



*A bold voice for transportation workers*

July 29, 2015

Mr. Sean Belouin  
Division of Workplace Programs  
Center for Substance Abuse Prevention  
Substance Abuse and Mental Health Services Administration  
Department of Health and Human Services  
1 Choke Cherry Road  
Rockville, MD 20857

**RE: Mandatory Guidelines for Federal Workplace Drug Testing Programs; Request for Information Regarding Specific Issues Related to the Use of the Hair Specimen for Drug Testing  
Docket No. SAMHSA-2015-0003**

Dear Mr. Belouin:

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I write to comment on the Substance Abuse and Mental Health Services Administration (SAMHSA) Request for Information Regarding the Use of the Hair Specimen for Drug Testing. By way of background, TTD consists of 32 affiliate unions that represent workers in all modes of transportation including those who would be directly impacted by any changes made to the current Mandatory Guidelines for Federal Workplace Drug Testing Programs. We therefore have a vested interest in this notice.<sup>1</sup> In addition to the comments that follow, we endorse those submitted independently by TTD affiliates, the Air Line Pilots Association (ALPA), International Association of Sheet Metal, Air, Rail and Transportation Workers-Transportation Division (SMART-TD), and the Transport Workers Union of America (TWU).

We reconfirm transportation labor's commitment to ensuring the highest level of safety across our transportation system. We recognize that an important component of that standard is maintaining a drug-free workforce, and the workers represented by TTD affiliates are dedicated to upholding that principle. TTD unions also share in this commitment by operating effective programs on drug and alcohol education, prevention, and elimination.

---

<sup>1</sup> Attached is a complete list of TTD's 32 affiliate unions.

**Transportation Trades Department, AFL-CIO**

815 16th Street NW / 4th Floor / Washington DC 20006  
Tel: 202.628.9262 / Fax: 202.628.0391 / [www.ttd.org](http://www.ttd.org)  
Edward Wytkind, President / Larry I. Willis, Secretary-Treasurer



As SAMHSA is aware, the Omnibus Transportation Employee Testing Act of 1991 requires the Department of Transportation (DOT) to adopt HHS's Mandatory Guidelines for Federal Workplace Drug Testing Programs as the foundation of its policies for testing transportation workers for drugs and alcohol. Thus, any changes to HHS's scientific and technical guidelines will necessarily change DOT drug and alcohol testing policies as well.

SAMHSA's notice under consideration is a Request for Information regarding a variety of issues related to the use of hair specimen for drug testing. While it is not a proposal to permit hair specimen testing, the notice indicates that the Drug Testing Advisory Board (DTAB) is considering the scientific supportability of amending the Mandatory Guidelines to allow entities to test hair specimen for drug use.

Given that more than six million transportation workers are subject to DOT drug testing requirements, SAMHSA must ensure that any changes to the longstanding federal testing standards are backed by objective, scientifically and forensically sound evidence that prove a new testing method can be applied in an even and fair manner. However, the current state of hair testing cannot meet this requirement, and we respectfully request that SAMHSA not propose hair as an alternative specimen for federal drug tests.

### **SAMHSA's Past Concerns for Hair Testing Remain**

In 2004, SAMHSA proposed revisions to its Mandatory Guidelines to establish hair as an alternative specimen in drug tests.<sup>23</sup> In the preamble of that notice, the agency identified external contamination and hair color as concerns particular to hair specimen testing. Four years later, the agency rescinded its proposal, writing that, "[w]ith regard to the use of alternative specimens including hair...significant issues have been raised by Federal agencies during the review process which require further examination, and may require additional study and analysis."<sup>24</sup> Those same concerns SAMHSA expressed in 2004 remain today.

### **External Contamination**

As noted above, the Omnibus Transportation Employee Testing Act of 1991 requires DOT to test transportation workers for the illegal *use* of drugs. Restricting workers' exposure to drugs or proximity to those who illegally use drugs is not contemplated under the statute. As such, SAMHSA must ensure that an alternative specimen and the standards by which to test the specimen can reliably and conclusively prove the donor ingested the drug and was not merely exposed to it. In the case of hair specimen, however, this is not possible.

---

<sup>2</sup> Substance Abuse and Mental Health Services Administration, Department of Health and Human Services, Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug Testing Programs. April 13, 2004, 69 FR 71, 19673-19732.

<sup>3</sup> In addition to hair specimen, SAMHSA's 2004 notice also proposed to make oral fluid and sweat alternative specimens for drug testing.

<sup>4</sup> Substance Abuse and Mental Health Services Administration, Department of Health and Human Services, Mandatory Guidelines for Federal Workplace Drug Testing Programs, Revised Guidelines. November 25, 2008, 73 FR 228, page 71858.

