems, there will be no urgency to develop a drug testing policy.

Ken Toole, Office of Public Instruction, said that state workers have a victim mentality. They constantly have to fight over pay in the legislative arena. Their pay is below the market level of what peers are being paid. State employees' insurance is being cut back. Workers have to put in much unpaid compensation time leading to stress and job dissatisfaction.

Most personnel officers do not see licit and illicit drug use as a major problem in state government. Instead, the major problems deal with stress, low pay, low morale, and a high workload. The personnel officers are dealing with problems more pressing than chemical abuse. For that reason, they would rather leave the state drug testing statute alone and not implement the policy. Should drug testing be implemented in state government? A recommendation will be discussed in the next chapter.

CHAPTER IV  
RECOMMENDATIONS AND CONCLUSIONS

Unlike President Reagan, who felt compelled to take action to stop drug abuse by issuing an executive order on drug testing, Montana's governors have not had that urgency. Montana citizens use drugs and alcohol, but neither politicians nor state citizens are clamoring for immediate action on the "drug crisis." While other state legislatures are enacting laws that give relatively free reign to drug test, the Montana legislature has taken a rather low key approach. Whereas many states sided with President Reagan's public safety concerns, the Montana state legislature was more concerned about privacy. The Montana statute on drug testing severely restricted the types of drug testing that could be done. In fact, the representatives who voted against the drug testing bill took the position that no drug testing should be allowed in the state. These representatives were opposed to even limited drug testing.

One gets the impression that the legislature did not want to pass a drug testing bill that would allow testing of private employees, but exclude public workers. The law included public employees, but the legislature conveniently left out the Department of Administration's authority to enact an Administrative Rule of Montana for state employee drug testing. The private sector could quickly start drug testing, but the state could not drug test because of the lack of the regulation. Both sides were placated in that both private and public sector employees could be tested, so private sector employees would not complain that the state legislature had singled them out. The public sector employees could not complain about the statute because testing was not implemented; the law remained unused in the code book.

During the interviews, the personnel officers for the various agencies did not express feelings that illegal drugs were a major problem for state government. They acknowledged alcohol was a problem, but not one that required immediate action. Montana state government is surviving, not flourishing, because of decade long budget woes. In a survival mode, personnel officers could only react to major problems as they arose.

Even though personnel officers do not view licit and illicit drug use as a problem, the Governor should act now, for safety reasons. If the Governor acts now, then some of the drug and alcohol abusers could be detected before they seriously hurt themselves or others. So the Governor should order the Department of Administration (DOA) to conduct an agency by agency study. The DOA would conduct surveys to determine drug and alcohol abuse in the various agencies. The Governor should also order the DOA to develop a personnel policy for the drug testing, since the administrative branch does not have legislative approval to develop an ARM. Lastly, the Governor should not impose drug testing on every state agency. The decision should rest solely with the department directors.

The Governor should re-iterate the legislature's intent of the law to departmental directors, specifically that the implementation of drug testing is discretionary. Then the department directors should examine the DOA's study of the drug and alcohol abuse in their agency. They should also look at the inherent risks involved in their employees' work. After scrutinizing these factors, the various department directors should make the decision of whether or not to implement drug testing.

Once the Governor makes the decision to develop a drug testing policy, he should realize the obstacles that he will encounter. There will be three major obstacles: legal, administrative, and political. The legal obstacle involves privacy. If the state begins to conduct drug testing under the Montana statute, workers and their public unions will challenge the testing in court as an invasion of their right to privacy. The Montana Constitution guarantees a right to privacy balanced against a compelling state interest. The state will incur costs in defending against these privacy claims, in showing that there is a compelling state interest to test workers for drug abuse.

There will be administrative obstacles as well. The personnel officers are already overworked. Also, in their interviews, the majority of personnel officers stated that they would be none too eager to implement the policy. If the department directors deemed the testing necessary, they should look into creating additional personnel officer positions to oversee the drug testing. The directors would also have to talk to the personnel officers about the state's interest in drug testing. So the directors would need to put

an emphasis on drug testing, and make sure that the personnel officers properly administered the program.

The last obstacle is political. The Governor needs to start the process of evaluating drug abuse problems, and then back every department director who implements drug testing. The department director would base her opinion on the DOA's survey showing drug abuse problems in that agency, and if the work done in the agency is inherently dangerous. Without active gubernatorial support, the department directors are not likely to act without direction from the Governor. The reason for the inaction is the political firestorm that could develop if a department implemented a policy without the Governor's approval. State employees and their union would most likely challenge the testing. An agency director could find herself in a tenuous position if the ensuing media coverage was critical enough, and the state's case for testing was weak against a citizen's right to privacy. A department director would fear for her position without active support from the Governor.

Capt. Steve Berry, as a personnel officer, closed his interview by asking where the Governor was on the issue. He recognized that it would take the Governor to start the process. In Capt. Berry's

opinion, the Governor's office had been inactive. He was impatiently waiting for some policy. Captain Berry has fears of a patrolman under the influence hurting himself, or others.

Before the Governor acts, he should be aware, like any other decision, that political capital is involved. His decision to study, develop, and implement drug testing policy could cause him to lose political support among the state workers. However, the prospect of having a safer and productive workforce should outweigh the political risks involved.

In conclusion, the Montana Legislature has passed one of the most restrictive drug testing statutes in the nation. They erred on the side of a worker's privacy over the state's interest in safety. The drug testing statute only allows "pre-employment" and "reason to believe" drug testing. The legislature then failed to provide the DOA with the authority to make an ARM. However, the DOA could develop a personnel policy. The personnel officers do not even wish to implement this limited form of drug testing authorized by the legislature. They do not view drug and alcohol abuse as a major problem.



Regardless, the Governor should order a study to see if there are drug and alcohol problems in the various agencies. He should then order the DOA to develop a policy. The Governor should be aware that there are three primary obstacles to implementing policy on drug testing.

Lastly, the department directors must be presented with the DOA's drug abuse study and personnel policy. The director, with this information and with an idea of the inherent dangers of his employees work, can then make a decision whether or not to implement the policy. So instead of the Governor ordering the policy be applied to all state workers, the department directors can make a determination for their individual agencies. This is a far better management practice.

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