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Written Comments

HCR 175/HR 135

REQUESTING A STUDY ON THE FEASIBILITY AND EFFECTIVENESS OF IMPLEMENTING DRUG TESTING TO TENANTS, SELECTED APPLICANTS, AND APPLICANTS OF FEDERAL AND STATE LOW-INCOME HOUSING IN THE STATE

Testimony by the Legislative Reference Bureau
Charlotte A. Carter-Yamauchi, Acting Director

Presented to the House Committee on Housing

Tuesday, March 27, 2012, 11:40 a.m.
Conference Room 325

Chair Cabanilla and Members of the Committees:

I am Charlotte Carter-Yamauchi, Acting Director of the Legislative Reference Bureau.

Thank you for this opportunity to comment on H.C.R. No. 175/H.R. No. 135.

The measures request that the Bureau conduct a study on the feasibility and effectiveness of implementing drug testing to tenants, selected applicants, and applicants of federal and state low-income housing in the State. More specifically, the study is requested to include an examination of the legal, economic, social, ethical, and practical considerations and implications of drug testing on tenants, selected applicants, and applicants of federal and state low-income housing in the State, including:

- (1) Housing, anti-discrimination, and privacy laws as they relate to drug testing tenants, selected applicants, and applicants of federal and state low-income housing;
- (2) The legal effects of random and suspicionless drug testing on tenants, selected applicants, and applicants of federal and state low-income housing;

- (3) Drug testing proposals nationally and in other states on tenants, selected applicants, and applicants of federal and state low-income housing, and the status of the proposals;
- (4) The feasibility and effectiveness of drug testing on tenants, selected applicants, and applicants of federal and state low-income housing, including the accuracy and reliability of drug tests; and
- (5) The costs and resources necessary to implement fair, accurate, and reliable drug testing.

While the Bureau takes no position on the merits of drug testing of public assistance applicants or recipients, examination of its economic, social, and ethical implications exceed the Bureau's expertise. It also appears that much of the requested information regarding legal and practical implications is already available and that further study by the Bureau at this point in time would not make a meaningful contribution to the Legislature's policy debate on this issue. We submit the following for your consideration.

Current State of Drug Testing of Public Assistance Applicants and Recipients

While the measures correctly note that numerous jurisdictions have considered proposals to require drug testing of public assistance applicants and recipients, there is no *trend* toward enactment of such a requirement. According to the National Conference of State Legislatures, as of March 20, 2012, proposals have been made in twenty-five states in 2012 to drug test public assistance applicants or recipients. None of these have been enacted thus far. Similar proposals were made in twenty states in 2009 and twelve states in 2010. None of these became law because most called for suspicionless drug testing that was deemed unconstitutional by a federal court in Michigan in the only reported case to date involving drug testing of public assistance applicants or recipients.¹

In 2011, out of thirty-six states considering the issue, only three states passed legislation of note. Arizona and Missouri both passed laws requiring testing when there is reason to believe the applicant or recipient is engaged in the illegal use of drugs. Arizona's law is a pilot program for Fiscal Year 2011-2012 only, and there is not yet available any information on the effectiveness of either law because they have been in place for less than a year. Florida passed a law requiring all applicants to be tested, but enforcement of the law was enjoined by a federal court in October 2011 based upon a finding that the testing requirement likely constitutes an unconstitutional search and seizure.² That ruling has been appealed to the U.S. Court of Appeals for the Eleventh Circuit.

In summary, there is not currently in effect anywhere in the United States a law requiring the suspicionless drug testing of public assistance applicants or recipients. The two

¹ *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000) aff'd. 60 F. Appx. 601 (6th Circ. 2003).

² *Lebron v. Wilkins*, No. 6:11-cv-01473-Orl-35DAB (Oct. 24, 2011).

laws that permit testing where there is reason to believe the person is using illegal drugs have been on the books less than a year and the verdict on their effect is not yet in.