Exposure to drugs in the environment can contaminate hair, potentially causing the specimen to test positive even in the absence of drug ingestion. In 2004, SAMHSA stated that washing procedures may remove some contaminants, but that testing for a metabolite indicative of only ingestion would differentiate contamination from actual use.<sup>5</sup>

To date, experts have not identified a biomarker indicating ingestion of cocaine or marijuana. Without such a substance to test for, workers are forced to put their faith in labs' washing methods to remove external contaminants. The theory holds that these procedures eliminate contaminants and what remains after completion of the wash is the presence of ingested drugs.

However, it is widely held that wash procedures are not capable of removing all contaminants from the specimen. The residue left behind is particularly troubling in hair testing because the concentration at which labs test for drugs in hair is extremely small – at the nanogram and pictogram levels. Thus, even the slightest remains of passive contamination could cause a worker to test positive for a drug she or he never ingested. As additional states legalize the recreational use of marijuana, this concern will continue to grow.

If an individual may be barred from gaining employment or fired from her/his job solely on the basis of a positive drug test, SAMHSA must have complete confidence in the accuracy and reliability of that test result. The possibility of passive contamination of hair specimen does not allow for such confidence.

### **Hair Color, Treatments, and Disparate Impact**

Natural qualities and treatment of hair can also affect how hair specimen test for drugs. For instance, melanin is a known receptor for certain drugs. Some evidence shows that individuals with darker hair retain some drugs at greater levels than those with lighter hair. Also, cosmetic treatments such as dying or straightening can damage hair and increase the absorption of drugs. Similarly, curly hair may be prone to damage and thus more susceptible to drug bonding.

In light of this evidence, some have raised concerns for whether hair testing inherently has a racial bias. While SAMHSA dismissed this concern in 2004, we highlight an ongoing case alleging a hair testing program caused disparate on the basis of race.

Ten African Americans brought a case before the United States Court of Appeals for the First Circuit against the Boston Police Department's (BPD) drug testing program. The plaintiffs claimed "that the department's program, which used hair samples to test for illegal drug use, caused a disparate impact on the basis of race in violation of Title VII of the Civil Rights Act of 1964."<sup>6</sup>

---

<sup>5</sup> Substance Abuse and Mental Health Services Administration, Department of Health and Human Services, Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug Testing Programs. April 13, 2004, 69 FR 71 19673-19732, page 19675.

<sup>6</sup> *Ronnie Jones, et al. v. City of Boston, et al.* No 12-2280 (1<sup>st</sup> Cir. 2014), page 3.

As part of their case, the plaintiffs presented eight years of BPD drug program test results demonstrating a statistical significance in the difference in rates at which African Americans tested positive for cocaine compared to their Caucasian counterparts. In May 2014, the Court found that the “difference in outcomes...were not random” and that, “we can almost be certain that the difference in outcomes associated with race over that [eight year] period cannot be attributed to chance alone.”<sup>7</sup> The Court held that the plaintiffs proved “beyond reasonable dispute a prima facie case of disparate impact under Title VII” of the Civil Rights Act of 1964.<sup>8</sup> In doing so, the Court reversed and remanded the US District Court for the District Massachusetts summary judgement to the defendants.

While the case is now back at the District Court, the May 2014 decision must not be taken lightly. The possibility that a drug testing program can discriminate is deeply troubling. Discrimination has no place in federal regulation, and we must insist that new federal testing standards can be applied evenly to all participants.

### **Lack of Standardization**

Today, virtually no standardization exists among hair testing programs. SAMHSA examines this issue in the notice, requesting feedback on whether federal standards should be set for various aspects of hair tests. As SAMHSA considers the lack of standards for hair testing, we refer the agency to the highly standardized procedures contained in the Mandatory Guidelines on urine specimen testing.

For decades, HHS has required employers to test workers for the illicit use of drugs by testing employee urine. The HHS Mandatory Guidelines provide comprehensive and standardized procedures for the complete process of urine testing. These requirements include that urine specimen collectors and Medical Review Officers receive initial and recurrent training on urine testing standards; specify exact procedures for capturing, labeling, and shipping specimens; and specify testing requirements and procedures labs must follow. These standards help ensure professionalism and consistency in the collection of specimens and helps reduce discrepancy and error in the treatment of specimen.

While labs performing hair testing conceal much of their information under proprietary protection, publicly available information shows vast inconsistencies in hair testing today. Labs collect different amounts of hair and from different locations, they boast superiority of their version of external contamination wash procedures and analysis of the wash solution, they use various methods to analyze hair specimen, and they even use different cutoff levels at which a test result is considered positive or negative. There is no standardized training requirement for collectors, and labs and their procedures are not held to the high standard of the National Laboratory Certification Program.

---

<sup>7</sup> *Id.* at 11.

<sup>8</sup> *Id.* at 47.

We understand that SAMHSA could set these parameters if it proposed hair specimen testing. We also recognize that labs performing these tests will likely provide the agency with a wealth of information about their procedures. But we urge the agency to critically examine that feedback. Just late last year, the Massachusetts Superior Court<sup>9</sup> upheld a 2013 ruling by the Commonwealth of Massachusetts Civil Service Commission that “the present state of hair testing...does not meet the standard of reliability necessary to be routinely used as the sole grounds to terminate a tenured public employee under just cause standards...” (emphasis in original).<sup>10</sup> The Commission’s decision provides detailed concerns for a variety of aspects of hair testing, including problems with external contamination and the processes and cutoff levels used by the lab performing the employees’ hair tests.<sup>11</sup>

We continue to believe that a drug-free, safe workforce can be achieved while simultaneously protecting the rights and dignities of individual workers. The longstanding HHS drug testing standards have proven effective at maintaining a high level of safety while helping to protect workers from flawed testing techniques, human error, and other issues capable of impacting a drug test result. As adopted by the Department of Transportation, today’s urine testing standards also provide workers with appropriate and necessary due process rights.

The decades-old standards are effective and should continue to be held as the gold standard. Hair testing is not mature enough to be a trusted measure of illicit drug use, and it should be rejected.

We appreciate the opportunity to comment on this notice, and we respectfully request our comments receive due consideration.

Sincerely,



Edward Wytkind  
President

---

<sup>9</sup> Boston Police Department v. Commonwealth of Massachusetts Civil Service Commission, Suffolk Superior Ct. No. 13-1250-A

<sup>10</sup> In Re Boston Police Department Drug Testing Appeals (“D” Cases), Commonwealth of Massachusetts Civil Service Commission, page 107.

<sup>11</sup> *Id.* The 2013 case was brought before the Commonwealth of Massachusetts Civil Service Commission by ten Boston police officers who were terminated by the Boston Police Department after they tested positive for cocaine on hair tests. The officers denied use of cocaine and challenged their terminations on the basis that the science of hair testing is not sound and “the process used to collect and test their samples were seriously flawed, making the test results insufficient to prove ‘just cause’ for their termination.” The Commission reinstated six of the officers with back pay.



**Transportation Trades Department, AFL-CIO**  
*A bold voice for transportation workers*

***TTD MEMBER UNIONS***

Air Line Pilots Association (**ALPA**)  
Amalgamated Transit Union (**ATU**)  
American Federation of Government Employees (**AFGE**)  
American Federation of State, County and Municipal Employees (**AFSCME**)  
American Federation of Teachers (**AFT**)  
Association of Flight Attendants-CWA (**AFA-CWA**)  
American Train Dispatchers Association (**ATDA**)  
Brotherhood of Railroad Signalmen (**BRS**)  
Communications Workers of America (**CWA**)  
International Association of Fire Fighters (**IAFF**)  
International Association of Machinists and Aerospace Workers (**IAM**)  
International Brotherhood of Boilermakers, Iron Ship Builders,  
Blacksmiths, Forgers and Helpers (**IBB**)  
International Brotherhood of Electrical Workers (**IBEW**)  
International Longshoremen's Association (**ILA**)  
International Organization of Masters, Mates & Pilots, ILA (**MM&P**)  
International Union of Operating Engineers (**IUOE**)  
Laborers' International Union of North America (**LIUNA**)  
Marine Engineers' Beneficial Association (**MEBA**)  
National Air Traffic Controllers Association (**NATCA**)  
National Association of Letter Carriers (**NALC**)  
National Conference of Firemen and Oilers, SEIU (**NCFO, SEIU**)  
National Federation of Public and Private Employees (**NFOPAPE**)  
Office and Professional Employees International Union (**OPEIU**)  
Professional Aviation Safety Specialists (**PASS**)  
Sailors' Union of the Pacific (**SUP**)  
Sheet Metal, Air, Rail and Transportation Workers (**SMART**)  
SMART-Transportation Division  
Transportation Communications Union/ IAM (**TCU**)  
Transport Workers Union of America (**TWU**)  
**UNITE HERE!**  
United Mine Workers of America (**UMWA**)  
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service  
Workers International Union (**USW**)

*These 32 labor organizations are members of and represented by the TTD*