The Implications of Drug Testing of Public Assistance Applicants and Recipients

In addition to the legal issues addressed briefly above, the Committee may wish to consider the following:

- Public assistance recipients are no more likely to use drugs than other parts of the population benefiting from government programs or subsidies. According to a 1996 study by the National Institute of Alcohol Abuse and Alcoholism, differences between the proportion of welfare and non-welfare recipients using illegal drugs are statistically insignificant. Before the Michigan program was halted by the federal court in the case referred to above, only 10% of recipients tested positive for illicit drugs. Only 3% tested positive for hard drugs, such as cocaine and amphetamines – rates that are in line with the drug use rates of the general population. Further, seventy per cent of all illicit drug users (and presumably a much higher percentage of alcohol users), ages 18-49, are employed full-time.
- Random drug testing is expensive. According to a 2002 U.S. Department of Education study, the average cost of a drug test is about \$42 per person tested, not including the costs of hiring personnel to administer the tests, to ensure confidentiality of results, and to run confirmatory tests to guard against false positives. One private employer estimated that it cost \$20,000 to find a drug using employee because, after testing 10,000 employees, only 49 tested positive. A congressional committee estimated that finding a drug user amongst the ranks of government employees cost \$77,000 because only 0.5 per cent tested positive. In its testimony on HB 1885, which would have required the suspicionless testing of public housing applicants and recipients, the Hawaii Public Housing Authority estimated that it would cost as much as \$1.8 million per year to implement such a requirement (\$600,000 to test tenants, \$900,000 to test applicants, and \$300,000 for the personnel necessary to properly implement the program).
- Suspicionless drug testing is an ineffective means to identify drug abusers. Most types of drug tests fail to detect alcohol abuse – the most commonly abused substance among Americans – and are most likely to detect marijuana use since the active ingredient in marijuana stays in the body's system longer than any other illicit substance. Therefore, drug tests often fail to identify people who are using more powerful, more addictive, and more dangerous drugs like methamphetamine or cocaine, which exit the body's system in a matter of hours or days. Suspicionless drug tests are not a cost-effective method of identifying drug users among public housing applicants and recipients because such tests almost exclusively identify only marijuana users and because drug abuse by welfare recipients can be more readily identified by case workers through regular

supervision and monitoring, absent the cost and intrusion of mandatory drug testing.

Summary

The measures ask the Bureau to "examine the legal, economic, social, ethical, and practical considerations and implications" of drug testing of public housing applicants and recipients, including, essentially, the legal issues raised by the proposal; the feasibility, effectiveness, and cost of the proposal; and the status of similar proposals nationwide. The Bureau has no expertise in assessing the economic, social, or ethical considerations and implications of any legislative proposal. At most, we could report on what others have opined. We note, however, that most of the literature on this issue is strongly opposed to such drug testing. In addition, the legal issues are already well known, and the cost and feasibility have already been addressed by the Hawaii Public Housing authority, to which we would turn for information. Finally, we note that the effectiveness of such a proposal is purely speculative at this point because there are only two similar laws now in effect. These require reasonable suspicion of illegal drug use (not random, suspicionless testing), and each is less than a year old. It is uncertain what more the Bureau could contribute to this policy debate.

Need for Clarification

Should the Committee wish to proceed with these measures, however, the Bureau requests clarification of the following issues so that it may complete the requested study in a timely fashion: The measures refer to "drug testing tenants, selected applicants, and applicants of federal and state low-income housing." It is not clear to whom the measures refer in their use of the term "selected applicants" nor in what way this category differs from "applicants".

Thank you for the opportunity to provide written comments on these measures.

From: mailinglist@capitol.hawaii.gov
Sent: Monday, March 26, 2012 8:40 PM
To: HSGtestimony
Cc: jyohta@hawaii.rr.com
Subject: Testimony for HCR175 on 3/27/2012 11:40:00 AM
Attachments: DPFH HCR 175 HR 135 Public Housing.docx

Testimony for HSG 3/27/2012 11:40:00 AM HCR175

Conference room: 325
Testifier position: Oppose
Testifier will be present: No
Submitted by: Jeanne Ohta
Organization:
E-mail: jyohta@hawaii.rr.com
Submitted on: 3/26/2012

Comments: